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“Constitution Seventeenth Amendment Act: Thoughts on the Jurisdictional Overlap, the Restoration of Labour Appeal Court and the Demotion of the Supreme Court of Appeal”

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***Constitution Seventeenth Amendment Act:
Thoughts on the Jurisdictional Overlap, the Restoration of the Labour Appeal Court
and the Demotion of the Supreme Court of Appeal***

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INTRODUCTION

Since the inception of the Labour Courts in 1996 there have been problems regarding the alignment of South Africa’s labour dispute resolution institutions and the civil High Courts. The drafters of the post-constitutional Labour Relations Act (LRA)¹ had the goal of instituting the ‘Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act’.² As part of the plan, the Labour Appeal Court (LAC) was envisioned to be the court of final appeal in respect of appeals from the Labour Court.³

After the establishment of the Labour Courts it became apparent that the LRA and the Constitution 1996 were misaligned regarding the status of the LAC as the apex court in respect of labour disputes. The drafters of the LRA did not take into account the hierarchy of courts intended by the Constitution when considering the status of the LAC vis-à-vis that of the Supreme Court of Appeal (SCA). A turf war ensued between the

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¹ 66 of 1995.

² Preamble to the LRA. See also s 157(1) of the LRA.

³ The *Explanatory Memorandum to the Labour Relations Bill* (1995) 16 *ILJ* 278 at 330 stated that the ‘LAC [would be] entitled to confirm, amend or set aside any decision of the Labour Court. No appeal lies to the Appellate Division’.

LAC and the SCA⁴ which, contrary to the initial idea, resulted in a situation where appeals are now being lodged against the decisions of the LAC to the SCA.⁵ Also, the drafters of the then new LRA did not take the bold step to clothe the Labour Court with true exclusive jurisdiction which covers all labour-related issues. The Labour Court and High Court were conferred with concurrent jurisdiction to determine disputes concerning alleged violations of constitutional labour rights.⁶ This gave rise to a ‘jurisdictional quagmire’⁷ of uncertainty between the High Court and the Labour Court.⁸

As long ago as 2001, the then President of the LAC, Zondo J, in *Langeveldt v Vryburg Transitional Local Council & others*⁹ called for ‘serious consideration’ to be given

‘by parliament, the Minister for Justice and Constitutional Development, the Minister of Labour and NEDLAC to taking a policy decision to the effect that all such jurisdiction . . . as the Supreme Court of Appeal may have in employment and labour disputes be transferred to the Labour Appeal Court’.

After more than a decade of uncertainty and wasted legal costs, parliament at long last passed the Constitution Seventeenth Amendment Act in 2012 (CSAA),¹⁰ the Superior Courts Act in 2013¹¹ and the Labour Relations Amendment Bill in 2012 (LRAB),¹² which address some of the problems associated with the overlap between the functions of the labour and civil courts. In this article the questions are posed whether the status of the LAC has been restored to the one which was originally envisaged by the drafters of the LRA and whether the jurisdictional conundrum between the labour and civil courts has been resolved. Before these questions can be properly answered, it

⁴ B P S Van Eck ‘The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters’ Part 1 (2005) 26(3) *Obiter* 549 and Part 2 27(1) (2006) *Obiter* 20; P Benjamin ‘Braamfontein versus Bloemfontein: The SCA and the Constitutional Court’s Approaches to Labour Law’ (2009) 30 *ILJ* 776-790.

⁵ See, for example, *Chevron Engineering (Pty) Ltd v Nkambule & others* (2003) 24 *ILJ* 1331; [2003] 7 BLLR 631 (SCA); *National Union of Metalworkers of SA & others v Fry’s Metals (Pty) Ltd* (2005) 26 *ILJ* 689 (SCA); [2005] 5 BLLR 430 (SCA); and *National Union of Mineworkers & others v Mazista Tiles (Pty) Ltd* (2006) 27 *ILJ* 471 (SCA).

⁶ s 157(2) of the LRA.

⁷ As referred to by T Cohen ‘Implying Fairness into the Employment Contract’ (2009) 30 *ILJ* 2271.

⁸ See the discussion that follows. See also J Grogan ‘Which Court When - and Why? Jurisdiction over Employment Disputes’ *Employment Law* (December 2001); B P S van Eck ‘The Right to a Pre-dismissal Hearing in terms of the Common Law: Are the Courts Misdirected?’ (2008) *Obiter* 339-351; D du Toit ‘A Common-law Hydra Emerges from the Forum-Swapping Swamp’ (2010) 31 *ILJ* 21.

⁹ (2001) 22 *ILJ* 1116 (LAC) para 67. See also V Ngalwana ‘The Supreme Court of Appeal is not the Apex Court in all Non-constitutional Appeals’ (2006) 27 *ILJ* 2000 at 2001.

¹⁰ Assented to in GG 36128 of 1 February 2013.

¹¹ 10 of 2013.

¹² B16B - 2012.

is necessary to traverse the background to the erosion of the status of the LAC and to provide some detail regarding the jurisdictional tangle in which the Labour Court and High Court are currently finding themselves.

LABOUR APPEAL COURT – NOT AS SUPREME AS INITIALLY INTENDED

The LRA currently provides that the LAC ‘is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction’.¹³ Also, the LAC is established as ‘a superior court’, which has inherent powers and authority ‘in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction’.¹⁴ However, as mentioned, it became apparent that these provisions were inconsistent with the sections of the Constitution which establish the hierarchy of the South African courts. Until recently, the Constitution described the hierarchy of the ‘[j]udicial system’ as:

- ‘(a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts . . . ;
- (d) the Magistrates’ Courts; and
- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts.’¹⁵

The architects of the Constitution were not averse to the idea of the establishment of specialist courts, such as the Labour Court, which are similar in status to the High Court. Section 166(e) made provision for the establishment of courts equal to the Magistrates’ Courts and the High Court. However, no mention was made regarding the establishment of courts with jurisdiction equalling that of the SCA. In addition, the Constitution provided that the ‘Supreme Court of Appeal may decide appeals in any matter’ and ‘[i]t is the highest court of appeal except in constitutional matters . . . ’.¹⁶ In other words, the Constitutional Court was established as the apex court in all ‘constitutional matters’ and the SCA was the highest court of appeal in

¹³ s 167(2) of the LRA.

¹⁴ s 167(3) of the LRA.

¹⁵ s 166 of the Constitution.

¹⁶ s 168(3) of the Constitution.

respect of all disputes which did not constitute constitutional matters. As discussed later in the contribution, this very divide later proved to be a problematic boundary.

The Constitutional Court, the LAC and the SCA have all had occasion to consider the LAC's apex status in labour matters. Initially, the LAC jealously clung to its exclusive jurisdiction. In 2002, in *Kem-Lin Fashions v Brunton & another*,¹⁷ the LAC held that although the Constitution 'would seem to indicate' that an appeal lies from the LAC to the SCA, this would be contrary to the wording of the LRA.¹⁸ This provision, the LAC held, provides that the LAC is a superior court with equal status and powers in relation to matters under its jurisdiction to that which the SCA has in relation to matters under its jurisdiction. Hence, the LAC held, 'It is inconceivable that a judgment of a court of equal authority can be taken on appeal to a court of equal authority and standing.'¹⁹ In hindsight this decision was clearly wrong. Surely there can be no doubt that it is the LRA that must be in line with the Constitution and not the other way round. The LAC should have given preference to the interpretation of the Constitution rather than merely emphasising the interpretation of the LRA.

In the following year, the appellant in *National Education Health & Allied Workers Union v University of Cape Town & others (NEHAWU)*²⁰ applied directly to the Constitutional Court for leave to appeal against a split decision of the LAC. Before the court entertained the substantive question regarding the transfers of businesses as going concerns, it considered the structure of the superior courts. Ngcobo J explained that the Constitution recognised two highest courts of appeal, namely, the Constitutional Court and the SCA and that the SCA was the highest court except in constitutional matters.²¹ Accordingly the court held that an appeal on constitutional matters did indeed lie from the LAC to the SCA.

During the same year, in *Chevron Engineering*,²² Farlam AJ of the SCA relied on *NEHAWU* and noted that an unsuccessful party before the LAC might, without leave to appeal being granted by the LAC, appeal against such a decision to the SCA. This decision was followed in *Fry's Metals*²³ in which the SCA confirmed that parties

¹⁷ (2002) 23 ILJ 882 (LAC) paras 4-5.

¹⁸ s 167(3) of the LRA.

¹⁹ *Kem-Lin Fashions* n 17 above para 6.

²⁰ (2003) 24 ILJ 95 (CC).

²¹ *NEHAWU* n 20 above para 21.

²² n 5 above.

²³ *ibid*.

dissatisfied with judgments by the LAC on matters other than constitutional matters, might appeal to the SCA.²⁴ However, the court placed limitations on the right to appeal to the SCA. It held that appellants were required first to petition the SCA and to persuade it that there were special reasons as to why a second appeal should be allowed. The SCA held that

‘[s]trong considerations suggest that the path from the LAC to this court should not be untrammelled. The first is the imperative of institutional expertise. The second is the imperative of expedition. The third (and only last in order of importance) is the workload of this court’.²⁵

Despite the call to parliament by Zondo J in *Langeveldt* as long ago as 2001, policy makers never adapted the LRA which establishes the LAC as the highest court in labour disputes (emanating from the LRA) and have only recently passed legislation which attempts to resolve the uncomfortable fit between the LAC and the SCA. However, the contest for the highest status in labour related issues between the LAC and the SCA only forms part of the problem. A morass of uncertainty has developed regarding the overlapping roles of the Labour Court and the High Court in respect of the exclusive jurisdiction of these superior courts.

OVERLAPPING JURISDICTION BETWEEN THE LABOUR AND HIGH COURTS

As mentioned at the outset, it was envisaged that the Labour Court would be clothed with ‘exclusive jurisdiction’ in all matters that in terms of the LRA are to be determined by the Labour Court.²⁶ However, directly after this point of departure, the LRA confers concurrent jurisdiction on the Labour Court and High Court to resolve violations regarding fundamental rights contained in the Constitution.²⁷ The problem is this: almost all conceivable matters to be determined by the Labour Court in terms of the LRA could also be classified to fall under the category ‘constitutional matters’. The Constitution entrenches everyone’s right to fair labour practices²⁸ which covers most, if

²⁴ See also H Irvine ‘Dismissal, Operational Requirements and the Jurisdiction of Courts’ (2005) 14(9) *CLL* 81-6.

²⁵ n 5 above para 35. See also *Mazista Tiles* (n 5 above) which also endeavoured to restore the initial specialist and exclusive role of the LAC.

²⁶ s 157(1) of the LRA.

²⁷ s 157(2) of the LRA.

²⁸ s 23(1) of the Constitution.

not all, matters regulated by labour legislation such as the LRA. Therefore, the LRA was set up for an interpretation that the High Court and the Labour Court have concurrent jurisdiction in most (if not all) labour disputes. This begs the question why the Labour Court was given exclusive jurisdiction in the first instance. It has resulted in two key contested areas where forum shopping has been rife between the Labour and High Courts since the early 1990s.

The first relates to the overlap between the common-law remedies associated with the termination of a contract of employment and the statutory regime pertaining to the regulation of unfair dismissal.²⁹ In *Fedlife Assurance Ltd v Wolfaardt*³⁰ Nugent AJA, for the majority, concluded that the LRA and the Constitution have not deprived employers and employees of their common-law entitlements. Stated differently, despite the unfair dismissal framework established by the LRA, claimants could still rely on their common-law remedies. In a minority dissenting decision, Froneman AJA, in our view correctly, held that a common-law termination dispute is about an unfair dismissal and therefore it should be dealt with in accordance with the provisions of the LRA, which would exclude the High Court from entertaining the matter. More often than not the election between either the Labour or the High Court was based on strategic (or forum shopping) purposes rather than being founded on substantive underlying reasons which justify the co-existence of these courts.

Subsequent decisions by the SCA further strengthened the civil courts' extension of jurisdiction over labour matters by holding that despite the unfair dismissal framework established by the LRA, nothing limited the development of the common-law contract of employment to include the right to procedural fairness under the influence of the Constitution.³¹ This developed to a point where in *Makhanya v University of Zululand*,³² Nugent JA held that it is not unusual for two rights to be asserted emanating from the same facts. A claimant could, for example, claim so called 'LRA rights' in one set of fora (being the Commission for Conciliation, Mediation and

²⁹ See the reference to articles by Benjamin, Du Toit and Van Eck in n 4 and n 8 above.

³⁰ (2001) 22 ILJ 2407 (SCA).

³¹ *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA); (2007) 28 ILJ 1499 (SCA); *Boxer Superstores Mthatha & another v Mbenya* 2007 (5) SA 450 (SCA); (2007) 28 ILJ 2209 (SCA); [2007] 8 BLLR 693 (SCA).

³² 2010 (1) SA 62 (SCA); (2009) 30 ILJ 1539 (SCA); [2009] 8 BLLR 721 (SCA). See also P Pretorius and A Myburgh 'A Dual System of Dismissal Law: Comment on *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA)' (2007) 28 ILJ 2172.

Arbitration (CCMA) and the Labour Court) and common-law rights based on the same facts in the High Court.

This, it is submitted, results in an untenable and irrational situation.³³ Why would policy makers invest public funds towards the maintenance of a set of specialist dispute resolution mechanisms (such as the CCMA and the Labour Courts) to resolve disputes about unfair dismissals and other employment matters if the civil courts and common-law principles could in any event provide adequate remedies for such disputes? However, this is not the end of the debate regarding the first overlapping area and we return to this issue below.

The second contested area concerns the intersection between administrative and labour law. Public service employees have been challenging the termination of their contracts of employment in the High Court on grounds of the failure to adhere to administrative law despite the fact that the LRA regulates unfair dismissal disputes. The trials and tribulations of the two Constitutional Court decisions in *Chirwa v Transnet*³⁴ and *Gcaba v Minister of Safety & Security*³⁵ are well recorded.³⁶ The question arose whether a dismissed public servant could rely on the provisions of the Promotion of Administrative Justice Act (PAJA)³⁷ which gives effect to the constitutional right to just administrative action irrespective of the fact that the LRA also regulates unfair dismissal law in general. In *Chirwa* the eleven judges of the Constitutional Court delivered three judgments but ultimately reached the same overall conclusion. The applicant employee had been dismissed for incompetence and therefore she had to find her remedy in the LRA and not in the PAJA. Skweyiya J held:

It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving

³³ See also A Steenkamp & C Bosch 'Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential' in R Le Roux & A Rycroft (eds) *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 120, 134.

³⁴ *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC); [2008] 2 *BLLR* 97 (CC).

³⁵ 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) [2009] 12 *BLLR* 1145 (CC).

³⁶ See in general *Transnet Ltd & others v Chirwa* 2007 (2) SA 198 (SCA); (2006) 27 *ILJ* 2294 (SCA); T Ngcukaitobi & J Brickhill 'A Difficult Boundary: Public Sector Employment and Administrative Law' (2007) 28 *ILJ* 769; B P S van Eck 'Labour Dispute Resolution in the Public Service: The Mystifying Complexity Continues *Transnet Ltd & others v Chirwa* (2006) 27 *ILJ* 2294 (SCA)' (2007) 28 *ILJ* 793; J Grogan 'Re-interpreting Chirwa: New Twist in the Jurisdictional Debate' (2009) 25(5) *Employment Law* 4.

³⁷ 3 of 2000.

employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue.³⁸

In respect of the constitutional law/labour matter overlap, the court concluded that ‘the primary purpose of section 157(2) [of the LRA] was not so much to confer jurisdiction on the High Court to deal with labour and employment relations disputes, but rather to empower the Labour Court to deal with causes of action that are founded on the Bill of Rights but which arise from employment and labour relations’.³⁹

In *Gcaba* the Constitutional Court delivered a unanimous decision and confirmed that forum shopping is undesirable. Van der Westhuizen J held that

‘[o]nce a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. . . . If litigants are at liberty to relegate the finely-tuned dispute resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees’.⁴⁰

These cases provide clear guidance on how the tide has turned in favour of the exclusive resolution of labour disputes by the Labour Courts. Returning to the first contested area, the SCA in *SA Maritime Safety Authority v McKenzie*⁴¹ relied on the sentiments expressed by the Constitutional Court in *Chirwa* and *Gcaba* when it grappled with the common law/unfair dismissal law overlap. Wallis AJA (as he was then) held that in so far as the LRA establishes a special remedy for unfair dismissal it is not necessary to imply terms into the common-law contract of employment to protect dismissed employees.⁴² However, the court was at pains to explain that it retained the jurisdiction to entertain disputes such as the one before it. It held that

‘[i]n the present case the issue is whether Mr McKenzie’s contract contains a term implied by law as pleaded by him. That is a question within this court’s jurisdiction and in my view the answer is that it does not. What creates difficulties is when the merits of a claim are confused with the jurisdiction to deal with it’.⁴³

From this it is clear that the tug of war for jurisdiction continues. The SCA is not willing to forego its jurisdiction to entertain such disputes, but at the very least, the SCA has retreated in so far as it has accepted that the LRA does provide adequate remedies in relation to

³⁸ n 3 above para 41.

³⁹ n 34 above para 120.

⁴⁰ n 35 above para 56.

⁴¹ (2010) 31 *ILJ* 529 (SCA).

⁴² n 41 above para 57.

⁴³ n 41 above para 58.

unfair dismissal to the exclusion of the further development of parallel remedies by the civil courts. This view is, however, still not in line with the previous decision reached by the same court in *Makhanya*, and the debate on this issue may not have reached its final conclusion.

THE CONSTITUTION SEVENTEENTH AMENDMENT ACT

To what extent have the amendments to the Constitution, the Superior Courts Act and the proposed LARB been successful in resolving the issues highlighted in the sections above? The CSAA addresses a number of issues which are of importance for purposes of this contribution. Firstly, it establishes the Constitutional Court as the apex court in respect of all matters – not merely constitutional matters. Secondly, it seeks to rectify the anomaly whereby the SCA is currently entertaining appeals from the LAC despite the fact that the LRA provides that the LAC is the court of final instance in respect of matters to be adjudicated in terms of this Act.

On the first point, the amended s 167(3)(a) of the Constitution states that the Constitutional Court is the ‘highest court of the Republic’ and the amended s 167(3)(b)(i) - (ii) of the Constitution provides that the Constitutional Court may decide ‘constitutional matters’ and ‘any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance’.

Regarding the second issue, whereas s 168(3) of the Constitution previously provided that the SCA ‘may decide appeals in any matter’ and that it was the ‘highest court of appeal except in constitutional matters’, the amended s 168(3) now provides:

‘The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of status similar to the High Court of South Africa, except in respect of *labour or competition matters* to such extent as may be determined by an Act of Parliament.’ (Emphasis added.)

In addition, s 186 of the Constitution was amended by the addition of a brief phrase which leaves room for legislation to restrict the functions of the SCA. Subsection (3)(a) of s 186 provides:

‘The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of similar status to the High Court of South Africa, *unless an Act of Parliament provides otherwise.*’ (Emphasised words added by the CSAA.)

The combined effect of these amendments is that leeway is created for the LRA and the Competition Act⁴⁴ to provide that the LAC and the Competition Appeal Court⁴⁵ may, subject to the authority of the Constitutional Court, have the ‘final say’ in respect of disputes emanating from legislation as long as such legislation so provides. It is submitted that this is a positive development. The CSAA attempts to make the LRA (as it stands) compatible with the Constitution and the amendments seek to resolve the problems highlighted in *Langeveldt*, *NEHAWU*, *Chevron*, *Fry’s Metals* and *Mazista Tiles*.⁴⁶ The LRA’s provision that the ‘Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction’⁴⁷ will no longer fall foul of constitutional scrutiny as long as it is understood that the Constitutional Court is the highest court. These simple amendments to the Constitution have in effect removed one potential level of appeal to the SCA which existed over and above the LAC. S 167(2) of the LRA provides that the LAC is the final court of appeal in respect of Labour Court orders and judgments ‘within its exclusive jurisdiction’ and this excludes the authority of the SCA to consider appeals from the LAC.

Despite this improvement, the CSAA will unfortunately not resolve the problems pertaining to the concurrent jurisdiction of the Labour and High Courts to resolve threatened violations of constitutional rights in terms of s 157(2) of the LRA. As alluded to above, s 23(1) of the Constitution is wide to the extent that this provision could potentially cover all aspects regulated in terms of labour legislation and thus the High Court and the SCA may, depending on how the courts interpret the provision, retain jurisdiction over such matters. As previously mentioned, this has caused

⁴⁴ 89 of 1998.

⁴⁵ Established in terms of s 36 of the Competition Act. In *American Natural Soda Corporation & another v Competition Commission & others* 2003 (5) SA 655 (SCA), the SCA held that it has jurisdiction to consider appeals from the Competition Appeal Court (CAC). According to the court, all provisions of the Competition Act that purport to vest the CAC with exclusive jurisdiction must be read so as to be consistent with the Constitution. This interpretation will render the finality conferred by the Act on the CAC subordinate to that conferred to the SCA by the Constitution. See also H R Kariga ‘Between a Rock and a Hard Place? A Closer Look at the Competition Appeal Court’ <http://www.compcom.co.za/fifth-annual-conference-on-competition-law-economics-and-policy-in-south-africa/>. The effect of the constitutional amendment is that the Competition Appeal Court will now be the final court of appeal in respect of the matters over which it has exclusive jurisdiction.

⁴⁶ as discussed above.

⁴⁷ s 167(2) of the LRA.

unsatisfactory overlaps of a constitutional nature in respect of the common-law contract of employment, unfair dismissal law and administrative law.⁴⁸

This begs the question whether it would theoretically have been possible, as the Constitution currently stands, to curb, in legislation such as the LRA, the authority of the High Court to entertain constitutional challenges in labour matters.. The answer to this is ‘yes’. The Constitution currently provides that the High Court may decide ‘any constitutional matter except a matter that . . . is assigned by an Act of Parliament to another court of a status similar to a High Court’.⁴⁹ This makes it clear that the Constitution has left room for the LRA to provide that the Labour Court and LAC have exclusive jurisdiction in respect of disputes emanating from the LRA and to consider any alleged violations of constitutional principles.

What remains of the status and functions of the SCA? The constitutional amendments have had the effect of limiting the SCA’s appeal functions in respect of labour and competition matters. Do they also limit the functions of the SCA in respect of other civil and criminal matters? Before the current amendments, the SCA was the final court of appeal in respect of all matters except those relating to constitutional matters. However, it was always extremely difficult to distinguish between constitutional and other matters in order to determine when and where appeals from the SCA to the Constitutional Court were excluded. As long ago as 2000, in *Pharmaceutical Manufacturers Association of SA & others: In re Ex parte President of the Republic of SA & others*,⁵⁰ Chaskalson P concluded that there ‘is only one system of law’. He added that it ‘is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control’. This served as precursor to the debates that would follow regarding the constitutional versus non-constitutional matter divide. The Constitutional Court has adopted different approaches regarding the question whether disputes about vicarious liability constitute constitutional matters. In *Phoebus Apollo Aviation CC v Minister of Safety & Security*,⁵¹ the court considered whether the Minister of Safety and Security could be held vicariously liable for the involvement of police officers in the

⁴⁸ It does, however, seem that *Chirwa* (n 34 above) and *Gcaba* (n 35 above) have turned the tide in favour of an interpretation which gives preference to the Labour Courts to determine disputes about labour related constitutional matters.

⁴⁹ s 169(1)(a) of the Constitution.

⁵⁰ 2000 (2) SA 674 (CC); (2000) (3) BCLR 241 (CC) para 44.

⁵¹ 2003 (2) SA 34 (CC); (2003) (1) BCLR 14 (CC).

alleged theft of money. The SCA had accepted that the policemen had embarked on an unauthorised expedition on their own account and that their employer could not be held vicariously liable for their conduct. On appeal to the Constitutional Court, the appellant argued that the appeal involved a violation of fundamental property rights⁵² and that the common-law principles were in need of further development. The Constitutional Court concluded that the application of the principles of delictual liability is ‘not a question of law but one of fact, pure and simple’.⁵³ Although this reasoning was followed in a number of subsequent decisions it was not the end of the matter.⁵⁴

In *N K v Minister of Safety & Security*⁵⁵ the Constitutional Court was faced with similar facts but came to a different conclusion. The case involved the rape of the appellant by members of the police force and a subsequent claim for damages on the grounds of vicarious liability against the Minister of Safety and Security. Here, the SCA followed the position adopted by the Constitutional Court in *Phoebus*. Accepting that the policemen had acted beyond the scope of their employment, the SCA concluded that the Minister of Safety and Security could not be held vicariously liable. However, in adjudicating the appeal in the Constitutional Court O’Regan J made an about turn. She concluded:

‘The obligations imposed upon courts by ss 8(1) and 39(2) of the Constitution are not applicable only to the criterion of wrongfulness in the law of delict. In considering the common-law principles of vicarious liability, and the question of whether that law needs to be developed in that area, the normative influence of the Constitution must be considered.’⁵⁶

This unsatisfactory situation regarding the split between the functions of the SCA and that of the Constitutional Court may be deplored as it seems like a futile exercise to try to distinguish between constitutional and non-constitutional matters with the view of delineating the functions of the SCA and that of the Constitutional Court.⁵⁷

⁵² s 25 of the Constitution.

⁵³ para 9.

⁵⁴ See, for example, *Carmichele & another v Minister of Safety & Security* (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); *Van Eeden v Minister of Safety & Security* (Women’s Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA); *Minister of Safety & Security v Hamilton* 2004 (2) SA 216 (SCA).

⁵⁵ 2005 (6) SA 419 (CC); (2005) 26 ILJ 1205 (CC); (2005) (9) BCLR 835 (CC).

⁵⁶ para 19.

⁵⁷ C Lewis ‘Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa’ (2005) 21 *SAJHR* 509, 519; and F Michelman ‘Constitutional Supremacy and Appellate Jurisdiction in South Africa’ in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 57-8.

In what can only be described as a positive development to resolve this issue, s 167(3)(a) has now been amended to read that the ‘Constitutional Court is the highest court of the Republic’ and the words ‘in all constitutional matters’ have been removed. This provision unequivocally establishes the Constitutional Court as the apex court in respect of all matters, whether dealing with mere factual considerations, issues deriving from the common law where fundamental principles may not be at stake or in respect of constitutional matters. Added to the limitations which are now permissible regarding labour and competition law matters, the status of the SCA has now been further reduced in so far as it no longer operates as the highest court in all non-constitutional matters. In short, the prominence of the SCA has now been downgraded to a shadow of what it used to be. This state of affairs begs the question whether, on substantive grounds, there is still any real justification for the existence of the SCA. Before the amendments, the SCA was supposed to play the role of the final court in matters which did not relate to constitutional matters. However, this frontier proved almost impossible for the courts to maintain and the Constitutional Court now assumes the role of apex court in all matters.

There can be no doubt that the elevation of the Constitutional Court to the apex of the court structure in all matters is a positive development. This arrangement will, as Carole Lewis argues, aid the coherent development of the law which was likely to be impeded by the existence of two apex courts.⁵⁸ It furthermore ends the debate and wasted costs regarding the question whether matters constitute constitutional matters or not. On the down side, it does not resolve the issue of determining whether matters are constitutional matters for purposes of the LRA, which currently still provides that the High Court and the Labour Court have concurrent jurisdiction in respect of such matters.

THE SUPERIOR COURTS ACT AND THE LRA AMENDMENT BILL

In 2003 Parliament set in motion a drive to address the confusion generated by the overlap of the functions of the Labour Court and the High Court by means of a new superior courts regimen. The drafters of the Superior Courts Bill 2003⁵⁹ contemplated the abolishment of both the Labour Court and the LAC. Amongst other aspects, it was

⁵⁸ Lewis n 57 above 513.

⁵⁹ B52 - 2003.

envisaged that all 'labour matters' (labour matters would have been defined) would be adjudicated by the High Court; judges of the High Court who were experts in labour law would have been appointed to a panel of experts to consider labour matters; all appeals about labour matters from the High Court would have been referred to the SCA; a second deputy president was to be appointed to the SCA who would have been responsible for managing appeals in respect of labour matters; and the majority of the judges who would have considered labour matter appeals at the SCA would have been judges elected from a panel of judges appointed as experts in labour matters.⁶⁰

The 2003 Bill was never developed to its full conclusion and it was replaced by a second Superior Courts Bill,⁶¹ which culminated in the Superior Courts Act 2013. What has become clear is that policy makers have abandoned the idea of rectifying the uncertain status of the LAC and the overlap between the functions of the Labour Court, High Court, LAC and the SCA by means of amendments to the Superior Courts Act. The new Superior Courts Act makes no mention of Labour Courts and leaves it to the CSAA and the LRA to regulate the respective roles of the Labour Court, High Court and the LAC. Hence, the Labour Court and the LAC remain intact as established by the LRA. The only indirect reference to the existence of specialist courts is contained in s 1 of the Superior Courts Act which defines '[s]uperior court' to mean 'the Constitutional Court, the Supreme Court of Appeal, the High Court and *any court of a similar status to the High Court*'. (Emphasis added.)

It is not clear why this definition makes no reference to any court of a similar status to the SCA.. This is probably a mere oversight on the part of the drafters of the Act. The section should have read 'any court of a similar status to the High Court or the Supreme Court of Appeal.' (Underlined words included.) This argument is based on the fact that the CSAA makes provision for courts of equal status to the High Court and the SCA and the LRA provides that the LAC has authority and standing equal to the SCA. It is, however, submitted that this oversight will have no substantive consequences as the Superior Courts Act must be interpreted to comply with the Constitution.

⁶⁰ See the discussion by A Steenkamp 'Wither the Labour Courts? The Superior Courts Bill and the Future of the Labour Courts' (2006) 27 *ILJ* 18; A van Niekerk et al *Law@Work* (2008) 424; Steenkamp & Bosch n 33 above 144-5.

⁶¹ B7- 2011.

To what extent does the proposed LRAB⁶² address the initial goals of the LRA by establishing specialist labour dispute resolution institutions with exclusive jurisdiction in respect of disputes emanating from labour legislation and instituting an apex LAC? It is unfortunate that the LRAB does not suggest any changes to s 157(2) which clothes the High Court and Labour Court with concurrent jurisdiction over constitutional matters. As succinctly pointed out by Steenkamp & Bosch, it will

‘remain the duty of judges, interpreting the guidelines of the SCA in *McKenzie* and those of the Constitutional Court in *Chirwa* and *Gcaba*, to decide what belongs where’.⁶³

Commentators have previously pointed out that it remained a problem to attract specialists to pursue a career as a Labour Court judge due to the fact that they were not appointed on the same basis as judges of the High Court.⁶⁴ The reason for this was that they were not appointed for an indefinite period. In what can only be described as a positive development, schedule 2 to the Superior Courts Act amends s 154(1) of the LRA to read that a judge of the Labour Court ‘holds office until discharged from active service in terms of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001)’. Section 154(5) is also amended to read that the remuneration paid to a judge of the Labour Court must be the same as the remuneration of a judge of the High Court. It is submitted that this amendment will remove the unequal status between High Court and Labour Court judges, and will enhance the quality of labour law practitioners who will make themselves available as judges of the Labour Court.

What is the situation pertaining to matters that have already been decided by the LAC and which would have been eligible to be considered by the SCA under the old system?⁶⁵ The combined effect of the LRA and the Constitution (as amended) is that the LAC is the highest court in respect of matters decided by the Labour Court and matters can only be taken on appeal to the Constitutional Court. The CSAA makes no provision for transitional measures. However, s 52(1) of the Superior Courts Act provides that

⁶² B16B - 2012. It is to be noted that the version of the Bill that was agreed to by the social partners at NEDLAC, LRAB B16 - 2012, was significantly changed subsequent to debates conducted at the Portfolio Committee on Labour in Parliament.

⁶³ Steenkamp & Bosch n 33 above 146.

⁶⁴ B Waglay ‘The Proposed Re-organization of the Labour Court and the Labour Appeal Court’ (2003) 24 *ILJ* 1223; Steenkamp & Bosch n 33 above 145-6.

⁶⁵ At the time of the writing, *SA Police Service v Solidarity obo Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* 2001 (4) SA 938 (CC); (2013) 34 *ILJ* 590 (LAC); [2013] 1 BLLR 1 (LAC) had already been decided by LAC and leave to appeal to the SCA had already been granted.

proceedings ‘pending’ in any court at the commencement of the Act must be continued and concluded as if the Superior Courts Act had not been passed. Even though that Act has not made any changes in respect of the hierarchy of appeals to the SCA, it is submitted that this is also the interpretation that should be given to the LRA and the Constitution as they currently stand.⁶⁶ Matters in respect of which leave to appeal had already been granted by the SCA before the enactment of the CSAA should proceed to be considered by the SCA.

CONCLUSION AND RECOMMENDATIONS

The CSAA has had a more significant effect regarding the rectification of problems in relation to the status of the LAC than what either the Superior Courts Act or the LRAB was able to achieve. The constitutional amendment has removed the description of the SCA (formerly contained in the Constitution), which described it as being the highest court of appeal except in constitutional matters. This previously had the effect that the LRA was interpreted in such a manner that the SCA was deemed to be a court of higher status than the LAC. The changes brought about by the CSAA have had the positive effect of restoring the original status of the LAC envisaged by the architects of the labour dispute resolution framework in the LRA. A direct effect of this amendment is that the SCA has been demoted to an ‘in-between’ court by not having a specialist apex appeal role similar to the one which the LAC and the Competition Appeal Court now respectively have in their fields of the law. In addition, the SCA no longer has, as was previously the case, a role as the apex court regarding non-constitutional matters.

The Superior Courts Act does little to confirm or detract from the role and status of the Labour Courts and it does not resolve the problems regarding the overlapping functions of the courts. Its main contribution is that it does not abolish the labour courts as it had previously been foreseen in the Supreme Courts Bill of 2003. In similar vein, none of the suggested changes in the LRAB are of any real significance in respect of the problems regarding the overlapping functions of the High and Labour Courts which prevailed before the latest round of amendments. The only positive effect which the LRAB will have regarding the composition of Labour Courts is the fact that Labour

⁶⁶ The principles of statutory interpretation dictate that legislation only applies in respect of the future, unless legislation provides otherwise. See C Botha *Statutory Interpretation: An Introduction for Students* (2012) 55-62.

Court judges will enjoy tenure and will in future be entitled to the same levels of remuneration as judges of the High Court.

It is submitted that the main weakness in the current set of changes is the fact that the original status of the Labour Court with its concurrent jurisdiction with the High Court in constitutional matters has been left intact. For reasons unknown, the drafters of the current changes were not prepared to address problems in relation to the constitutional law, common law, labour law and administrative law overlaps. The legislature could have resolved the complexities by opting to follow one, or a combination, of a number of avenues. Firstly, s 157(2) of the LRA could have been amended to read:

‘(2) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive [concurrent] jurisdiction [with the High Court] in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

- (a) employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any the threatened executive or administrative act or conduct, by the State in its capacity as employer; and
- (c) the application of any law for the administration of which the *Minister* is responsible.’ (Underlined words included and words in brackets deleted.)

As pointed out, the Constitution makes provision that the jurisdiction of the High Court can be limited by means of national legislation regarding its function to entertain constitutional matters. Such a limitation would have put an end to a situation in terms of which employment related matters are brought before the High Court on constitutional or administrative law grounds based on the concurrent jurisdiction of the High Court and Labour Court. The sagas which lead to *Chirwa* and *Gcaba* would not have occurred had the Labour Court been clothed with exclusive jurisdiction as suggested above.

The second option would be to extend the exclusive jurisdiction of the Labour Court even further by adapting s 77 of the Basic Conditions of Employment Act 1997 (BCEA).⁶⁷ Section 77(1) of the BCEA provides that, subject to the Constitution, ‘the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act’. However, s 77(3) provides that ‘the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment’.

⁶⁷ 75 of 1997.

Policy makers could have considered the possibility of clothing the Labour Court with exclusive jurisdiction to entertain disputes emanating from contracts of employment as well. Section 77A(e) of the BCEA in any event provides that the Labour Court has the power to make any appropriate determination

‘including an order - (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation’.

It seems rational to accord one set of courts the jurisdiction to determine labour related disputes concerning both considerations of fairness and lawfulness. Such a construction would prevent the recurrence of discourses regarding the issue of developing the common-law contract of employment to include the requirement of pre-dismissal proceedings.⁶⁸

Thirdly, the s 167(2) of the LRA should have been amended to make it clear that the Constitutional Court is the apex court in respect of issues to be decided in terms of the LRA. The section could have read:

‘Subject to the Constitution the Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.’ (Underlined words included.)

Fourthly, as controversial as it may seem, it is suggested that the *raison d’être* of the SCA should be placed under scrutiny. The SCA no longer has the role of being the highest court in respect of non-constitutional matters. What exactly will the future role of this court be apart from lessening the workload of the Constitutional Court in respect of those matters that do not make the grade of being classified as being of public importance? Could this role not be fulfilled by full benches of the High Court (consisting of three judges) as was the case during the pre-constitutional era when the former Appellate division was the highest court in all matters? It is submitted that these questions justify a debate regarding the future role of the SCA during which the pros and cons of the existence of this court should be considered.

⁶⁸ See the discussion concerning *Wolfaardt* n 30 above, *Gumbi* n 31 above, *Boxer Superstores* n 31 above, *Makhanya* n 32 above and *McKenzie* n 41 above.