

# THE CONSTITUTIONALISATION OF LABOUR LAW: NO PLACE FOR A SUPERIOR LABOUR APPEAL COURT IN LABOUR MATTERS (PART 1): BACKGROUND TO SOUTH AFRICAN LABOUR COURTS AND THE CONSTITUTION

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## SUMMARY

This article explores the status of the Labour Appeal Court under South Africa's constitutional democracy. The stages of development of this country's labour laws have coincided with the establishment of new sets of labour dispute resolution *fora*: firstly, the Industrial Court; secondly, the labour courts under our present constitutional democracy; and thirdly, a yet to be implemented new dispute resolution paradigm under the proposed Superior Courts Bill. The focus of this contribution is on the influence of the provisions of the Constitution on these developments, and the gradual erosion of the exclusive appellate powers of the Labour Appeal Court by the Supreme Court of Appeal, and the Constitutional Court, in the assertion of their power to serve as highest courts in all labour matters.<sup>1</sup>

## 1 INTRODUCTION

The Superior Courts Bill of 2003<sup>2</sup> provides for the incorporation of the Labour Court and Labour Appeal Court<sup>3</sup> into the High Court system in the not too distant future.<sup>4</sup> Depending on the finalised Act's date of implementation, it will mean that the labour courts, as we know them today, will be abolished

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<sup>1</sup> I wish to extend a special word of gratitude towards my colleague, Prof David Burdette, for suggestions he made during the finalisation of this article.

<sup>2</sup> B53-2003.

<sup>3</sup> Collectively referred to as the "labour courts".

<sup>4</sup> For a discussion of the Superior Courts Bill see Waglay "The Proposed Re-organisation of the Labour Court and the Labour Appeal Court" 2003 24 *ILJ* 1223; Benjamin "A Termination for Operational Requirements? Some Thoughts on the End of the Labour Court" 2003 24 *ILJ* 1869; and Strydom "Changing the Labour Court: The Superior Courts Bill 2003" 2003 *CLL* Vol 13 3 22.

barely eight years after their establishment on 1 November 1996.<sup>5</sup> Their demise will denote the end of the South African experiment with specialised labour courts.<sup>6</sup> The rise and fall of South African labour courts spans a period of over 25 years, and coincided with dramatic changes to the political landscape in South Africa. Possibly not all that surprisingly, both the institution of the initially humble Industrial Court (an administrative tribunal in nature) during 1980,<sup>7</sup> and the establishment of the present labour courts (with their superior court of law status) during 1995, marked important starting points in the various stages of the development of South African labour law.

The Industrial Court first saw the light after changes to the old Labour Relations Act<sup>8</sup> introduced a single system of labour laws for white and black workers alike.<sup>9</sup> The labour courts, on the other hand, were crafted at the dawn of the South African democracy founded on our supreme Constitution.<sup>10</sup> Although undoubtedly unforeseen at its inception, it is ironic that a number of provisions embodied in this centrepiece of our still-growing democracy are leading the way for our labour courts to enter their twilight years. It is mentioned at the outset that the focus of this contribution does not fall on the Superior Courts Bill or the future look and feel of labour dispute resolution mechanisms. Rather, the emphasis is on the assertion by the Constitutional Court and the Supreme Court of Appeal that they have the right, in terms of the provisions of the Constitution, to hear appeals in labour matters. Part I of this contribution consists mainly of an exposition of the reasons for the implementation of specialised dispute resolution institutions in labour matters, followed by an overview of the context within which the former Industrial Court and the present labour courts were established. Part II deals with a sequence of Labour Appeal Court, Supreme Court of Appeal and Constitutional Court decisions that illustrate how the exclusive jurisdiction of the Labour Appeal Court in labour matters has gradually been eroded in the shadow of the provisions of the Constitution.

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<sup>5</sup> The Labour Relations Act 66 of 1995 is the enabling legislation for the Labour Court and Labour Appeal Court.

<sup>6</sup> Benjamin 2003 24 *ILJ* 1869 writes that "most labour lawyers will be saddened by the imminent demise of the LC. They will be saddened because an experiment has failed. One of the institutions conceived in the heady 'brave new world' of the first years of democracy has proved to be unsustainable."

<sup>7</sup> In actual fact the Industrial Court replaced the Industrial Tribunal, which had been established by the Industrial Conciliation Act 28 of 1956 on 1 January 1957, by virtue of GG 5786 of 16 December 1956. However, this Industrial Tribunal had a low profile and played no role in the development of modern South African labour law.

<sup>8</sup> 28 of 1956.

<sup>9</sup> Du Toit, Bosch, Woolfrey, Godfrey, Rossouw, Christie, Cooper, Giles *Labour Relations Law: A Comprehensive Guide* (2003) 10 state that in "1977 the government appointed the Wiehahn Commission of Inquiry into Labour Legislation which, in 1979, recommended a number of reforms that would fundamentally change the industrial system. Most far-reaching was the proposal that African workers be allowed to join registered trade unions ... thus ending the dual system."

<sup>10</sup> Constitution of the Republic of South Africa, 1996.

## 2 REASONS FOR THE INSTITUTION OF LABOUR COURTS

Courts of law are often associated with problems that do not suit the resolution of labour disputes. Consequently, in numerous developed countries of the world, the need has developed to institute tailor-made dispute resolution institutions for labour disputes that function separately from the ordinary courts.<sup>11</sup> Although a small number of countries utilise the regular civil court system to resolve most, if not all, labour disputes, other countries use labour courts, administrative tribunals and boards (or a combination of these specialised institutions) to resolve labour disputes.<sup>12</sup> Italy and the Netherlands are examples of countries where the regular courts hear both civil and labour cases.<sup>13</sup> In France,<sup>14</sup> Germany<sup>15</sup> and Sweden<sup>16</sup> specialised labour courts serve as vehicles for the adjudication of labour disputes. Specialised quasi-judicial tribunals and boards deal with labour disputes in Great Britain<sup>17</sup> and the United States of America.<sup>18</sup> In South Africa an administrative tribunal, the Commission for Conciliation, Mediation and Arbitration (the "CCMA") and the labour courts (the joint term for the Labour Court and Labour Appeal Court) share most of the responsibility for resolving labour disputes.<sup>19</sup>

It is no coincidence that labour dispute resolution has been transferred from regular civil courts to specialised *fora* in so many instances. The establishment of these specialised institutions can be traced back to the emergence of specific requirements that crystallised in developing industrialised economies.<sup>20</sup> These needs, which are well known in the labour fraternity, played a central role in the establishment of both the former industrial<sup>21</sup> and present labour courts.<sup>22</sup> In my view, and without attempting

<sup>11</sup> International Labour Office Report *Labour Courts (Studies and Reports Series A)* Industrial Relations 40 (1938) 1-5; Aaron *Labor Courts and Grievance Settlement in Western Europe* (1971) vii-xx; Hepple "Labour Courts: Some Perspectives" 1980 *Current Legal Problems* 169; and Van Eck *Evaluering van die Nywerheidshofstelsel in die Suid-Afrikaanse Arbeidsreg* (LLD thesis, UP 1994) 7.

<sup>12</sup> See Le Roux "Substantive Competence of Industrial Courts" 1987 8 *ILJ* 183; and Jordaan and Davis "The Status and Organization of Industrial Courts: A Comparative Study" 1987 8 *ILJ* 199.

<sup>13</sup> Gladstone "Settlement of Disputes over Rights" in Blanpain and Engels (eds) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2001) 632-635.

<sup>14</sup> The *Conceil des Prud'hommes*.

<sup>15</sup> The *Arbeitsgericht*.

<sup>16</sup> The *Abetsdomstolen*.

<sup>17</sup> The Industrial Tribunal.

<sup>18</sup> National Labour Relations Board.

<sup>19</sup> It is to be noted that only those disputes that are specified in labour legislation are referred to the CCMA and labour courts. However, the civil courts have retained their jurisdiction to resolve labour disputes emanating from the common law contract of employment and administrative law. See *Fedlife Assurance v Wolfaardt* 2001 22 *ILJ* 2407 (SCA); and *Denel (Pty) Ltd v Vorster* [2005] 4 *BLLR* 313 (SCA).

<sup>20</sup> ILO Report *Labour Courts* 1-3; and Hepple 1980 *Current Legal Problems* 179.

<sup>21</sup> See *The Complete Wiehahn Report Parts 1-6* (1982) Part 1 Ch 5 1.4.22 for a discussion of the reasons why the Industrial Court was instituted.

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to formulate an exhaustive list of common requirements, the institution of labour courts can be justified by the following meaningful underlying reasons:<sup>23</sup>

- (a) Labour disputes should ideally be finalised expeditiously. A lengthy hierarchy of appeals should therefore be avoided. Long periods of uncertainty without legal redress (possibly even reinstatement) place a heavy burden on dismissed employees.
- (b) Employees can ill-afford high legal costs. Apart from the fact that employees are generally in a weaker financial position than their employers, dismissed employees often have no income at all. It is therefore sensible to introduce dispute resolution bodies where applicants feel at ease to represent themselves, or to be represented by representatives of their trade unions or employee organisations. It is often the case that only employers are in a financial position to drag matters out and wear an opposing employee down by means of litigation.
- (c) Labour dispute resolution institutions should be accessible to employees by virtue of simplified procedures and proximity. The absence of formal procedures and legalistic arguments generally promotes accessibility.
- (d) Labour law has, possibly to its own detriment, developed into a separate autonomous body of law that would require specialists in employer/employee relations to consider and determine labour disputes.<sup>24</sup>
- (e) Specialised dispute resolution institutions, clothed with exclusive jurisdiction, are more likely to develop uniform and coherent labour law principles that are based on the premise of fairness, rather than merely dealing with lawfulness within the confines of the law of contract.

At the time of the writing of this article, South Africa has entered the final stage of the gradual demise of its labour court system. This contribution attempts to explore, from a labour and constitutional law perspective, to what extent the above underlying reasons (that gave rise to the implementation of

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<sup>22</sup> See the *Explanatory Memorandum to the Draft Negotiating Document in the Form of a Labour Relations Bill* Government Gazette 16259 of 10 February 1995 147 for the reasons for the creation of the CCMA and labour courts.

<sup>23</sup> Jordaan and Davies 1987 8 *ILJ* 199 219 cite De Givry "Labour Courts as Channels for the Settlement of Labour Disputes – An International Review" 1986 *British Journal of Industrial Relations* 364 371 who makes the point that a number of principles are significant for the proper functioning of labour courts, namely: labour courts should be appointed on a permanent basis; labour judges should have special experience and knowledge in labour matters; labour courts should have exclusive jurisdiction in individual contracts of employment and collective agreements; settlement should be sought by means of conciliation before judicial determinations are made; procedures should be simplified and all measures should be taken to expedite procedures; services should be free of charge; and workers should enjoy protection against discrimination which could prevent them from having recourse to the labour courts.

<sup>24</sup> Hepple 1980 *Current Legal Problems* 169 183-184 states that "the reason most recently advanced by Wedderburn and McCarthy for pointing us towards a Labour Court is the quest for an autonomous labour law which 'promotes collective bargaining and is freed from the contract of service' ... The kind of 'exclusive jurisdiction' which such a British Labour Court would require, has been attained in Germany, Sweden and Belgium."

the labour court system in the first place) have played a role in the decisions of the Constitutional Court and the Supreme Court of Appeal that have led to their conclusion that there is no room under the constitutional dispensation for the Labour Appeal Court as the highest court in labour-related matters.

### 3 THE INDUSTRIAL COURT AND THE “UNFAIR LABOUR PRACTICE” CONCEPT

Thompson points out that reforms that were initiated by the Wiehahn Commission of Inquiry into Labour Legislation (that was established in 1977), were to a large extent dictated by internal political instability and external pressure experienced in South Africa during the 1970s.<sup>25</sup> The spontaneous outbreak of strikes in Durban during 1973 by unorganised African labourers saw black workers flocking to unregistered trade unions that emerged in the aftermath of the strikes.<sup>26</sup> This labour unrest was followed by student revolts in black townships during 1976, and increasing economic pressure exerted on the country by international sanctions. All of this took place against the backdrop of a racially divided labour relations system that precluded black workers from joining registered trade unions, and which resulted in the issuing of “job reservation” determinations in favour of white workers, making certain work the exclusive preserve of persons of a specified race.<sup>27</sup>

The publication of Part 1 of the Wiehahn Commission Report<sup>28</sup> in 1979 marked the commencement of modern South African labour law.<sup>29</sup> The acceptance of the commission’s proposals led to the implementation of a number of fundamental principles that resulted in a break with the past – the most notable of which allowed black workers to join registered trade unions; led to the establishment of the Industrial Court with its extensive powers to determine “unfair labour practices”;<sup>30</sup> and saw the abolition of statutory work reservation provisions from the labour legislation that existed at the time. Thompson, in his review of the era after the Wiehahn Commission, observes:

“Today, on a superficial reading, we would say that the Wiehahn Commission gifted the country a non-racial workplace, specialist tribunals, ... trade union recognition through a legal obligation to bargain and protection against unfair dismissal. That is all substantially true, but perhaps not quite what the commission had in mind.”<sup>31</sup>

<sup>25</sup> Thompson “Preface – 25 Years after Wiehahn” 2004 25 *ILJ* iii iv.

<sup>26</sup> Du Toit *et al* 10.

<sup>27</sup> The exclusion from trade unions of black workers and work reservation was regulated in terms of s 77 of the Industrial Conciliation Act 28 of 1956, which was enacted by the minority National Party government.

<sup>28</sup> *The Complete Wiehahn Report Parts 1-6* 19.

<sup>29</sup> Benjamin “An Accident of History: Who is (and Who Should Be) an Employee under South African Labour Law” 1994 25 *ILJ* 786.

<sup>30</sup> The Industrial Tribunal was in fact the predecessor to the Industrial Court. See fn 8 above.

<sup>31</sup> Thompson 2004 25 *ILJ* iii v.

In separate contributions, Landman<sup>32</sup> and Van Niekerk<sup>33</sup> observe that with the granting of equal trade union rights to black workers and the removal of formal job reservation, the then new Industrial Court, with its power to determine unfair labour practices, was introduced with a racial intent, namely to protect the interests of white workers who stood to lose their racial privilege of work reservation at the workplace, and to ameliorate the encroachment on white jobs by black workers.

However, notwithstanding the initial rationale for the introduction of the concept, the Industrial Court, with its power to determine unfair labour practices, played a significant role in the development of South African labour law. It ushered in the development of a "new labour law" which recognised that: (i) employees with their inferior status are in need of special protection; (ii) the law of contract (and the common law) is not suited to regulate the employment relationship without the creation of a floor of rights for workers; (iii) the common law is largely ignorant as to the rights to freedom of association and organisation and the right to strike. Under its "unfair labour practice" jurisdiction,<sup>34</sup> and taking cognisance of International Labour Organisation conventions (long before South Africa's readmission as member) and developments in mainly European jurisdictions, the Industrial Court fostered a growing interest in labour law as a vibrant and developing branch of South African law. The newly recognised black trade unions found an avenue through which their members could assert basic rights, such as the right not to be unfairly dismissed and the right to participate in collective bargaining. Growing in confidence with their new equal status to white trade unions, and combined with their superior numbers, the trade union movement played a central role with their partners in the African National Congress and South African Communist Party to pressurise the apartheid National Party government into a negotiated democracy.

During the growing years of South African labour law between 1980 and 1995, the Industrial Court struggled to carve out its own identity and status amongst the civil courts. In the absence of assertive provisions in the Labour Relations Act (the "LRA") of 1956,<sup>35</sup> and careful not to tread on the common law jurisdiction of the civil courts, the Industrial Court was cut down to size by the then Appellate Division in *SA Technical Officials' Association v President of the Industrial Court*<sup>36</sup> when it held that the Industrial Court was neither a superior court nor a court of law.

At the end of the era before the birth of our democracy, South Africa had a complex system of labour *fora* involved in dispute resolution. Industrial councils and conciliation boards had the primary function of conciliating labour disputes, and the Industrial Court was the central dispute resolution

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<sup>32</sup> "Fair Labour Practices – the Wiehahn Legacy" 2004 25 *ILJ* 805 806.

<sup>33</sup> "In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa" 2004 25 *ILJ* 853 861.

<sup>34</sup> Much of the developments occurred under the definition of "unfair labour practice" that Mureinik "Unfair Labour Practice: Update" 1980 1 *ILJ* 113 113 described as "open textured in the extreme".

<sup>35</sup> 28 of 1956.

<sup>36</sup> 1985 6 *ILJ* 186 (A). See also a discussion of the case by Landman "The Status of the Industrial Court" 1985 6 *ILJ* 278.

body that considered unresolved unfair labour practice disputes. At the end of its reign, it was possible to appeal from the Industrial Court to the Labour Appeal Court (constituted by a judge of the then Supreme Court and two lay assessors), and in the final instance to the Appellate Division<sup>37</sup> (with its five judges sitting in Bloemfontein) now known as the Supreme Court of Appeal.<sup>38</sup> Decisions of the Industrial Court could also be taken on review to the Supreme Court (now the High Court). In one extreme example it took the labour dispute resolution system 13 years of appeals, cross-appeals and reviews to finalise a dispute regarding the dismissal of nearly 1 000 striking employees.<sup>39</sup> This state of affairs was clearly unacceptable. A strong wave of criticism built up against the long hierarchy of courts that could be approached prior to gaining finality in decisions, the uncertain status of labour dispute resolution institutions, and their inability to develop coherent labour principles.<sup>40</sup>

#### 4 CURRENT DISPUTE RESOLUTION INSTITUTIONS

As was to be expected, the field of labour law entered a new stage of transformation and change at the time when power was transferred from the apartheid National Party government to the first democratically elected

<sup>37</sup> S 17C of the LRA 28 of 1956. Grogan *Workplace Law* (2004) 460 mentions that "under the 1956 LRA, the Appellate Division of the Supreme Court (now renamed the Supreme Court of Appeal) became the highest court of appeal in labour matters when that Act was amended in 1988".

<sup>38</sup> In *Pep Stores (Pty) Ltd v Laka* NO 1998 19 ILJ 1534 (LC) 1539 and *Shoprife Checkers (Pty) Ltd v Ramdow* NO 2000 21 ILJ 1232 (LC) the Labour Court uttered critical remarks in respect of the old dispute resolution system. See also Ngcukaitobi "Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court" 2004 25 ILJ 1.

<sup>39</sup> *Betha v BTR Sarmcol (A Division of BTR Dunlop Ltd)* 1998 19 ILJ 459 (SCA). For a discussion of the case see Anonymous "Final Round? BTR Sarmcol goes down Fighting" 1998 Vol 14(4) EL 4. In another instance, *Chevron Engineering (Pty Ltd) v Nkambule* [2004] 3 BLLR 214 (SCA) it took the parties 10 years to attain a final decision in the courts. The history of the dispute can be summarised as follows: In March 1995 124 workers were dismissed for participating in an unlawful strike. The employees referred a dispute to the Industrial Court, which held that their dismissal was unfair. The Supreme Court set the Industrial Court decision aside on review and the matter was remitted to the Industrial Court to be considered afresh. The Industrial Court once again held that the dismissal was unfair. The employer then appealed (and the employees cross-appealed) to the Labour Appeal Court (reported as *Chevron Engineering (Pty) Ltd v Nkambule* 2001 22 ILJ 627 (LAC)). An application for leave to appeal (to the Supreme Court of Appeal) was lodged, but dismissed by the Labour Appeal Court. The employer then applied directly to the Supreme Court of Appeal for leave to appeal (reported as *Chevron Engineering (Pty) Ltd v Nkambule* [2003] 7 BLLR 631 (SCA)). Having succeeded with its application for leave to appeal the substantive matter was finalised by the Supreme Court of Appeal (in *Chevron Engineering (Pty) Ltd v Nkambule* [2004] 3 BLLR 214 (SCA)) in June 2003.

<sup>40</sup> The *Explanatory Memorandum of the Draft Negotiating Document in the form of a Labour Relations Bill* Government Gazette 16259 dated 10 February 1995 148 contains the following statement: "The Industrial Court is positioned outside the hierarchy of the judiciary. It lacks status." Further, it is mentioned that "the process within the Industrial Court and appeals from this court to the LAC and then to the Appellate Division all result in lengthy delays in the resolution of disputes in an area where speedy determination of disputes is at a premium. The overlapping and competing jurisdictions and the use of different courts prevent the development of coherent and developing jurisprudence in labour relations. Neither the Industrial Court nor the LAC has exclusive jurisdiction over labour matters."

government led by the African National Congress. In the long title of the LRA of 1995, a range of visions is articulated for post-apartheid labour law. Centrally placed amongst the goals is the imperative of giving effect to fundamental labour law principles contained in the Constitution,<sup>41</sup> and obligations incurred as a member state of the International Labour Organisation.<sup>42</sup> Closely followed by these, the aspiration was expressed to establish simple and effective dispute resolution procedures that would include the establishment of a Labour Court and a Labour Appeal Court with exclusive jurisdiction to decide matters arising from the LRA.<sup>43</sup>

On 11 November 1996, barely two-and-a-half years after the first democratic elections, the crafters of South Africa's new labour law established a fresh set of dispute resolution bodies with which to resolve labour disputes emanating from the LRA. However, before turning to a discussion of these bodies, it is to be noted that the LRA does not cover the whole sphere of law regulating employer/employee relationships. The LRA's focus falls on the regulation of collective labour law,<sup>44</sup> the codification of unfair dismissal law<sup>45</sup> and the establishment of dispute resolution institutions.<sup>46</sup> The LRA constitutes a codification of employee rights (especially the right not to be unfairly dismissed) and the open-textured definition of "unfair labour practice", as the Industrial Court knew it, was removed from the LRA of 1995.<sup>47</sup> However, this term was given special

<sup>41</sup> S 1(a) of the LRA. S 27 of the Interim Constitution 200 of 1993, and now s 23 of the final Constitution, contain the following fundamental principles:

- "23. (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right
- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.
- (3) Every employer has the right
- (a) to form and join an employers' organisation; and
- (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right
- (a) to determine its own administration, programmes and activities;
- (b) to organise; and to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

<sup>42</sup> S 1(b) of the LRA.

<sup>43</sup> Long title and s 1(d)(iv) of the LRA.

<sup>44</sup> Ch II to VI of the LRA regulates collective labour law issues, such as the freedom of association, trade union's organisational rights, strikes and lock-outs, workplace forums and bargaining councils, registration of trade unions and employer's organisations. Ch VIII regulates unfair dismissal and unfair labour practices.

<sup>45</sup> Ch VIII of the LRA.

<sup>46</sup> Ch VII of the LRA.

<sup>47</sup> It is to be noted that the LRA of 1995 does still contain a definition of "unfair labour practice" (s 186(2)) but that it merely contains a codification of leftovers dealing with issues such as demotions and steps taken by employers that fall short of dismissal. Landman 2004 25 *ILJ*



status when it was implanted as a fundamental right into the Constitution.<sup>48</sup> From this it therefore follows that, from the very beginning, it was not foreseen that the labour dispute resolution institutions would be responsible, to the exclusion of the civil courts, for the adjudication of disputes in relation to common law contracts of employment, administrative law problems or challenges in respect of constitutional law issues.<sup>49</sup>

The then new statutory dispute resolution network, that is still in place today, comprises three main functionaries. The first two, namely the CCMA<sup>50</sup> and accredited bargaining councils, are responsible for the conciliation and arbitration<sup>51</sup> of the majority of statutory individual labour disputes, most notably unfair dismissal disputes.<sup>52</sup> Today the CCMA plays a central role in statutory dispute resolution with more than 100 000 labour disputes being referred to this agency per annum.<sup>53</sup> The labour courts, on the other hand, adjudicate more complex disputes regarding the dismissal of striking employees,<sup>54</sup> retrenchments,<sup>55</sup> and unfair discrimination cases.<sup>56</sup> The labour courts were also charged to function as guardian over the CCMA in so far as they were given the power to review and set aside CCMA awards on statutory grounds.<sup>57</sup>

In the hope of averting “the overlapping and competing jurisdictions” of the civil and labour courts experienced under the old dispensation,<sup>58</sup> the LRA established the labour courts as courts of law and equity, with exclusive

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807 mentions that the “decision to retain the name [‘unfair labour practice in the LRA’] is probably ill advised”.

<sup>48</sup> Landman 2004 25 *ILJ* 807 notes that “it is this right to fair labour practices that will keep the torch burning”.

<sup>49</sup> In one example where the High Court cut the jurisdiction of the labour *fora* down to size, *Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation* 2000 21 *ILJ* 482 (B), Friedman JP noted that a dangerous and incorrect tendency had developed to “subsume all matters concerning employer and employee under the aegis and authority of the LRA”. Having considered the nature of the dispute, namely one in relation to a reduction in salary, the court held that “it was clear that the legislature did not intend to oust the jurisdiction of the High Court to hear ordinary common-law issues relating to a contract of employment”.

<sup>50</sup> This is an administrative tribunal. See *Carephone v Marcus* 1998 *ILJ* 1425 (LAC) in this regard.

<sup>51</sup> The prevailing structure dictates that most labour disputes are referred to the CCMA for the first stage in the life of a labour dispute, namely conciliation or mediation. Should the CCMA fail to resolve the dispute at this preliminary consensus-seeking stage, the process splits into either one of arbitration before the CCMA, or adjudication by the labour courts. The vast majority of unresolved disputes land before the CCMA for arbitration.

<sup>52</sup> Ch VIII of the LRA.

<sup>53</sup> The *CCMA Annual Report 2001/2002* (RP 82/2002 ISBN 0-621-32930-4) 4 indicates that 110 639 labour disputes were referred to the CCMA during that period. The *CCMA Annual Report 2002/2003* (RP 49/2003 ISBN 0-621-33672-6) 7 states that 118 051 disputes were referred to the CCMA during that year.

<sup>54</sup> S 191 (5)(b)(iii).

<sup>55</sup> S 191 (5)(b)(ii).

<sup>56</sup> In terms of Ch II of the Employment Equity Act 97 of 1998.

<sup>57</sup> S 145 of the LRA.

<sup>58</sup> In the *Explanatory Memorandum* 147-148; Van Eck and Vettori “Does the High Court have Concurrent Jurisdiction with the Labour Court to Hear Unfair dismissal disputes? – *Runeli v Minister of Home Affairs* 2000 *ILJ* 910 (Tk)” 2000 *Obiter* 490.

jurisdiction over disputes emanating from the LRA.<sup>59</sup> To this end the Labour Court, consisting of one judge in each sitting, was created with equal status to the High Court.<sup>60</sup> The Labour Appeal Court, comprising three judges (of the Labour Appeal Court) in each sitting, was established as a court of final appeal<sup>61</sup> with status equal to the highest court in civil matters, namely the Supreme Court of Appeal.<sup>62</sup>

The LRA essentially refers to two types of disputes, namely those referred to in labour legislation<sup>63</sup> and those based on constitutional grounds. There is actually a third category, namely those derived from the common-law contract of employment and emanating from administrative law principles. This led to the labour court's jurisdiction being described as "a sporadic one" in *Maropane v Gilbey's Distillers & Vintners*,<sup>64</sup> and as "an invitation for forum shopping" in *Langeveldt v Vryburg Transitional Local Council*.<sup>65</sup>

Subject to the Constitution, the LRA confers exclusive jurisdiction on the Labour Court in respect of all matters that are to be dealt with by the Labour Court in terms of the LRA.<sup>66</sup> The LRA also provides that the Labour Court has concurrent jurisdiction with the High Court in respect of Bill of Rights violations arising from labour relations and related matters.<sup>67</sup>

The Labour Appeal Court was established as the pinnacle of the hierarchy of labour courts. Subject to the Constitution, the Labour Appeal Court has exclusive jurisdiction to hear and decide all appeals against final judgments and orders of the Labour Court<sup>68</sup> and, also subject to the Constitution, "no appeal lies against any decision, judgment or order given by the Labour Appeal Court".<sup>69</sup> These provisions undoubtedly constituted a legislative attempt to vest final appellate powers with the Labour Appeal Court. However, within its own words were implanted the potential for the creation of conflicting jurisdictions. The Labour Court and High Court are empowered with concurrent jurisdiction over constitutional matters, but the Labour

<sup>59</sup> S 157(1) states that, subject to the Constitution, the Labour Court has "exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court".

<sup>60</sup> S 151(2) provides that the "Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court or a provincial division of the Supreme Court has in relation to matters under its jurisdiction".

<sup>61</sup> S 167(2) of the LRA states 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".

<sup>62</sup> S 167(3) of the LRA provides that the Labour Appeal Court has inherent powers and standing "equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction".

<sup>63</sup> Apart from the LRA, this includes the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998, and the Skills Development Act 97 of 1998.

<sup>64</sup> 1998 19 ILJ 635 (LC) 638G.

<sup>65</sup> [2001] 5 BLLR 501 (LAC) 519 par 55. Zondo JP said that "the problems I have highlighted need urgent attention by the government and all relevant stakeholders. For this reason I shall make an order at the end of my judgement directing the Registrar of this Court to send a copy of this judgement to all relevant authorities for their attention" (524 par 69).

<sup>66</sup> S 157(1) of the LRA.

<sup>67</sup> S 157(2) of the LRA.

<sup>68</sup> S 167(1) of the LRA.

<sup>69</sup> S 183 of the LRA.

Appeal Court is at the same time given the highest appeal status in all matters referred to the labour courts. Where does the Constitutional Court fit into this scheme of things? On the same note, almost all imaginable labour disputes can be formulated in such a way so as to contain an element of constitutionality. This can be done merely by classifying it as an unfair labour practice dispute. Could the drafters of the LRA not have foreseen that the courts clothed with the jurisdiction to determine constitutional breaches in terms of the Constitution would ultimately challenge the exclusive and ultimate jurisdiction of the Labour Appeal Court extended to it by the LRA?<sup>70</sup>

## 5 THE HIERARCHY OF COURTS UNDER THE CONSTITUTION

Although the labour dispute resolution mechanisms referred to above were designed in the hope of creating easy-to-follow and swift procedures that would see the development of coherent and autonomous labour law principles, a complex system was created that did not take the ramifications of a gradual process of the constitutionalisation of labour law into account.

All public power, including the power and jurisdiction that is vested in all South African courts, is derived from the Constitution.<sup>71</sup> Section 166 of the Constitution describes the hierarchy of courts within which the country's judicial authority is vested. It states that the courts are:

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts;
- (d) the Magistrates' Courts;
- (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 Magistrate's Courts."

This provision makes it clear that the drafters were not opposed to the idea of leaving room for specialist tribunals or courts instituted by legislation separate from the Constitution itself. However, section 166(e) only makes provision for the establishment of courts equal to the Magistrates Court and High Court. No mention is made of the establishment of courts with equal jurisdiction to the Supreme Court of Appeal or the Constitutional Court. It is suspected that at the time of the drafting of the Constitution, members of the erstwhile Appellate Division (now the Supreme Court of Appeal) may have felt threatened by the establishment of the Constitutional Court, and that they did not want to see the further piecemeal transfer of segments of their jurisdiction to specialist courts by national legislation.

In respect of the role of the Supreme Court of Appeal, section 168(3) of the Constitution provides that:

<sup>70</sup> Grogan "Reclaiming Jurisdiction: Appeals from the LAC to the SCA" 2003 19(4) *EL* 13.

<sup>71</sup> S 165(1) of the Constitution provides that "[t]he judicial authority of the Republic is vested in the courts". See *NUMSA v Fry's Metals (Pty) Ltd* [2005] 5 BLLR 430 (SCA) 433 par 5.

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- “(3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only –
- (a) appeals;
  - (b) issues connected to appeals;
  - (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.”

As will become apparent from the discussion in Part 2 regarding the interpretation of these provisions by the courts, the drafters of the Constitution in effect closed the door on the possibility of legislative intervention that would see the creation of courts that could successfully compete with the Supreme Court of Appeal for jurisdiction over segments of the law. The drafters of the Constitution saw a logical single appellate structure that would culminate in the Supreme Court of Appeal as the ultimate court of appeal in all but constitutional matters. It is submitted that the drafters of the LRA and the drafters of the Constitution had different goals in mind when crafting the so-called “ultimate” Labour Appeal Court and Supreme Court of Appeal.<sup>72</sup> Although they should have, it is unlikely that they did foresee the development of a lengthy line of decisions at that vital stage in the development of labour law under a new democratic dispensation in respect of competing appellate powers in labour matters.

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<sup>72</sup> It is of interest to note that it is not only in the arena of labour law, but also in competition law, that there is no place for any other superior court excluding the jurisdiction of the Supreme Court of Appeal. See in this regard the as yet unreported Supreme Court of Appeal decision *American Natural Soda Ash Corporation v Competition Commission of SA* Case number 554/03 dated 13 May 2005.