

BOTSWANA FEDERATION OF TRADE UNIONS

Plot 4220-2

Extension 14
Gaborone

Email: BFTUStaff@gmail.com



P.O. Box 440

Gaborone, Botswana
Tel: (+267) 3952534
Fax: (+267) 3952013
Cell: +267 74869663

ALL CORRESPONDENCE TO BE ADDRESSED TO THE SECRETARY GENERAL

REPORT ON THE AMENDMENT OF THE TRADE DISPUTE ACT 2003

Background

The Trade Dispute Act (TDA) was re-enacted in 2004 with amendments. The amendments to the Act were necessitated by Botswana's ratification of ILO Conventions C87¹, C98² and C151³ in 1997. To give effect to the conventions it was thus necessary to align all the labour legislation with the ratified conventions. One of the key amendments was the definition of an employee and employer in the Act which now included public service workers and the Government as an employer. This meant that scores of public service workers who all along have been excluded from the operation of the Act were now covered. However, not all that was in the Act was acceptable to workers. The schedule of the Act on essential services still contained categories of workers that do not fall under the strict definition of essential services. ⁴Such workers included Bank of Botswana, Operational and maintenance of services of the Railways, Sewerage services and Botswana Vaccine Laboratory.

The Genesis of the current dispute

In April 2011 the public service unions (five unions in total) went on strike demanding salary increase. The strike that was thought to last about a week became protracted and went on for over six weeks. As a result the Government suffered unprecedented loss in terms of

¹ Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

² Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

³ Labour Relations (Public Service) Convention, 1978 (No. 151)

⁴ Trade Dispute Act 2003 – Schedule (Essential Services)

productivity and image as services were not forthcoming. In response to this state of affairs, the Government reacted by hurriedly bringing before parliament a statutory instrument which sought to categorize a number of services as essential. Among these were the teaching services and diamond cutting and polishing services.

Botswana Federation of Trade Unions (BFTU) together with Botswana Federation of Public Service Unions (BOFEPUSU) opposed the statutory instrument and at first Parliament rejected it. However, it was subsequently approved. The statutory instrument was later struck off by the Courts which ruled that it was unlawful as the Minister did not have the power to change the law.

Further Developments in the TDA Amendments

In 2013 the Government started a new process to review and amend the TDA. Among its proposed amendments was the list on essential services which its new look was identical to the failed statutory instrument.⁵BFTU was requested to submit proposals for consideration for inclusion in the amendments, which we did. However, none of the proposals we put forward were included in the Draft Bill of the TDA.

The Draft Bill was taken to the Labour Advisory Board (LAB) which is a tripartite structure consisting of Government, representatives of workers and representatives of employers at equal footing. At the LAB, BFTU motivated its position on the new essential services provision under section 47 and provided for an alternative⁶. The LAB unanimously embraced BFTU's position and resolved to render that as its own position to the Minister. However, it turned out that the Minister ignored the position of the LAB as the final Draft Bill taken to Parliament in July 2015 had the same sections 46 and 47 but with an extended list of essential services to include immigration and customs and excise workers as well as the public broadcasting workers.

Once again BFTU opposed the Bill and lobbied members of Parliament and released press statements denouncing the Bill. We particularly raised issues on both the procedure the Minister followed to take the Bill to Parliament and the substantive issues pertaining to essential services. The Bill now contained elements that were not there when it was taken to the LAB and therefore they were not consulted upon as per the

⁵ See BFTU Final Submission on the TDA 2015

⁶ See proposal 4 in BFTU Final Submission on the TDA 2015

requirement of the Employment Act⁷. Parliament then resolved to refer the Bill back to the Minister for further consultation.

The Minister met with BFTU leadership for consultation on or about 10th November 2015. BFTU was requested to submit its proposal on the sections that it was not happy with and we did exactly that. We reiterated that sections 46 and 47 of the Bill be replaced with the ILO definition on essential services and a provision for a tripartite national body that can preside over cases of declaring services essential including on temporary basis. We further reminded the Minister that this position was shared by all members of the LAB which included Government. The Minister assured us that our proposals will be taken into consideration particularly where the new Bill went contrary to the ILO ratified conventions.

During the February 2016 sitting of Parliament we learnt that the ⁸TDA Bill will be tabled. To our surprise nothing had changed from the previous Bill particularly sections 46 and 47 which was being complained about. Once again we engaged members of Parliament by way of providing them with our position on the matter. Of particular note BFTU met with the ruling party Labour Committee to assist us to access their Members of Parliament. It was then that we were informed that the Bill will not be discussed during the February sitting but will be postponed to allow for further consultation. Specifically we were informed that the Minister will be in touch with us for further discussions.

The Minister never contacted BFTU on the matter. We subsequently learnt that the Bill will be tabled during the July 2016 Parliament sitting, and it was and passed by Parliament at the said sitting. BFTU once again raised its objection to the Bill but this time we were not successful. ⁹We wrote to the Minister seeking clarity on the way forward on any possible dialogue but our letter was not responded to. The Bill has been passed by Parliament and now awaits the ascension by the President for it to take effect.

⁷ Section 143(1) and (2) of the Employment Act

⁸ See document saved as TDB 2015 page B.354

⁹ See attachment – Ministry of Labour – Inquiry on the TDA Bill

The Reasons for our opposition to the new law

1. The ILO Definition

Botswana is a member of the International Labour Organization (ILO) and a member of its Governing Body (GB). By virtue of its membership to the ILO it is obliged to adhere to its statutes and principles. And as a member of the Executive (the GB) Botswana must lead by example and ensure that the principles of the organization are respected. The definition of essential services as adopted by the ILO, Botswana inclusive, is binding to the country. By moving away from this definition, Botswana violates the principles it has adopted.

2. Violation of Convention 87 of the ILO

Botswana ratified Convention 87 of the ILO on Freedom of Association and the Right to Organize in 1997. This is the convention that grants workers the right to strike and this right is only limited where workers concerned are in essential services. By declaring workers who ordinarily do not fall under the purview of essential services essential, the Botswana Government standards in violation to this convention. The right to strike is a fundamental right for workers and can only be limited under exceptional circumstances such as contemplated by the ILO definition on essential services. Taking away the right to strike from workers fundamentally weakens their bargaining power.

3. Essentialization of the entire workforce

The provision of section 46 (1) (o) has the potential of turning the whole economy essential. This subsection provides that all other services that are necessary to the operation of the services in the list are also essential. There is no doubt that this covers the rest of services that are not in the list as economic activities are interrelated. For example for diamond polishers to polish them they need supply from the mines and this automatically makes diamond mining essential. Such a situation cannot be allowed to exist.

4. Bad Faith Consultations

It has become common occurrence that the Minister engages on consultation without any intention whatsoever to take into consideration the inputs of those he consults with. The statutory provision for the Labour Advisory Board has become nothing but a laughing stock. The Minister only consults the LAB to satisfy the statutory provision without

regard of the advice coming from it. It will seem the only reason such a tripartite structure was setup was to camouflage the intentions of Government and use it as smokescreen for it to do what it pleases. The actions of the Minister are once again in violation of another ILO convention, Convention 144 on Tripartite Consultation which Botswana has ratified.

5. BFTU's Submissions to the Minister and the Labour Advisory Board

BFTU was invited by the Ministry of Labour and Home Affairs to make submissions on the amendments of the TDA for consultation with the Minister. These submissions we did present to the Minister and the Labour Advisory Board. During our consultations with the Minister he indicated a positive attitude to our submissions. However, to our dismay none of these submissions were taken on board when the final Bill was drafted. Once again it would seem the consultations were done purposes of legitimizing the intentions of the Minister and not on good faith and based of genuine consultation. We attach the said submissions to this position paper for reference.

Conclusion

1. It is our view that we have exhausted all efforts to get the Botswana Government not to enact the new TDA particularly the provision on the essential services and our efforts have so far yielded nothing positive.
2. The attitude of the Botswana Government does not indicate any willingness for any more dialogue on the matter. In fact the dialogue on their part has never been in good faith.
3. The new provision of section 47 of the TDA renders almost all workers in Botswana essential, a situation that cannot be allowed to prevail.
4. Allowing the new amendments to take effect will weaken collective bargaining and render trade unions in the country of no use to workers.
5. The fundamental right to strike has been taken away from almost the entire workforce of the country.
6. On the above premises we wish to submit a complaint to the ILO Governing Body to assist to get the Government of Botswana to reverse the draconian law in the form of the new TDA amendments.



Gadzani Mhotsha (Mr.)
Secretary General

**President: Bohithletswe Lentswe, Vice President: (Vacant), Secretary General: Gadzani Mhotsha,
Assistant Secretary General: Thusang Butale, Treasurer: Thatayaone Tauyakgale**