

# TRADE DISPUTES ACT, 2016

No. 6



of 2016

## ARRANGEMENT OF SECTIONS

### SECTION

#### Part I — *Preliminary*

1. Short title and commencement
2. Interpretation

#### Part II — *Establishment of panel and procedure for settlement of trade disputes generally*

3. Establishment of panel of mediators and arbitrators
4. Removal from panel
5. Mediation by Commissioner
6. Referral of trade disputes to Commissioner
7. Process of mediation
8. Process of arbitration
9. Representation in mediation and arbitration
10. Conduct of proceedings by mediator or arbitrator
11. Mediators' and arbitrators' code of ethics
12. Referral of trade disputes to Industrial Court
13. Minister's power to refer trade disputes to Industrial Court

#### Part III — *Industrial Court*

14. Continuation of Industrial Court
15. Appointment of judges and other staff
16. Oath to be taken by Industrial Court judge
17. Protection of judicial officers
18. Tenure of office of Industrial Court judge
19. Removal from office
20. Jurisdiction of Court
21. Review of decisions of mediators and arbitrators
22. Power to hear evidence
23. Applications to Court
24. Representation in Court
25. Proceedings in public or in private
26. Publication of evidence
27. Wrongful termination of contract or disciplinary action
28. Decision of Court

29. Variation or rescission of default judgments
30. Variation or rescission of orders and judgments
31. Interpretation of decisions
32. Costs
33. Remuneration of Court

*Part IV – Settlement of claims that recognised terms and conditions of employment are not being observed*

34. Claims that terms and conditions of employment are not being observed
35. Recognition at workplace
36. Withdrawal of recognition at workplace
37. Recognition at level of industry
38. Withdrawal of recognition at level of industry
39. Joint industrial councils

*Part V – Collective labour agreements*

40. Collective labour agreements binding on parties thereto
41. Registration of collective labour agreements

*Part VI – Unlawful industrial action and enforcement of collective labour agreements and decisions of Industrial Court*

42. Right to strike and lockout
43. Regulation of strikes and lockouts
44. Strikes and lockouts in compliance with this Part
45. Prohibition of certain strikes and lockouts

*Part VII – Protection of essential services, life and property*

46. Essential services
47. Prohibition of strike or lockout in essential services
48. Breaches of contracts affecting essential services
49. Notices of section 48 to be displayed
50. Dispute resolution in essential services

*Part VIII – Miscellaneous*

51. Consent of Director of Public Prosecutions for prosecutions
  52. Regulations
  53. Codes and guidelines
  54. Statistics and reports on trade dispute prevention and resolution
  55. Delegation of functions
  56. Repeal of Cap. 48:02
  57. Savings and transitional provisions
- SCHEDULE

**An Act 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.**

*Date of Assent:* 20.09.16

*Date of Commencement:* ON NOTICE

ENACTED by the Parliament of Botswana.

## PART I — Preliminary

1. This Act may be cited as the Trade Disputes Act, 2016, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint. Short title and commencement
2. (1) In this Act, unless the context otherwise requires — Interpretation
- “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;
- “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;
- “Board” means the Labour Advisory Board established under the Employment Act; Cap 47:01
- “collective labour agreement” means —
- (a) a written agreement relating to the terms and conditions of employment concluded between one or more organisations; or
  - (b) where no organisation exists, the representatives of the employees concerned duly elected and authorised by them and one or more employers or an organisation;
- “Commissioner” means the person lawfully performing the functions of the public office of Commissioner of Labour;
- “contract of employment” means an agreement, whether oral, in writing, expressed or implied, where one person agrees, for a wage or other benefit or both, to let his or her labour to another and to perform the labour under the orders of the other person who agrees to hire it;
- “Court” means the Industrial Court as continued under section 14;
- “day” means any period of 24 hours commencing at midnight;
- “decision” in relation to the Industrial Court, includes an order and an award;
- “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;

- “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;
- “employee” means any person who has entered into a contract of employment for the hire of his or her labour;  
 Provided that the expression does not include members of the —
- (i) Botswana Defence Force,
  - (ii) Botswana Police Service,
  - (iii) Prison Service,
  - (iv) Directorate of Intelligence and Security, and
  - (v) Directorate on Corruption and Economic Crime;
- “employer” means any person who has entered into a contract of employment to hire the labour of any person and includes —
- (a) the Government in respect of all its officers except members of the —
    - (i) Botswana Defence Force,
    - (ii) Botswana Police Service,
    - (iii) Prison Service,
    - (iv) Directorate of Intelligence and Security, and
    - (v) Directorate on Corruption and Economic Crime;
  - (b) a public authority; and
  - (c) the person who owns or is carrying on for the time being or is responsible for the management of the undertaking, business or enterprise of whatever kind in which the employee is engaged;
- “employment” means the performance by an employee of a contract of employment;
- “essential service” means a service designated as essential under section 46;
- “industrial action” means a strike, lockout or action short of a strike, in furtherance of a trade dispute;
- “joint industrial council” means a body constituted for a trade or industry in accordance with the provisions of section 39, for the purpose of negotiating terms and conditions of employment for all employees in that trade or industry;
- “labour officer” means a person appointed as a labour officer under the Employment Act;
- “lockout” means 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;
- “mediation” includes facilitation, conducting a fact finding exercise, and the making of an advisory award;
- “officer”, where used with reference to an organisation, includes any member of the executive committee thereof;
- “organisation” means a trade union or an employers’ organisation registered under the Trade Unions and Employers’ Organizations Act;
- “public authority” includes a local authority and a land board;
- “Registrar” means the Registrar of the Industrial Court and includes a Deputy Registrar and Assistant Registrar appointed under section 15 (8);
- “serious misconduct” has the same meaning assigned to it under the Employment Act;

“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 to work;

“trade” includes —

- (a) an industry;
- (b) any business, trade, manufacture, undertaking or calling of employers;
- (c) any calling, service, employment, handicraft or industrial occupation or vocation of employees;
- (d) a branch or section of any trade or industry or a group of trades or industries; and
- (e) the carrying on of its activities by the Government or any public authority;

“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 conditions of employment, or
  - (vii) whether or not a dispute does exist;

“trade union” includes, for purposes of this Act, unions acting jointly and a federation of trade unions registered under the Trade Unions and Employers’ Organizations Act;

“unlawful industrial action” means any industrial action declared by this Act or by the Industrial Court under this Act, to be unlawful, or any lockout, strike or action short of a strike deemed to be unlawful industrial action by virtue of section 45; and

“working to rule” means an industrial action where workers do not withdraw their labour but rather stay in their jobs and drastically slow down the operations by punctilious adherence to a narrow interpretation of the work rules included in the collective bargaining agreement.

(2) Any reference in this Act to employees shall not, unless the context otherwise requires, include a reference to a sole employee.

PART II — *Establishment of panel and procedure for settlement  
of trade disputes generally*

Establishment  
of panel of  
mediators and  
arbitrators

3. (1) There shall be a panel of mediators and arbitrators with the Commissioner as the administrator of the panel.

(2) The Minister shall, after consultation with the Board —

- (a) appoint to the panel, full time and part time mediators and arbitrators with expertise in labour law, labour relations or other specialist areas of expertise; and
- (b) determine the terms, conditions and periods of the appointment of the mediators and arbitrators to the panel.

(3) The function of the mediators and arbitrators in the panel shall be to preside over the trade disputes referred to any mediator or arbitrator from the panel, and to perform duties assigned to them, in accordance with this Act.

(4) The mediators and arbitrators shall, in the discharge of their functions, be subject only to the direction and control of the Commissioner.

(5) A person who obstructs or improperly influences a mediator or arbitrator in the performance of his or her duties under this Act, or attempts to do so, commits an offence and is liable to a fine of P1 000 or to imprisonment for six months, or to both.

Removal from  
panel

4. The Minister may, after consultation with the Board, remove a mediator or arbitrator from the panel on the following grounds —

- (a) inability to perform the functions of his or her office, whether arising from infirmity of body or mind, or from any other cause; or
- (b) serious misconduct by the mediator or arbitrator.

Mediation by  
Commissioner

5. (1) In this section “apprehended trade dispute” includes a trade dispute that exists but has not been referred to the Commissioner in terms of section 6.

(2) Where the Commissioner is satisfied that a trade dispute is apprehended, the Commissioner may mediate between the parties to the apprehended dispute if —

- (a) the parties invite the Commissioner to intervene; or
- (b) the Commissioner is satisfied that the apprehended trade dispute may cause harm to employees, employers, the community or property.

(3) The Commissioner may delegate a mediator, from the panel referred to under section 3, to mediate between the parties contemplated under subsection (2).

(4) Mediation under this section shall be directed towards —

- (a) helping the parties to the dispute to reach a settlement of the dispute principally by their own efforts; and
- (b) helping the parties on the incorporation of the terms of the settlement into an agreement or collective agreement.

(5) The Commissioner may, in order to promote the prevention and resolution of trade disputes —

- (a) provide organisations with advice and training relating to, *inter alia* —
  - (i) designing and establishing in-house procedures for the prevention of and resolution of trade disputes,
  - (ii) the recognition of trade unions,
  - (iii) the design and content of collective agreements, and
  - (iv) codes and procedures, including disciplinary and termination of employment procedures; or

(b) assign a labour officer, or a mediator from the panel, to provide the advice or training under paragraph (a).

6. (1) A party to a trade dispute may refer the dispute, in the prescribed form, to —

- (a) the Commissioner; or
- (b) a labour officer delegated by the Commissioner.

(2) Any party referring a trade dispute under subsection (1) concerning termination of employment shall refer the trade dispute within 30 days of the date of such termination.

(3) Any party referring a trade dispute shall satisfy the Commissioner in writing that a copy of the referral has been served on the other party to the trade dispute, unless the Commissioner is satisfied that it was not possible to serve the referral on that other party.

(4) Notwithstanding subsections (1) and (2), a party who cannot read or write may refer a trade dispute concerning a grievance or a termination of employment orally, and the Commissioner or a labour officer delegated to do so shall complete the prescribed form on the party's behalf.

(5) The Commissioner or the labour officer delegated to complete a prescribed form on behalf of an employee under subsection (4), shall, upon receiving a matter referred in accordance with subsection (1) —

- (a) assign, immediately, a mediator from the panel referred to under section 3 to resolve the trade dispute through mediation;
- (b) determine the venue, date and time of the first mediation hearing; and
- (c) inform the parties to the trade dispute, in writing, of the details contemplated under paragraphs (a) and (b).

(6) Notwithstanding subsection (5), the Commissioner shall refer a trade dispute directly to arbitration if the dispute is one that is required to be determined by arbitration by —

- (a) a collective labour agreement;
- (b) any other agreement; or
- (c) this Act.

(7) Any party referring a dispute concerning the payment of an entitlement in terms of a contract of employment shall refer the trade dispute within 30 days or a reasonable period from the date when non-payment of the entitlement first came to his or her knowledge or from the date when the employee's right to payment of the entitlement accrued, whichever is the earlier date.

7. (1) Subject to subsection (2), a mediator shall mediate a trade dispute referred to him or her, within 30 days of the date the trade dispute was received by the Commissioner or labour officer delegated in terms of section 6.

(2) The period referred to in subsection (1) may be extended by —

- (a) agreement between the parties to the trade dispute; or
- (b) a collective labour agreement.

(3) Where a mediator fails to mediate a trade dispute within the period referred to in subsection (1) or (2), the parties to the trade dispute may refer the dispute to arbitration or to the Industrial Court.

(4) Where the parties to a trade dispute choose to refer the trade dispute to arbitration or to the Industrial Court in accordance with subsection (3), the mediator shall, before the trade dispute is referred, explain in detail to the parties the implications of referring a trade dispute to arbitration or to the Industrial Court.

Referral of trade  
disputes to  
Commissioner

Process of  
mediation

(5) Subject to any prescribed rules or guidelines published in terms of section 53, the mediator shall determine how the mediation shall be concluded, and may require further hearings to be held within the period referred to in subsection (1).

(6) Any statement made and any information divulged by a party to a trade dispute during the mediation process shall be confidential and without prejudice unless the party making the statement or divulging the information states otherwise.

(7) Subject to subsection (6), a party to a mediation process or any other person concerned in or present at the mediation process, shall not disclose any statement made or any information divulged, to any person.

(8) A person who contravenes subsection (7) commits an offence and is liable to a fine of P2 000 or to imprisonment for 12 months, or to both.

(9) A mediator may, in dealing with a trade dispute assigned to him or her —

- (a) determine any question concerning —
  - (i) whether a trade dispute has been referred in terms of section 6,
  - (ii) the date on which the trade dispute was referred for mediation, or
  - (iii) the jurisdiction of the mediator to mediate the trade dispute;
- (b) allow an application for the condonation of a late referral, where the applicant shows good cause for such late referral;
- (c) dismiss a referral if the referring party fails to attend a mediation hearing;
- (d) 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) fails to attend a mediation hearing;
- (e) reverse, on good cause —
  - (i) any dismissal of a referral, or
  - (ii) default award, contemplated under paragraphs (c) and (d) respectively;
- (f) recommend a settlement; or
- (g) make an advisory award if —
  - (i) the parties request it, or
  - (ii) it is in the interests of settlement to do so.

(10) A default award made pursuant to subsection (9) (d) shall be confirmed or varied by the Commissioner after the expiry of the period referred to in subsection (12).

(11) The Commissioner may vary a default award where there is an ambiguity, error or omission in the default award.

(12) 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, upon notice to the other party in whose favour the dismissal of the referral or the default award was made, for the reversal, on good cause, of the dismissal of referral or the default award.

(13) Where a settlement has been recommended to the parties by a mediator, in accordance with subsection (9) (f), the terms of the settlement agreement shall have the same force and effect as a judgment or order of the Industrial Court and be enforceable in like manner as such judgment or order.

(14) A default award by a mediator and confirmed by the Commissioner shall have the same force and effect as a judgment or order of the Industrial Court and shall be enforceable in like manner as such judgment or order.

(15) A party to a dispute may appeal to the Industrial Court in respect of a decision made pursuant to subsection (9) (a) (iii), (b) or (e).

(16) A mediator shall not be a compellable witness in any legal proceedings in respect of anything said or information divulged during the mediation process relating to a dispute he or she mediated upon, except 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 to enable the Industrial Court to establish jurisdiction.

(17) Subject to subsection (18), the mediator shall issue a certificate of failure to settle if the trade dispute is not settled within the period contemplated under subsection (1) or (2).

(18) The mediator may issue a certificate of failure to settle before the expiry of the period contemplated under subsection (1) or (2), to the effect that either party may refer the trade dispute to the Industrial Court, if the mediator is satisfied that there are no prospects of settlement at that stage of the trade dispute.

8. (1) The Commissioner shall refer a trade dispute referred in terms of section 6 to arbitration where —

- (a) the parties to the trade dispute have agreed to have the trade dispute settled by arbitration;
- (b) the parties to the trade dispute are engaged in an essential service and the trade dispute concerns a dispute of interest;
- (c) the Industrial Court has directed the Commissioner to refer the trade dispute to arbitration;
- (d) the trade dispute concerns a dispute of interest, except in the case of a collective dispute of interest where the employees are represented by a trade union; or
- (e) a mediator fails to resolve or fails to mediate a dispute of interest within the periods referred to in section 7 (1) and (2), except in the case of a collective dispute of interest where an employee is represented by a trade union.

(2) The Commissioner shall —

- (a) after consultation with the parties to the trade dispute, assign an arbitrator from the panel of mediators and arbitrators appointed in terms of section 3, to arbitrate the dispute;
- (b) determine the venue, date and time of the arbitration hearing; and
- (c) advise the parties to the trade dispute of the details contemplated under paragraphs (a) and (b).

(3) Notwithstanding that the trade dispute has been mediated, if the arbitrator is of the view that there are prospects of settlement, he or she may attempt to resolve the trade dispute through mediation before commencing the arbitration hearing.

(4) Where the trade dispute has not been mediated, the arbitrator shall attempt to resolve the trade dispute through mediation before the commencement of the arbitration hearing.

Process of  
arbitration

(5) Subject to any prescribed codes or guidelines published in terms of section 53, the arbitrator may conduct the arbitration in a manner that he or she considers appropriate, but shall deal with the substantial merits of the trade dispute with the minimum of legal formalities.

(6) The arbitrator shall settle a trade dispute referred to him or her for arbitration within 30 days of the trade dispute being referred to him or her.

(7) Subject to the discretion of the arbitrator as to the appropriate form of proceedings, a party to the trade dispute may give evidence, call witnesses, question the witnesses of any other party and address concluding arguments.

(8) The arbitrator shall have the power to —

- (a) give such directions to parties to a trade dispute or do such things as may be necessary or expedient for the expeditious and just hearing and determination of any trade dispute before him or her;
- (b) make an award for a specific period of time, or such other award as he or she considers appropriate;
- (c) vary or rescind an award if —
  - (i) it was erroneously made by a mediator in the absence of any party affected by the award,
  - (ii) it is ambiguous or contains an error or omission, but only to the extent of that ambiguity, error or omission, or
  - (iii) it was made by a mediator as a result of a mistake common to the parties to the proceedings;
- (d) dismiss a referral if the referring party, after notice to the other party to attend the hearing, fails to attend an arbitration hearing;
- (e) give a default award if a party upon whom a referral has been served in terms of section 6 (3) fails to attend an arbitration hearing; or
- (f) reverse, on good cause —
  - (i) any dismissal of a referral, or
  - (ii) a default award,contemplated under paragraph (d) and (e) respectively.

(9) The arbitrator shall, upon the conclusion of an arbitration hearing, make an award and shall, within 30 days of the hearing, give reasons for the award.

(10) The Commissioner may, where he or she considers it appropriate, extend the number of days within which an award is to be made under subsection (9).

(11) The arbitration shall not include an order of costs in an arbitration award unless —

- (a) the parties to the trade dispute agree; or
- (b) a party or a person representing a party in the proceedings acted in a frivolous or vexatious manner —
  - (i) by proceeding with or defending the trade dispute in the proceedings, or
  - (ii) in the party's or person's conduct during the proceedings.

(12) An arbitration award shall have the same force and effect as a judgment or order of the Industrial Court, and shall be enforceable in like manner as such judgment or order.

(13) A person aggrieved by a decision of an arbitrator under this section may appeal against such decision to the Industrial Court, within 14 days of the arbitrator's decision.

(14) An appeal referred to under subsection (13) shall lie only in respect of a decision —

- (a) to join a party to the arbitration proceedings; or
  - (b) concerning the jurisdiction of the arbitrator to make an award.
- 9. (1)** In any mediation or arbitration proceedings, a party to a trade dispute may appear in person or be represented only by —
- (a) a member or officer of that party's organisation;
  - (b) a colleague, if the party is an employee; or
  - (c) a director or employee of that person, if the party is a juristic person.
- (2)** Notwithstanding subsection (1), an arbitrator may permit a legal representative to represent a party to a trade dispute in arbitration proceedings if —
- (a) the parties to the trade dispute agree; or
  - (b) at the request of a party to the trade dispute, the arbitrator is satisfied that —
    - (i) the trade dispute is of such complexity that it is appropriate to allow the party to have legal representation, and
    - (ii) the other party will not be prejudiced.
- 10.** The provisions of section 22 (2) and (3) shall, with the necessary modifications, apply to the conduct of proceedings by a mediator or arbitrator under this Act.
- 11.** The Minister shall, after consultation with the Board, publish a code of ethics for mediators and arbitrators performing functions under this Act.
- 12.** Notwithstanding the provisions of sections 5, 6, 7 and 8, the Commissioner or a labour officer delegated by him or her may, within 30 days, refer a trade dispute mediated upon under this Act to the Industrial Court for determination.
- 13. (1)** Where the Minister is satisfied that a trade dispute exists or is apprehended and where —
- (a) subject to section 8 (1) (b), the trade dispute involves an essential service; or
  - (b) the trade dispute involves categories of officers regarded as members of management,
- the Minister may, whether the trade dispute has or has not been referred to the Commissioner under section 6, refer the trade dispute to arbitration or to the Industrial Court.
- (2)** Where the Minister decides to take steps under subsection (1), he or she shall immediately serve a notice, in writing, of his or her decision on the parties to the trade dispute.
- (3)** In this section "member of management" means an employee who —
- (a) has authority, on behalf of his or her employer —
    - (i) to employ, transfer, suspend, lay off, recall, promote, terminate the employment of, reward, discipline or deal with the grievances relating to the employment of any fellow employees, or
    - (ii) to recommend any action under paragraph (i), or the manner in which a grievance ought to be dealt with,
 if the exercise by him or her of the authority is not merely of a routine or clerical nature but requires the use of his or her discretion;
  - (b) participates in the making of a general policy regarding relations between his or her employer and his or her fellow employees or any of them; or

Representation  
in mediation  
and arbitration

Conduct of  
proceedings by  
mediator or  
arbitrator

Mediators' and  
arbitrators' code  
of ethics

Referral of trade  
disputes to  
Industrial Court

Minister's power  
to refer trade  
disputes to  
Industrial Court

- (c) is employed in a capacity that requires him or her to have full knowledge of the financial position of the undertaking or enterprise in which he or she is employed or gives him or her free personal access to other confidential information relating to the conduct of his or her employer's business.

### PART III — *Industrial Court*

Continuation of  
Industrial Court

14. (1) There shall continue to be an Industrial Court as a court of law and equity, with all the powers and rights set out in this Act or any other written law.

(2) The functions of the Court are to —

- (a) settle trade disputes; and
- (b) further, secure and maintain good industrial relations in Botswana.

(3) The Court may consist of one or more divisions, as the Minister considers necessary, each headed by an Industrial Court judge.

Appointment  
of judges  
and other  
staff

15. (1) The President shall appoint Industrial Court judges from among persons possessing the qualifications to be judges of the High Court, as prescribed under section 96 (3) of the Constitution.

(2) In appointing Industrial Court judges, the President shall designate one such judge to be the President of the Industrial Court, and any other judges shall rank according to their dates of appointment.

(3) Every appointment made under this section shall be published by the Minister by notice in the *Gazette*.

(4) 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 on contract and shall be eligible for reappointment.

(5) Subject to subsection (6), in exercise of the jurisdiction of the Court under section 20, a judge shall sit with two nominated members, one of whom shall be 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.

(6) 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, as the case may be, unless the judge, for good reason, decides that the hearing should be postponed.

(7) There shall be appointed such public officers as may be necessary to staff the Court and enable it to carry its functions under this Act.

(8) The power to —

- (a) appoint persons to hold or act in the offices of Registrar, Deputy Registrar and Assistant Registrar of the Industrial Court;
- (b) exercise disciplinary control over persons holding or acting in such offices; and
- (c) remove the persons appointed under paragraph (a) from office,

shall vest in the President.

(9) The Registrar shall perform such duties and exercise such jurisdiction in exercise of the powers and authorities of the Industrial Court as may be prescribed by this Act or any other written law, or as may be directed either generally or specifically by the Judge President.

(10) Notwithstanding the generality of subsection (9) —

- (a) the Registrar shall —
- (i) issue all summonses, subpoenas, warrants and writs of execution,
  - (ii) register all orders and judgments,
  - (iii) keep a record of all proceedings of the Industrial Court,
  - (iv) have custody and keep an account of all fees and awards payable or paid into the Industrial Court and of all moneys paid into or out of the Industrial Court and keep proper accounts, and
  - (v) compile and register statistics of all adjudicated cases; and
- (b) where a writ of summons is endorsed for a debt or liquidated demand only and the respondent fails, or all the respondents fail, if more than one, to enter appearance thereto, the Registrar may, on application by the applicant, enter final judgment against that respondent in a prescribed Form, including judgment declaring immovable property secured by a mortgage bond specially executable, for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, and if no rate is specified at the rate of 10 per cent per annum to the date of payment, and costs, and proceed with the action against the other respondents, if any.

(11) The Registrar may authorise any public officer in his or her division to perform any of the functions vested in him or her under this Act or any other written law, and any public officer so authorised may perform such functions under the direction of the Registrar.

**16.** (1) An Industrial Court judge shall not enter upon the duties of his or her office unless he or she has taken and has subscribed to an oath, for the due execution of his or her office, as set out in the Schedule.

Oath to be taken  
by Industrial  
Court judge

(2) An oath under subsection (1) shall be tendered by and subscribed before the President or the Chief Justice.

(3) The provisions of sections 5, 7, 8, 9 and 10 of the Promissory Oaths Act shall, with the necessary modifications, apply to an oath under this Act.

Cap. 26:03

**17.** (1) A judge shall not be liable to be sued in any court for any act done or ordered to be done by him or her in the discharge of his or her duty whether or not done within the limits of his or her jurisdiction, nor shall any order for costs be made against him or her, provided that he or she acted in good faith.

Protection of  
judicial officers

(2) An officer of the Industrial Court or other person bound to execute the lawful warrants or orders of the Industrial Court or other person acting judicially shall not be liable to be sued in any court for the execution of any warrant or order which he or she would be bound to execute if within the jurisdiction of the person issuing the same, nor shall any such person or the person at whose instance such warrant or order is to be executed be deemed to be a trespasser by reason of any irregularity in any proceeding on the validity of which such warrant or order depends or in the form of such warrant or order or in the mode of executing the same.

(3) An officer of the Industrial Court shall not be liable to be sued in any court for any act or omission of any police officer or other person in the execution of any process which is done or may have occurred either through disobedience or neglect of the orders or instructions given.

Tenure of  
office of  
Industrial Court  
judge

**18.** (1) An Industrial Court judge shall vacate office on attaining the age of 70 years:

Provided that the President 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 the Industrial Court judge 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.

(2) In accordance with the provisions of the proviso to section 96 (6) of the Constitution, a person appointed to act as an Industrial Court judge shall vacate that office on attaining the age of 75 years.

Removal from  
office

**19.** (1) An Industrial Court judge may be removed from office only for —

- (a) inability to perform the functions of his or her office, whether arising from infirmity of body or mind, or from any other cause; or
- (b) serious misconduct.

(2) The power to remove an Industrial Court judge from office vests in the President acting in accordance with the procedure provided under section 97 of the Constitution for the removal from office of judges of the High Court.

Jurisdiction  
of Court

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

- (a) to hear and determine all trade disputes except disputes of interest;
- (b) to interdict any unlawful industrial action and to grant general interdicts, declaratory order or interim orders;
- (c) to hear appeals and reviews of decisions of mediators and arbitrators;
- (d) to direct the Commissioner to assign a mediator to mediate a dispute, where in the opinion of the Court, the matter has not been properly mediated or requires further mediation;
- (e) to direct the Commissioner to refer a dispute that is before the Court to arbitration;
- (f) to refer any matter to an expert and, at the Court's discretion, to accept the expert's report as evidence in the proceedings; and
- (g) generally to give such directions to parties to a trade dispute and do such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it.

(2) Any matter of law arising for decision at a sitting of the Court, and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the presiding judge.

(3) Upon all issues other than those referred to under subsection (2), the decision of the majority of the persons representing the Court shall be the decision of the Court.

(4) Where there is no majority decision under subsection (3), the decision of the judge shall prevail.

(5) There shall be an appeal to the Court of Appeal against decisions of the Industrial Court.

(6) In the exercise of its powers under this Act, the Court may take into consideration any —

- (a) existing code of industrial relations good practice agreed between the Government, employers' organisation and trade unions;
- (b) guidelines or directives relating to wage and salary levels; and
- (c) other terms and conditions of employment that may be issued by the Government.

(7) The Court shall regulate its own procedure and proceedings.

21. (1) A review of a decision of a mediator referred to under section 20 (1) (c) shall lie to the Industrial Court, only in respect of a decision —

- (a) where the mediator acted contrary to provisions of this Act and procedures established under this Act;
- (b) where the decision making process was unfair; or
- (c) where the mediator failed to explain in detail to the parties, the implications of referring a dispute to arbitration, in accordance with section 7 (4).

(2) A review of a decision of an arbitrator referred to under section 20 (1) (c), where the parties consented to arbitration, or where the dispute was one that is required by the Act to be determined by arbitration, shall lie to the Industrial Court, only in respect of a decision —

- (a) where the arbitrator acted contrary to provisions of this Act and procedures established under this Act; or
- (b) where the arbitrator failed to apply his or her mind to the relevant issues which resulted in the decision being arrived at arbitrarily, capriciously, unreasonably, irrationally or in bad faith.

22. (1) The Court shall not be bound by the rules of evidence or procedure in civil or criminal proceedings and may disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice.

(2) For the purpose of dealing with any matter before it, the Court may order any person to —

- (a) furnish, in writing or otherwise, such particulars in relation to the matter as it may require;
- (b) attend before it;
- (c) give evidence on oath or otherwise; or
- (d) produce any relevant document.

(3) An order given under subsection (2) may include a requirement as to the date on which or the time within which the order is to be complied with.

(4) Any person who, without reasonable cause, fails to comply with an order given under this section, commits an offence and is liable to a fine of P1 000, or to imprisonment for six months, or to both.

(5) Any person being required by an order made under this section to furnish information or particulars, produce any document or give evidence before the Court, who makes any statement, or furnishes information or particulars, or produces any document which he or she knows or has reasonable cause to believe is false or misleading in any material particular, commits an offence and is liable to a fine of P2 000, or to imprisonment for 12 months, or to both.

(6) If a witness objects to answering any question or to producing any document on the ground that it will tend to incriminate him or her, or on any ground on which he or she could lawfully object if the objection had been made in civil or criminal proceedings in the High Court, the witness shall not

Review of  
decisions of  
mediators and  
arbitrators

Power to hear  
evidence

be required to answer such question or to produce such document, nor shall the witness be liable to any penalty for refusing to do so:

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

Applications  
to Court

- 23.** (1) Applications to the Court shall be in such form as may be prescribed.
- (2) If, in the opinion of the Court —
- (a) the points in issue in any matter before the Court or to be brought before the Court are not clearly defined to allow the matter to be heard or determined; or
- (b) the parties have not made sufficient attempt to reach an agreement, the Court may remit the matter to the parties, or to the parties and the Commissioner, with such directions or advice as it may consider appropriate.
- (3) Notwithstanding the provisions of sections 5, 6, 7, and 8, a party to a trade dispute may make an urgent application to the Court for the determination of a trade dispute.
- (4) An urgent application made under subsection (3) shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(5) The applicant shall set forth, in the affidavit, explicitly the circumstances which the applicant avers render the matter urgent and the reasons why the applicant claims that he or she could not be afforded substantial redress at mediation by the Commissioner in due course.

Representation  
in Court

**24.** Any interested party in any proceedings under this Act may appear by legal representation or may be represented by any other person so authorised by that party.

Proceedings in  
public or in  
private

**25.** (1) In any proceedings before the Court, the presiding judge may, on the application of any party, and for good cause, exclude members of the public from such proceedings or any part of them.

(2) Until the decision of the Court in such proceedings has been published in accordance with this Act, nothing shall be published in respect of the proceedings or the evidence produced in such proceedings, other than a factual account thereof.

(3) A person who contravenes the provisions of subsection (2) commits an offence and is liable to a fine of P1 000 or to imprisonment for six months, or to both.

Publication  
of evidence

**26.** (1) A person shall not include, in any publication relating to proceedings before the Court, any evidence or information disclosed during the course of such proceedings by —

- (a) any organisation representing employers or employees; or
- (b) any individual business, whether carried on by an individual person, a firm or a company,

and in respect of which the Court has accepted an application made during the proceedings that such evidence or information be withheld from publication.

(2) A member of the Court, or any other person concerned in or present at the proceedings, shall not disclose any evidence or information referred to under subsection (1) to any person except with the consent of the organisation or business concerned.

(3) A person who contravenes the provisions of this section commits an offence and is liable to a fine of P2 000 or to imprisonment for 12 months, or to both.

**27.** (1) In any case where the Court determines that an employee has been wrongfully dismissed or disciplined, the Court may, subject to its discretion to make any other order which it considers just —

Wrongful  
termination  
of contract  
or disciplinary  
action

- (a) in the case of wrongful dismissal, order reinstatement of the employee, with or without compensation, or order compensation in lieu of reinstatement; or
- (b) in the case of wrongful disciplinary action, order the payment of such compensation as it considers just.

(2) The Court shall consider compulsory reinstatement as a remedy for wrongful dismissal only —

- (a) where the termination was found to be unlawful, or motivated on the grounds of gender, trade union membership, trade union activity, the lodging of a complaint or grievance, religious, tribal or political affiliation; or
- (b) where the employment relationship has not irrevocably broken down.

(3) Where the Court orders reinstatement under subsection (2), any compensation ordered shall not exceed the actual pecuniary loss suffered by the employee as a result of wrongful dismissal.

(4) In assessing the amount of compensation to be paid under subsection (1), the Court may take the following factors into account —

- (a) the actual and future loss likely to be suffered by the employee as a result of the wrongful dismissal;
- (b) the age of the employee;
- (c) the prospects of the employee in finding other equivalent employment;
- (d) the circumstances of the dismissal;
- (e) the acceptance or rejection by either the employer or the employee of any recommendations made by the Court for the reinstatement of the employee;
- (f) any contravention of the terms of any collective agreement or of any law relating to employment by the employer or the employee; and
- (g) the employer's ability to pay.

(5) Where a contract of employment is wrongfully terminated by an employee, the Court may make such order of compensation in favour of the employer as it considers just.

(6) An employer who fails to comply with an order of reinstatement made by the Court commits an offence and is liable to a fine of P1 000 or the equivalent of the employee's basic monthly wages, whichever is the greater, for every month or part thereof during which the failure to reinstate continues.

(7) The Court may order that the fine imposed under subsection (6) or any part of the fine, be paid to the employee concerned as compensation for any loss suffered as a result of the employer's failure to reinstate the employee concerned.

(8) A person who, without lawful excuse, fails to comply with any decision of the Court under this section, other than an order referred to under subsection (7), commits an offence and is liable to a fine of P1 000 for every month or part thereof during which the failure continues.

Decision of  
Court

**28.** (1) The Court may order the payment, to any person, of money it finds to be due to the person under the terms of his or her contract of employment, this Act or any other written law.

(2) A decision of the Court shall have the same force and effect as a judgment or order of the High Court, and shall be enforceable in like manner as such judgment or order:

Provided that, without prejudice to any other remedy, any payment of money ordered under this section may be recovered summarily as a civil debt.

(3) A certificate signed by the Registrar shall be conclusive evidence of the existence of the decision of the Court to which it refers.

(4) Decisions of the Court may be made retrospectively to such date as the Court considers just in the circumstances of the particular case.

Variation or  
rescission of  
default  
judgment

**29.** (1) A judgment or order obtained in default of appearance or of defence or in the absence of one of the parties to the action or proceedings (in this section referred to as a "default judgment") may be varied or rescinded on the application of the party affected by the default judgment in accordance with the provisions of subsection (2).

(2) A party affected by a default judgment may, within one month of knowing of the default judgment, apply to the Court, upon notice to the party in whose favour the default judgment was given, to vary or rescind such default judgment, and the Court may, on good and sufficient cause shown by the party against whom the default judgment was given, vary or rescind the default judgment on such terms as it considers just in the circumstances.

Variation or  
rescission of  
orders and  
judgments

**30.** (1) The Court may, on the application of any party affected or *mero motu*, vary or rescind —

- (a) an order or judgment erroneously sought or erroneously granted without notice to any party affected thereby;
- (b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to all parties; or
- (d) an order or judgment granted as the result of an issue raised *in limine* if, having regard to changed circumstances since such order or judgment was granted, it would be unjust or inequitable to allow such order or judgment to stand.

(2) A party desiring relief under this section shall make application upon notice to all parties whose interests may be affected by any variation sought.

(3) The Court shall not make any order varying or rescinding any order or judgment unless it is satisfied that all parties whose interests may be affected have notice of the order proposed.

Interpretation  
of decisions

**31.** (1) A decision of the Court shall state clearly to which parties and to which employers and employees comprised in the parties each of the provisions of the decision relates, and the date on which it is to come into effect:

Provided that the decision may be given retrospective effect, and different provisions may be brought into effect on different dates.

(2) A decision containing any provision inconsistent with the provisions of any written law relating to the terms or conditions of or affecting employment or labour, shall have effect as if such inconsistent provision were omitted.

(3) If a question arises as to the interpretation of a decision, or as to a decision being inconsistent with any written law, the Minister or any party to the decision may apply to the Court for a determination of the question, and the Court shall determine the matter after hearing the parties concerned, or if the parties concerned consent without such hearing, and any such determination shall be considered to be a decision made under this Act:

Provided that, where the question arises out of a clerical; or incidental error or omission, the Court may rectify such error or omission without hearing the parties concerned.

(4) Subject to the provisions of this section, a decision shall, as from the date when it has effect, be binding on the parties to the dispute, and shall be an implied term of every contract between the employers and employees to whom the decision relates, so that the rate of wages to be paid and the terms and conditions of employment to be observed under the contract shall be in accordance with the decision until it is varied by a subsequent decision or by agreement.

**32.** (1) Costs shall not be awarded by the Court except against a party held by the Court to have acted frivolously or vexatiously, or with deliberate delay in the bringing or defending of a proceeding.

Costs

(2) Where costs are awarded under subsection (1), the tariff of costs laid down under the Rules of the High Court shall, with the necessary modifications, apply in respect of costs awarded by the Court.

**33.** (1) Industrial Court judges shall be paid such salaries and allowances, not being less than those payable to judges of the High Court in accordance with the provisions of the Judicial Services Act, as may be determined by the President.

Remuneration  
of Court  
Act No. 21  
of 2014

(2) Nominated members of the Court, under section 15 (5) shall be paid such remuneration, including allowances, as the Minister shall, with the approval of the Minister responsible for finance, determine.

*PART IV — Settlement of claims that recognised terms and conditions of employment are not being observed*

**34.** (1) A claim that —

- (a) the terms and conditions of employment in any trade or industry, either generally or in a particular area, have been settled by a collective labour agreement or by a decision of the Industrial Court;
- (b) the parties to the collective labour agreement or the parties bound by the decision are, or represent, either generally or in that particular area, a substantial proportion of the employers and employees in that trade or industry, being employees of the description to which the agreement or the decision relates; or
- (c) in respect of any employee of the description referred to in paragraph (b), an employer engaged in that trade or industry, or, where the operation of the collective labour agreement, or of the

Claims that  
terms and  
conditions of  
employment  
are not being  
observed

decision, is limited to a particular area, an employer so engaged in that area is not observing those terms and conditions, may be referred to the Industrial Court, in writing, by, or on behalf of, any employer or employee who is adversely affected.

(2) A claim contemplated under subsection (1) may be referred to the Industrial Court only if —

- (a) it has been referred to the Commissioner under section 6 for mediation; and
- (b) it has not been resolved within 30 days of the referral to the Commissioner or within the extended period contemplated under section 7 (2), as the case may be.

(3) If, in the opinion of the Court, a claim lodged with it for the purposes of this section does not contain sufficient particulars, the Court may require to be provided with further particulars of the claim and, where it does so, the claim shall be deemed, for the purposes of this Act, not to have been lodged with the Court in accordance with this section until the Court is satisfied that it has been provided with the particulars required.

Recognition  
at workplace

**35.** (1) A trade union seeking recognition in terms of the Trade Unions and Employers' Organizations Act may, in the prescribed forms, apply to an employer for recognition.

(2) A copy of the application, together with proof that the request has been served on the employer, shall be submitted to the Commissioner.

(3) The employer shall, within 30 days of receipt of the application, in the prescribed form, notify the trade union whether —

- (a) the employer grants the trade union recognition as a collective bargaining agent in terms of the Trade Unions and Employers' Organizations Act; or
- (b) the employer refuses to grant the trade union recognition.

(4) Subject to subsection (5), an employer may only refuse to recognise a trade union on the grounds that —

- (a) the trade union does not represent at least one third of the employees of the employer who are eligible to be members of that trade union; or
- (b) the Industrial Court has authorised the withdrawal of recognition and the period contemplated in that order has not expired.

(5) Where a trade union is aggrieved by a decision made in terms of subsection (3) (b) or by the employer's failure to respond to the application within the 30 days stipulated under subsection (3), the trade union may refer the trade dispute to the Commissioner in the manner prescribed under section 6.

(6) If the trade dispute remains unresolved after 30 days of referral of the trade dispute, any party may refer the trade dispute to the Industrial Court for determination.

(7) If the trade dispute concerns whether the union represents at least one third of the employer's employees, the Industrial Court may direct the assigned mediator to conduct a ballot to determine the trade dispute.

Withdrawal  
of recognition  
at workplace

**36.** (1) An employer may apply to the Commissioner to withdraw the recognition of a trade union on the grounds contemplated under the Trade Unions and Employers' Organizations Act.

(2) The provisions of sections 6 and 7 shall apply to a mediation conducted in terms of this section.

(3) If the trade dispute remains unresolved for 30 days, the employer may refer the trade dispute to the Industrial Court for determination.

(4) The Industrial Court may —

- (a) if the trade dispute concerns the trade union's representativeness —
  - (i) direct the Commissioner or the assigned mediator to conduct a ballot to determine the question, or
  - (ii) give the union an opportunity to achieve the one third representation contemplated under the Trade Unions and Employers' Organizations Act; or
- (b) if the dispute concerns a refusal to bargain or a material breach of a collective agreement —
  - (i) suspend or authorise the withdrawal of any of the organisational rights granted pursuant to recognition in terms of the Trade Unions and Employers' Organizations Act, or
  - (ii) suspend or authorise the withdrawal of recognition.

(5) If the Industrial Court authorises a withdrawal of recognition, it shall include in its order, the period within which the trade union will not be entitled to recognition.

**37.** (1) For the purposes of this section, a trade union includes two or more trade unions acting jointly.

Recognition  
at level of  
industry

(2) Any trade union seeking recognition in terms of the Trade Unions and Employers' Organizations Act may, in the prescribed form, apply to the Commissioner for recognition in an industry.

(3) On receipt of the application, the Commissioner shall call for representations by —

- (a) publishing a notice in the *Gazette*; and
- (b) publishing a notice in a newspaper with national circulation.

(4) After considering the representations, the Commissioner shall call a meeting of all interested organisations and attempt to facilitate the establishment of a joint industrial council.

(5) If the Commissioner fails to establish a joint industrial council, the Commissioner shall determine whether or not the trade union has at least one third of the employees in the industry as members.

(6) If the Commissioner is satisfied that the trade union represents at least one third of the employees in an industry, the Commissioner shall issue a certificate in the prescribed form, certifying that the trade union is a recognised trade union in the industry.

(7) A party aggrieved by a decision of the Commissioner granted in terms of this section may appeal to the Industrial Court against that decision.

**38.** (1) Any employer or employers' organisation may apply to the Commissioner to withdraw recognition granted under section 37 on the grounds that —

Withdrawal of  
recognition at  
level of industry

- (a) subject to subsection (2), the trade union no longer represents one third of the employer's employees of those who are eligible to be members of the trade union;
- (b) the trade union refuses to negotiate in good faith with the employer;
- (c) the trade union refuses or fails to comply with an arbitration award or an order of the Industrial Court applicable to the industry; or

- (d) the trade union has materially breached a collective agreement concluded with an employer or an employers' organisation.
- (2) Whether a trade union represents one third of an employer's employees or not, may be challenged only —
  - (a) one year after the Commissioner has issued a certificate in terms of section 37 (6); or
  - (b) one year after an application in terms of this section to withdraw the trade union's recognition on grounds of representativeness.
- (3) The employer or employers' organisation shall satisfy the Commissioner, in writing, that a copy of the application has been served on the recognised trade union.
- (4) On receipt of the application, the Commissioner or labour officer delegated to do so shall —
  - (a) assign a mediator from the panel established under section 3, to attempt to resolve the trade dispute through mediation;
  - (b) determine the place, date and time of the first mediation hearing; and
  - (c) inform the parties to the trade dispute of the details contemplated under paragraphs (a) and (b).
- (5) The provisions of sections 6 and 7 shall apply to a mediation conducted in terms of this section.
- (6) If the trade dispute remains unresolved for 30 days, the employer or employers' organisation may refer the trade dispute to the Industrial Court for determination.
- (7) The Industrial Court may give any order it considers appropriate including —
  - (a) giving the trade union an opportunity to —
    - (i) remedy any breach, or
    - (ii) achieve the required threshold of representativeness, within a given period;
  - (b) the suspension or the authorisation of the withdrawal of any or all organisation rights granted pursuant to recognition in terms of the provisions of the Trade Unions and Employers' Organizations Act;
  - (c) the suspension or the authorisation of the withdrawal of recognition in respect of a particular employer; or
  - (d) the suspension or the authorisation of the withdrawal of recognition in respect of the whole industry.
- (8) Where it is necessary to determine the representativeness of the trade union, the Industrial Court may direct the Commissioner or the assigned mediator to determine the representativeness of the trade union by the conduct of a ballot.

Joint industrial councils

**39. (1)** Where a trade union, an employer's organisation or the Government as an employer consider themselves to be sufficiently representative of employees' and employers' interests in an industry, they may jointly apply in writing to the Commissioner for the establishment of a joint industrial council, in this section referred to as the "council", for that industry.

(2) The trade union, employer's organisation and Government shall submit a copy of the proposed constitution of the council with the application referred to in subsection (1).

(3) On receipt of the application, the Commissioner shall consult any other interested parties and, after satisfying himself or herself that the establishment of a joint industrial council is desirable and practicable, and that the proposed constitution is suitable, subject to any amendments that the Commissioner may consider desirable, and that all conditions required under this Act are met, the Commissioner may, by notice published in the *Gazette*, establish and register a council for the industry concerned.

(4) Where the Commissioner does not consider that the establishment of the council is desirable or practicable, and after hearing representations from any interested parties, the Commissioner shall, as soon as possible, inform the parties in writing, setting out the reasons for his or her decision.

(5) The constitution of a council shall provide for the following matters —

- (a) the industry or class or classes of employees to be covered by the council;
- (b) the appointment, number and method of selection of employer and employee representatives;
- (c) the appointment, number and method of selection of a chairperson and deputy chairperson of the council;
- (d) the appointment and method of selection of a secretary or joint secretaries of the council;
- (e) the procedure for the appointment of alternative members of the council;
- (f) the number of members required to form a quorum;
- (g) the procedure for the replacement of members;
- (h) the term of office of members of the council and office holders;
- (i) the procedure to be followed in the event of a dispute or deadlock in the council;
- (j) the method by which persons affected by any collective agreement made or amended by the council shall be informed; and
- (k) such other matters as may be included in the constitution by the party making the application and approved by the Commissioner, or as may be advised by the Commissioner.

(6) The Commissioner may, on the application of an interested party, and upon reasonable cause being shown, cancel the registration of a council.

(7) Any interested party aggrieved by a decision of the Commissioner not to establish and register a council, or a decision to cancel the registration of a joint industrial council, may appeal against such decision to the Minister.

#### PART V — *Collective labour agreements*

40. (1) Every collective labour agreement shall be binding upon the parties to the agreement.

(2) A collective labour agreement shall cease to be binding upon the parties upon the expiry of one month, or such greater period as the notice may specify, immediately after the day on which any party to the agreement serves notice in writing to every other party to the agreement that it repudiates the agreement:

Provided that no notice under this subsection shall be served without the permission in writing of the Minister before the expiry of six months immediately after the day on which the agreement came into force.

Collective  
labour  
agreements  
binding on  
parties thereto

Registration of  
collective  
labour  
agreements

**41. (1)** Each party to a collective labour agreement or to an agreement extending or varying the terms of a collective labour agreement shall lodge a certified copy of an agreement with the Commissioner within 28 days of the day on which such agreement was concluded.

(2) The Commissioner shall —

- (a) register, in such manner as may be prescribed, or in the absence of any such prescription as he or she may determine, one copy of the agreement lodged with him or her; and
- (b) serve notice on each party to the agreement that he or she has registered the agreement.

(3) Where the Commissioner is of the opinion that any term of the agreement lodged with him or her under the provisions of this section is contrary to any provision of this Act or any other written law, the Commissioner shall withhold registration and shall serve notice of such fact and his or her opinion, in writing, on each party to the agreement.

(4) Any interested party aggrieved by a decision of the Commissioner to withhold the registration of a collective labour agreement, may appeal against such decision to the Minister.

(5) Any party to a collective labour agreement who contravenes the provisions of subsection (1) commits an offence and is liable to a fine of P2 000 or to imprisonment for 12 months, or to both.

#### *PART VI — Unlawful industrial action and enforcement of collective labour agreements and decisions of Industrial Court*

Right to strike  
and lockout

**42. (1)** Subject to section 47, a party to a dispute of interest has the right to strike or lockout if —

- (a) the dispute of interest has been referred to the Commissioner in accordance with section 6, and, subject to subsections (2) and (3), the dispute of interest still remains unresolved after 30 days;
- (b) after 30 days has expired, 48 hours notice of the commencement of the strike or lockout has been given in the prescribed form to the Commissioner and the other parties to the dispute of interest; and
- (c) the strike or lockout conforms to —
  - (i) the provisions of this Part, and
  - (ii) any agreed rules regulating the conduct of a strike or lockout, or
  - (iii) any rules determined by the mediator in terms of section 43 (1).

(2) If the party referring the dispute of interest fails to attend a mediation hearing contemplated under section 6 (5), the period of 30 days referred to under subsection (1) (b) shall be extended for a further 30 days commencing from the date of the hearing.

(3) If parties to the dispute of interest, other than the referring party, fail to attend a mediation hearing contemplated under section 6 (5), the mediator shall not be obliged to grant an extension contemplated under subsection (2).

Regulation of  
strikes and  
lockouts

**43. (1)** A mediator assigned in terms of section 6 (5) (a) to mediate a dispute of interest shall, if the dispute of interest cannot be resolved before the expiry of the 30 days period, try to reach an agreement on —

- (a) rules to regulate the conduct of the strike or lockout, failing which the mediator shall determine rules in accordance with any guidelines published in terms of section 53; and
- (b) the provision of a minimum service.

(2) The rules contemplated in subsection (1) shall include rules concerning the conduct of the strike or lockout and any conduct in contemplation or furtherance of the strike or lockout including, subject to the provisions of subsection (4), picketing and the use of replacement labour.

(3) An employer shall not take persons into employment to do the work of employees who are on strike or who are locked out —

- (a) if the parties have concluded an agreement on the provision of a minimum service during the strike or lockout; or
- (b) if no such agreement is concluded, within 14 days of the commencement of the strike or lockout.

(4) A trade union shall not picket the premises of the employer during a strike or lockout —

- (a) if the parties have concluded an agreement on the provision of a minimum service during the strike or lockout; or
- (b) if no such agreement is concluded, within 14 days of the commencement of the strike or lockout.

**44.** (1) A person does not commit a delict or breach of contract by taking part in a strike or a lockout in compliance with the provisions of this Part.

(2) A person who takes part in a strike or lockout may not be dismissed for doing so, but this shall not preclude the employer from dismissing an employee during a strike or lockout for any other reason that is valid and fair.

(3) Notwithstanding subsection (1), an employer is not obliged to remunerate an employee for services that the employee does not render during the strike or lockout in compliance with the provisions of this Part.

(4) Civil proceedings may not be instituted against any person for participating in a strike or lockout carried out in compliance with this Part except any act in contemplation or furtherance of a strike or lockout that constitutes defamation or an offence.

**45.** (1) A person may not take part in a strike or lockout if —

- (a) the strike or lockout —
  - (i) is not in compliance with the provisions of this Part or an agreed procedure, or
  - (ii) is in breach of a peace clause in a collective labour agreement; or
- (b) the subject matter of the strike or lockout is —
  - (i) not a trade dispute,
  - (ii) regulated by a collective labour agreement,
  - (iii) a matter that is required by this Act to be referred to arbitration or to the Industrial Court for adjudication, or
  - (iv) a matter that the parties to the dispute of interest have agreed to refer to arbitration.

(2) The Industrial Court may interdict —

- (a) a strike or lockout not in compliance with the provisions of this Act; or
- (b) a conduct —

Strikes and lockouts in compliance with this Part

Prohibition of certain strikes and lockouts

- (i) in contemplation or in furtherance of a strike or lockout, and
  - (ii) that is not in compliance with this Act.
- (3) An interdict contemplated under subsection (2) may not be granted unless
- (a) the applicant has given the prescribed notice to the respondent of the applicant's intention to apply for an interdict;
  - (b) the applicant has served a copy of the notice and the application on the Commissioner; and
  - (c) the respondent has been given a reasonable opportunity to be heard before a decision is made.

**PART VII — Protection of essential services, life and property**

Essential services

- 46. (1)** The following are designated essential services —
- (a) Air Traffic Control Services;
  - (b) Botswana Vaccine Laboratory Services;
  - (c) Bank of Botswana;
  - (d) Diamond Sorting, Cutting and Selling Services;
  - (e) Electricity Services;
  - (f) Fire Services;
  - (g) Health Services;
  - (h) Operational and Maintenance Services of the Railways;
  - (i) Sewerage Services;
  - (j) Water Services;
  - (k) Veterinary Services in the Public Service;
  - (l) Teaching Services;
  - (m) Government Broadcasting Services;
  - (n) Immigration and Customs Services;
  - (o) Transportation and Distribution Services of Petroleum Products; and
  - (p) services necessary to the operation of any of the foregoing services.
- (2) The Minister may, after consultation with the Board, by Statutory Instrument published in the *Gazette* declare any service not referred to in subsection (1), essential in the event the interruption of the service which, as a result of the duration of a strike, endangers life, safety or health of the whole or part of the population, or harms the economy.
- (3) For the purpose of subsection (2), “duration of a strike” means seven continuous days or more.
- (4) Where a service is declared essential in accordance with subsection (2) —
- (a) a trade dispute involving the service shall be resolved in accordance with section 50; and
  - (b) upon resolution of the trade dispute, such service shall cease to be an essential service.

Prohibition of strike or lockout in essential services

- 47. No —**
- (a) employee in essential services shall take part in a strike; and
  - (b) employer in essential services shall take part in a lockout.

Breaches of contracts affecting essential services

- 48. (1)** An employee who wilfully breaches his or her contract of employment knowing or having reasonable cause to believe that the probable consequence of his or her doing so, either alone or in combination with others, will be —

- (a) to deprive the public or any section of the public, either wholly or to a substantial extent, of an essential service or substantially to diminish the enjoyment of an essential service by the public or by any section of the public; or
- (b) to endanger human life or public health or to cause serious bodily injury to any person or to expose valuable property, whether movable or immovable, to the risk of destruction, deterioration, loss or serious damage,

commits an offence and is liable to a fine not exceeding P2 000 or to imprisonment for a term not exceeding 12 months, or to both.

(2) Any person who causes, procures, counsels or influences any employee to breach his or her contract of employment, knowing or having reasonable cause to believe that the probable consequence of that employee's breach of his or her contract of employment, either alone or in combination with others, or of the lockout, as the case may be, will be any of the consequences specified by subsection (1), commits an offence and is liable to a fine not exceeding P2 000 or to imprisonment for a term not exceeding 12 months, or to both.

**49.** (1) Every employer in an essential service shall cause to be conspicuously displayed in accordance with this section, in all premises used for the purposes of the essential service, a printed notice containing a copy of section 48 together with a Setswana language translation of the same.

Notices of section 48 to be displayed

(2) Every notice referred to in subsection (1) shall be displayed in a conspicuous place where it may conveniently be read by persons employed in the premises in question and, in the event of the notice being lost, destroyed, removed, defaced, obliterated or otherwise damaged, the employer shall forthwith cause it to be replaced.

(3) Every employer in an essential service shall take every reasonable step to ensure that any employee in the essential service who is illiterate is regularly informed of and understands section 48.

(4) Any person who, without reasonable excuse, destroys, removes, defaces, obliterated or otherwise damages any printed notice displayed in accordance with this section commits an offence and is liable to a fine not exceeding P500 or to imprisonment for a term not exceeding three months, or to both.

(5) In any proceedings for an offence under subsection (4), the court shall presume the absence of a reasonable excuse on the part of the person charged unless the contrary is proved.

(6) Any employer who contravenes this section commits an offence and is liable to a fine not exceeding P500 or to imprisonment for a term not exceeding three months, or to both.

**50.** (1) Where there is a trade dispute involving an employer, employers or employees in an essential service, the trade dispute shall be reported to the Commissioner by an organisation acting on behalf of the employer, employers or employees.

Dispute resolution in essential services

(2) The provisions of section 6 (3) shall apply in respect of a report of the trade dispute made in accordance with subsection (1).

(3) Where a trade dispute is reported in accordance with this section it shall be deemed, for the purposes of this Act, to have been reported to the Commissioner under section 6.

(4) Where there is a failure to reach a settlement of a trade dispute reported to the Commissioner in accordance with subsection (2) within 21 days of the day on which the trade dispute was so reported, the Commissioner may immediately refer the trade dispute to —

- (a) arbitration if the trade dispute is a dispute of interest; or
- (b) the Industrial Court if the trade dispute is a dispute of right.

#### PART VIII — *Miscellaneous*

Consent of  
Director of  
Public  
Prosecutions  
for prosecutions

**51.** A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Director of Public Prosecutions:

Provided that a person may be arrested for and charged with such an offence and remanded in custody or on bail notwithstanding that the consent of the Director of Public Prosecutions to the institution of a prosecution for the offence has not been obtained, but no further proceedings shall be taken until that consent has been obtained.

Regulations

**52.** The Minister may make regulations for any matter required to be prescribed under this Act and for the better carrying into effect of the purposes and provisions of this Act and, without prejudice to the generality of the foregoing, such regulations may prescribe the —

- (a) remuneration and allowances payable to persons, other than public officers, appointed by the Minister under this Act; and
- (b) form in which statistics on the mediation, arbitration and adjudication of trade disputes shall be kept under section 54.

Codes and  
guidelines

**53.** (1) The Minister may, after consultation with the Board, publish Codes of Good Practice, policies, guidelines, rules and model procedures and agreements to guide employers, employees and their representative organisations.

(2) In making any decision under this Act, a mediator, arbitrator or the Industrial Court shall take any Code of Good Practices, policy, guideline or model agreement into account.

(3) The Judge President of the Industrial Court may, after consultation with the Minister, publish rules for the conduct of arbitrations under this Act.

Statistics and  
reports on  
trade dispute  
prevention  
and resolution

**54.** (1) The Commissioner shall keep prescribed statistics on the mediation, arbitration and adjudication of trade disputes.

(2) The Commissioner shall prepare an annual written report for submission to the Board on the state of trade dispute prevention and resolution.

(3) The Commissioner shall provide the Board with further information on the prevention and resolution of trade disputes at the request of the Board.

Delegation of  
functions

**55.** The Commissioner may delegate any of the Commissioner's functions under this Act to labour officers.

Repeal of  
Cap. 48:02

**56.** The Trade Disputes Act (hereinafter referred to as "the repealed Act"), is hereby repealed.

Savings and  
transitional  
provisions

**57.** (1) Any subsidiary legislation made under the repealed Act and in force immediately prior to the coming into operation of this Act shall, in so far as it is not inconsistent with the provisions of this Act, continue in force and be of effect as if made under this Act.

(2) The mediators and arbitrators appointed under the repealed Act shall continue to be mediators and arbitrators under this Act.

(3) The judges and other staff appointed under the repealed Act shall continue to be judges and staff of the Industrial Court, as continued under this Act.

(4) Every decision made under the repealed Act shall continue to have force and effect according to its substance as if it was made under this Act.

(5) Every registration of collective labour agreements made under the repealed Act shall continue to be so registered as if registered under this Act.

(6) The repeal of the Trade Disputes Act shall not be construed as invalidating any process to resolve a trade dispute begun or undertaken under or in accordance with the provisions of the repealed Act.

(7) Notwithstanding the repeal of the Trade Disputes Act, proceedings, commenced under the repealed Act shall be dealt with, inquired into and determined in accordance with this Act.

(8) Any penalty in respect of an offence under the repealed Act shall be imposed as if this Act had not come into operation, but where, under this Act, the penalty in respect of the offence is reduced or mitigated in relation to the penalty or punishment that would have been applicable before the coming into operation of this Act, the provisions of this Act relating to penalties shall apply.

## SCHEDULE

### OATH OF INDUSTRIAL COURT JUDGE

*(section 16 (1))*

I ....., do swear that I will well and truly serve the Republic of Botswana in the office of Industrial Court Judge and that I will do justice in accordance with the Constitution of Botswana as by law established and in accordance with the laws and usage of Botswana without fear or favour, affection or ill-will.

*So Help Me God*

PASSED by the National Assembly this 3rd day of August, 2016.

BARBARA N. DITHAPO,  
*Clerk of the National Assembly.*