

THE CONSTITUTIONALISATION OF LABOUR LAW: NO PLACE FOR A SUPERIOR LABOUR APPEAL COURT IN LABOUR MATTERS (PART 2): EROSION OF THE LABOUR COURT'S JURISDICTION

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SUMMARY

In Part 1 of this article the reasons for the establishment of specialist labour courts were explored, and the stages of development of the former industrial, and present labour courts were considered. However, as already pointed out, the drafters of the Constitution and the Labour Relations Act of 1995 (the "LRA") had different goals in mind when creating the overall scheme of the courts respectively responsible for the adjudication of civil and constitutional matters and those in relation to labour matters. Ultimately, this prepared fertile ground for the superior courts to clash over the ultimate power to consider appeals in labour matters. Part 2 of this article explores the development of jurisprudence after the inception of the Constitution, which illustrates the gradual erosion of the Labour Appeal Court's status in labour-related matters to the point where there is no logical reason for its continued existence.

1 BATTLE FOR JURISDICTION

1.1 The labour courts

In the first in a sequence of cases illustrating the battle for jurisdiction between the Constitutional Court, the Supreme Court of Appeal and the Labour Appeal Court, it would appear that the judges of the labour courts were so enthralled by their then new status as superior labour court, that they were blind to the effect of the Constitution on the autonomy of labour law.¹ In *Khoza v Gypsum Industries Ltd*² the applicant appealed to the

¹ Hepple "Labour Courts: Some Perspectives" 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

Labour Appeal Court, having lost a case regarding an alleged unfair dismissal before the former Industrial Court. The Labour Appeal Court dismissed the appeal and the applicant applied to the same court for leave to appeal to the Supreme Court of Appeal. The court noted that, with the repeal of the former LRA of 1956, item 22 of schedule 7 to the new LRA had been promulgated to regulate appeals against decisions of the Industrial Court. The relevant portions of item 22, for purposes of this discussion, read as follows:

- “(5) Any appeal from the decision of the industrial court ... must be made to the Labour Appeal Court established by s 167 of this [new] Act ...
- (6) Despite the provisions of any other law but subject to the Constitution, no appeal will lie against any judgment or order given or made by the Labour Appeal Court established by this Act in determining any appeal brought in terms of sub-item (5).”³

With reference to the above, the court held that they were consistent with the provisions of the LRA and concluded that the parties were not at liberty to appeal to the Supreme Court of Appeal.⁴ Firstly, the court remarked, in terms of section 167(3) of the LRA, the Labour Appeal Court is a superior court with equal status and standing to the Supreme Court of Appeal in relation to matters under its jurisdiction. In the second place it held that in terms of section 167(2) of the LRA, the Labour Appeal Court is the final court of appeal in respect of all judgments made by the Labour Court in relation to matters under its exclusive jurisdiction. Thirdly, by virtue of section 183 of the LRA, subject to the Constitution and despite any other law, no appeal lies against any decision or judgment given by the Labour Appeal Court.

The court noted that the registrar of the court had warned the attorneys of the applicant that its decisions were not appealable to the Supreme Court of Appeal by virtue of item 22(6).⁵ Although the wording “subject to the Constitution” forms part of item 22(6), and although the matter before the court was not brought on constitutional grounds, a careful reading of the judgment indicates that neither the judges nor the legal representatives of the parties considered the effect of the Constitution on court structures during the course of the case. In hindsight, one can almost sense the irritation of the judges of the Labour Appeal Court at the audacity of the representatives of the applicant for daring to challenge their new-found equal status to the Supreme Court of Appeal in matters falling under its jurisdiction. Although the respondents merely sought costs on an attorney-client scale, the Labour Appeal Court rubbed salt in the wounds of the appellants by

jurisdiction’ which such a British Labour Court would require, has been attained in Germany, Sweden and Belgium”.

² 1998 19 *ILJ* 53 (LAC).

³ Sub-item 6 was added by GN R 1734 of 1 November 1996 and by s 28(1)(a) of Act 127 of 1998.

⁴ 55G-56A.

⁵ Under s 17C(1)(a) of the LRA of 1956, any party to proceedings before the old Labour Appeal Court could appeal to the Supreme Court of Appeal with the leave of the Labour Appeal Court or the Supreme Court of Appeal.

ordering the applicant's attorneys (and not the applicants) to pay the costs of the application *de bonis propriis* on an attorney-client scale.⁶

In the second matter where leave to appeal was sought from the Labour Appeal Court to the Supreme Court of Appeal, employees were dismissed for participating in a strike during 1995. The Industrial Court found in favour of the employees and the employer appealed to the Labour Appeal Court in *Chevron Engineering (Pty) Ltd v Nkambule*.⁷ The employer once again lost its case, and it was against this decision that the employer sought leave to appeal from the Labour Appeal Court to the Supreme Court of Appeal.⁸ Although the Labour Appeal Court did consider the provisions of the Constitution in this second matter, it once again refused the application for leave to appeal to the Supreme Court of Appeal. As was the case in *Khoza*, the full bench of the court *per* Nugent AJA relied upon item 22(7) of Schedule 7 to the LRA that provides expressly that, subject to the Constitution, no appeal would lie against a decision of the Labour Appeal Court. Although it was argued that section 168(3) of the Constitution permitted further appeal, Zondo JP opined in a unanimous decision that it was not necessary to express a view on this question since if the applicant was entitled to such further appeal, it did not require leave from the Labour Appeal Court as neither the Constitution nor the LRA required it. This somewhat unsatisfactory decision leaves the impression that the court preferred to sidestep rather than face the vexed question in respect of the influence of the Constitution on the relationship between the Labour Appeal Court and the Supreme Court of Appeal. However, this was not the end of the saga. The application for leave to appeal was eventually brought before the Supreme Court of Appeal⁹ itself at a later stage, and is discussed below.

In the third matter before the Labour Appeal Court, namely *Kem-Lin Fashions v Brunton*,¹⁰ the superior court status of the Labour Appeal Court was once again considered. There were, however, two important differences between this case and the *Khoza* and *Chevron Engineering* cases. Firstly, in this instance the dispute dealt with a constitutional matter¹¹ and not a matter falling under the exclusive jurisdiction of the labour courts in terms of the LRA. Secondly, the applicants approached the Labour Appeal Court for leave to appeal to the Constitutional Court, not to the Supreme Court of Appeal. In the prelude to this case the applicant appealed, without success,

⁶ 56G.

⁷ 2001 22 ILJ 627 (LAC).

⁸ Although the Labour Appeal Court decision where leave to appeal was considered and dismissed was not reported, the facts can be deduced from the reported Supreme Court of Appeal decision, *Chevron Engineering (Pty) Ltd v Nkambule* [2003] 7 BLLR 631 (SCA) 632 par 1-8, where the applicant, two years later, received leave to appeal against the Labour Appeal Court decision to the Supreme Court of Appeal.

⁹ *Chevron Engineering (Pty) Ltd v Nkambule supra*.

¹⁰ The decision on the application for leave to appeal to the Constitutional Court is reported in 2002 23 ILJ 882 (LAC).

¹¹ The nature of the constitutional matter is not recorded in the decision of the Labour Appeal Court.

to the Labour Appeal Court against a decision of the Labour Court.¹² The applicant then applied for a certificate in terms of rule 18 of the Constitutional Court Rules, to grant it leave to appeal on a constitutional matter to the Constitutional Court. Rule 18(1) states:

“The procedure set out in this rule shall be followed in an application for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution has been given by any court other than the Supreme Court of Appeal irrespective of whether the Chief Justice has refused leave to appeal.”

As was the case in *Chevron Engineering*, the Labour Appeal Court’s unanimous decision, *per* Joffe AJA in this instance, considered the provisions of the Constitution, once again coming to the same conclusion where it jealously protected its position at the pinnacle of the hierarchy of labour courts. Although the primary application was for an appeal to the Constitutional Court, it nevertheless considered the status of the Labour Appeal Court *vis-à-vis* the Supreme Court of Appeal. The court held that although section 168 of the Constitution “would seem to indicate that there is an appeal from this court to the Supreme Court of Appeal”,¹³ this would be contrary to the wording of section 167(3) of the LRA. Section 167(3) provides that the Labour Appeal Court is a superior court with equal status and powers in relation to matters under its jurisdiction to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction. Accordingly, it only applied to appeals from lower courts (such as the High Court) to the Constitutional Court. To this the court added that “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”,¹⁴ namely the Supreme Court of Appeal. Here, it is submitted, the court erred in not distinguishing between matters over which the labour courts have exclusive jurisdiction under the LRA and constitutional matters. It can also be argued that the court misdirected itself by holding that a provision of the Constitution is contrary to the wording of section 167(3) of the LRA, instead of observing that the provisions of the LRA appear to be infringing upon the provisions of the superior Constitution. Had the court applied the correct emphasis, it would have been impossible for it to come to this conclusion.

In considering the argument that an appeal lies directly from the Labour Appeal Court to the Constitutional Court, Joffe AJA further held that the rule contemplates an appeal to the Constitutional Court from a court “prior to the appeal procedure through the different courts being completed”.¹⁵ In other words, rule 18 provides for an intervention before the exhaustion of normal appeal procedures by permitting an appeal directly to the Constitutional Court. However, the court found that in this instance the appeal procedure

¹² The appeal against the Labour Court decision is reported in *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC).

¹³ *Chevron Engineering (Pty) Ltd v Nkambule supra* 883 par 4-5.

¹⁴ *Chevron Engineering (Pty) Ltd v Nkambule supra* 884 par 6.

¹⁵ *Chevron Engineering (Pty) Ltd v Nkambule supra* 883 par 2.

before the labour courts had already been exhausted and that consequently there was no further appeal to the Constitutional Court.

It is worth noting that the Labour Appeal Court did not go so far as to hold that it had exclusive jurisdiction in all labour matters. However, by closing the door for appeals from the Labour Appeal Court to the Constitutional Court on constitutional issues (save possibly if the appeal was sought between the Labour and Labour Appeal stages), the impression was created that labour disputes (including those in relation to constitutional matters) were all ring-fenced under the jurisdiction of the labour courts with the Labour Appeal Court as the final court of appeal.

1 2 The High Courts and the Constitutional Court

As could be expected, the first cracks in the ultimate status of the Labour Appeal Court did not appear in the decisions of the labour courts. They first appeared in a labour dispute based on constitutional grounds referred to the High Court, and ultimately to the Constitutional Court. In this line of cases the Constitutional Court dispelled any misguided visions of exclusive appellate jurisdiction in all labour matters for the Labour Appeal Court that may have been strengthened by the Labour Appeal Court in the *Kem-Lin Fashions* case.

In a dispute regarding the application of a collective agreement regulating retrenchment proposals, approximately 50 teachers launched an application in the High Court, claiming that the Department of Education had breached their constitutional rights to equality¹⁶ and fair administrative action.¹⁷ A full bench of the High Court held¹⁸ that it lacked jurisdiction to entertain collective agreement disputes, but issued a certificate for leave to appeal to the Constitutional Court in terms of rule 18.¹⁹ In *Fredericks v MEC for Education & Training, Eastern Cape*²⁰ the Constitutional Court considered whether the jurisdiction of the High Court was ousted in favour of the Labour

¹⁶ S 9 of the Constitution.

¹⁷ S 33 of the Constitution.

¹⁸ *Fredericks v MEC Responsible for Education & Training in the Eastern Cape Province* [2001] 11 BLLR 1269 (Ck).

¹⁹ In *Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Substructure* 1999 20 ILJ 1018 (T) the High Court also considered a dispute regarding the enforcement of a collective agreement. This case was not based on constitutional grounds. The court noted that the LRA prescribes that disputes regarding collective agreements must be referred for conciliation and, should this fail, for arbitration before the CCMA (s 24 of the LRA). More significantly, however, with reference to the CCMA and labour courts, it held at 1022J that the LRA "creates a two stream labour dispute resolution system which is all-embracing, leaving no room for intervention by another court." Further, it held (1023 A-G) that there are "cogent policy considerations underlying these measures for keeping labour disputes out of the channel of a superior court ... For one party to a labour dispute to take the other directly to court defeats the whole process and materially frustrates the accomplishment of the objectives of the Act. Concurrent jurisdiction may give rise to forum shopping." Under the policy considerations for separate labour *fora*, the court (1022H) mentioned the accomplishment of "simple inexpensive and accessible resolution of labour disputes".

²⁰ [2002] 2 BLLR 119 (CC).

Court in constitutional matters. In her decision, O'Regan J first considered section 169(a) of the Constitution which states that a "High Court ... may decide any constitutional matter" other than a matter that falls within the exclusive jurisdiction of the Constitutional Court or "any other matter assigned by an Act of Parliament to another court of a status similar to a High Court".²¹ The court then considered the provisions of the LRA in order to determine whether the High Court's jurisdiction was ousted from determining a constitutional issue arising from an employment relationship. The court held:

"[36] The starting point for the enquiry must be section 157(1) [of the LRA], which provides that the Labour Court shall have exclusive jurisdiction over all matters that 'are to be determined' by it in terms of the Labour Relations Act or other legislation.

[37] To the extent that exclusive jurisdiction over a matter is conferred upon the Labour Court by section 157, or any other provision of the Labour Relations Act or other legislation, the jurisdiction of the High Court to adjudicate such matter is ousted. There can be no constitutional objection to such an ouster as section 169 of the Constitution makes it plain that a constitutional matter over which the High Court has jurisdiction may be assigned by an Act of Parliament to another Court of a status similar to a High Court. The Labour Court is such a Court."²²

With reference to section 157(2) of the LRA it held:

"That section provides that challenges based on constitutional rights arising from the State's conduct in its capacity as employer is a matter that may be determined by the Labour Court, concurrently with the High Court. Whatever else its import, section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction."²³

In conclusion O'Regan J held that there is no other provision in the LRA that confers exclusive jurisdiction on the Labour Court to determine disputes arising out of constitutional matters, and that the High Court had therefore erred in finding that it had no jurisdiction to entertain a constitutional matter arising from a dispute regarding a collective agreement.

It is also worth noting the following principle that comes to the fore by virtue of this decision. It would, hypothetically, have been possible to limit the High Court's jurisdiction and to bestow on the Labour Court an exclusive constitutional jurisdiction in all labour matters, including those based on constitutional grounds. This the drafters of the LRA declined to do, and the court held that there could be no constitutional objection to that. However, it is doubtful that this could be done in respect of the Labour Appeal Court by virtue of the fact that there is no similar provision in the Constitution that

²¹ *Fredericks v MEC for Education & Training, Eastern Cape supra* 133 par 31.

²² *Fredericks v MEC for Education & Training, Eastern Cape supra* 135 par 36-37.

²³ *Fredericks v MEC for Education & Training, Eastern Cape supra* 136 par 41.

would make it possible to limit the Supreme Court of Appeal's jurisdiction in constitutional matters in favour of another court.²⁴

It is submitted that O'Regan J was correct in her interpretation of the relevant constitutional provisions. It is, however, doubtful that it was foreseen in the *Fredericks* case that it would open a steady stream of cases on appeal to both the Constitutional and Supreme Court of Appeal on constitutional matters, and disputes that traditionally fell under the exclusive jurisdiction of the labour courts.²⁵ In addition, this decision emphasised the fact that ultimately the Constitution, and not the LRA, determines the extent of the jurisdiction of the labour courts. After the *Fredericks* case, it was only a matter of time before unsuccessful litigants would commence appealing to both the Constitutional Court and the Supreme Court of Appeal.²⁶

In *National Education Health and Allied Workers Union v University of Cape Town*,²⁷ the trade union applied for leave to appeal to the Constitutional Court against a split decision of the Labour Appeal Court.²⁸ The substantive question was whether, in terms of section 197 of the LRA upon transfer of a business as a going concern, the employees are transferred automatically with the business without the consent of the transferee and transferor. In the Constitutional Court the applicant contended that the decision of the majority of the Labour Appeal Court infringed upon every worker's constitutional right to fair labour practices.²⁹ Ngcobo J, for a unanimous bench, noted that the LRA was enacted to "give effect and to regulate the fundamental rights conferred" by the Constitution.³⁰ The court remarked that South Africa is unique in so far as this undefined

²⁴ See ss 166 and 168(3) of the Constitution and the discussion in par 5 in Part 1 above.

²⁵ Ngcukaitobi "Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court" 2004 25 *ILJ* 1 6 states that "since the *Fredericks* judgment, however, the HC has demonstrated a willingness to assume jurisdiction in dismissal cases".

²⁶ The most significant cases in which an appeal was lodged against a decision of the Labour Appeal Court subsequent to this decision are: *NEHAWU v University of Cape Town* 2003 24 *ILJ* 95 (CC) (appeal upheld); *NUMSA v Bader Bop (Pty) Ltd* [2003] 2 BLLR 103 (CC) (appeal upheld); *Xinwa v Volkswagen of South Africa (Pty) Ltd* [2003] 5 BLLR 409 (CC) (appeal dismissed); *Chevron Engineering (Pty) Ltd v Nkambule* [2003] 7 BLLR 631 (SCA) (appeal upheld); *Chevron Engineering (Pty) Ltd v Nkambule* [2004] 3 BLLR 214 (SCA) (appeal upheld); and *NUMSA v Fry's Metals (Pty) Ltd* [2005] 5 BLLR 430 (SCA) (appeal dismissed). In the last-mentioned case, the court considered similar petitions for leave to appeal from two other Labour Appeal Court cases, namely *Rustenburg Platinum Mines Ltd v CCMA* case number 596/03 and *Goodyear SA (Pty) Ltd v CCMA* case number 074/04.

²⁷ 2003 24 *ILJ* 95 (CC).

²⁸ The Labour Appeal Court decision was reported as *NEHAWU v University of Cape Town* [2002] 8 BLLR 311 (LAC). The application for leave to appeal was brought in terms of rule 20 of the Rules of the Constitutional Court. This rule governs appeals from the Supreme Court of Appeal to the Constitutional Court. Appeals from all other courts are regulated in terms of rule 18. The court held that the Labour Appeal Court is not the Supreme Court of Appeal and should have utilised rule 18 instead. However, the court condoned the failure of the trade union to comply with rule 18 and heard the appeal.

²⁹ S 23 of the Constitution.

³⁰ *National Education Health & Allied Workers Union v University of Cape Town* *supra* 105 par 13 with reference to s 1(a) of the LRA.

right to fair labour practices is enshrined in its Constitution.³¹ To this end the court held that the provisions of the LRA must be interpreted “in compliance with the Constitution”, and that this interpretation would raise a constitutional issue.³²

Before the court entertained the substantive question before it, it gave an exposition of the structure of the superior courts to determine the issue of jurisdiction. Ngcobo J explained that the Constitution recognises two highest courts of appeal, the Constitutional Court and the Supreme Court of Appeal.³³ The Supreme Court of Appeal is the highest court except in constitutional matters.³⁴ Its jurisdiction in constitutional matters is only limited in so far as certain matters are reserved for the exclusive jurisdiction of the Constitutional Court.³⁵ The court accordingly held that an appeal on constitutional matters does lie from the Labour Appeal Court to the Supreme Court of Appeal. However, the court held that there was nothing that precluded an applicant from appealing directly from the Labour Appeal Court to the Constitutional Court.³⁶ With this decision the Constitutional Court effectively overturned both the *Chevron Engineering* and *Kem-Lin Fashions* decisions of the Labour Appeal Court.³⁷

With reference to the labour courts, the court accepted that labour courts were specifically established by parliament to administer dispute resolution under the LRA with a view to developing labour relations policy and precedent. Ngcobo J wrote that “[t]hrough their skills and expertise, judges of the LAC and Labour Court accumulate the expertise which enables them to resolve labour disputes speedily”.³⁸ It was argued by the respondent employer that it would be ill-advised for the Constitutional Court to assume jurisdiction to hear all labour matters. To this the court replied that the LRA

³¹ *National Education Health & Allied Workers Union v University of Cape Town supra* 110 par 33. It was held that the “concept of unfair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.” In par 34 the court held that it is the primary responsibility of the labour courts, including the Labour Appeal Court, to give content to the concept by seeking guidance from legislation and domestic and international experience, but that ultimately the Constitutional Court will have an important supervisory role to ensure that the constitutional principles are properly interpreted and applied.

³² The court rejected the argument that the only constitutional matters that may arise where one is dealing with a statute that gives effect to constitutional principles, relate to the constitutionality of the principle. The court held that, in relation to a statute, a constitutional matter may arise either because the constitutionality of the statute itself is in issue, or because of the constitutionality of its interpretation and application is in dispute.

³³ *National Education Health & Allied Workers Union v University of Cape Town supra* 107 par 21.

³⁴ S 168(3) of the Constitution.

³⁵ S 167(4) of the Constitution.

³⁶ *National Education Health & Allied Workers Union v University of Cape Town supra* 108 par 22.

³⁷ Discussed in summary above.

³⁸ *National Education Health & Allied Workers Union v University of Cape Town supra* 110 par 30.

was enacted to give effect to the right to fair labour practices, and if “the effect of this requirement is that this court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy”.³⁹ However, the court held it would not apply its discretion in favour of leave to appeal lightly, but only in those matters where it would serve the interests of justice.⁴⁰

The *University of Cape Town* decision confirmed that it is possible to follow two avenues of appeal from the Labour Appeal Court on constitutional matters, namely directly from the Labour Appeal Court to the Constitutional Court, or from the Labour Appeal Court to the Supreme Court of Appeal, and then ultimately to the Constitutional Court. The remaining question to be answered was whether it is possible to appeal to the Supreme Court of Appeal on matters that do not relate to constitutional matters, but that resort under the so-called exclusive jurisdiction of the labour courts. It is submitted, however, that the explanation that the Constitution dictates that the Supreme Court of Appeal is the highest court in all matters (apart from constitutional matters where the Constitutional Court is supreme) had already laid the groundwork for the answering of this question.

In *Chevron Engineering (Pty) Ltd v Nkambule*⁴¹ the Supreme Court of Appeal had the opportunity to express itself on the question of whether an appeal lies from the Labour Appeal Court to the Supreme Court of Appeal. As discussed above, the Labour Appeal Court had already considered and declined such an application. Farlam JA, on behalf of a unanimous Supreme Court of Appeal bench, considered item 22(6) of the LRA and section 168(3) of the Constitution in answering this question. The court held that the *Khoza* decision of the Labour Appeal Court on which it previously relied “was clearly arrived at *per incuriam*”.⁴² Relying on the *University of Cape Town* case, it noted that had the words “subject to the Constitution” not been included in item 22(6), it would clearly have been unconstitutional by virtue of section 168(3) which provides that this court is the penultimate court in all but constitutional matters.⁴³ The court held that an unsuccessful party to an appeal to the Labour Appeal Court may, without leave to appeal being granted by the Labour Appeal Court, once more appeal against that decision to the Supreme Court of Appeal.

³⁹ *National Education Health & Allied Workers Union v University of Cape Town supra* 106 par 16.

⁴⁰ *National Education Health & Allied Workers Union v University of Cape Town supra* 109-110 par 25-29. One of the main factors to be considered would be the prospects of success. See *S v Boesak* 2001 1 SA 912 (CC). Another factor that counted in favour of granting leave to appeal in this matter, was the fact that the members of the Labour Appeal Court were divided on the proper interpretation of s 197 of the LRA. Another factor taken into account by the court was the fact that this was the first occasion on which the court had to define the approach it would take when interpreting legislation that aimed to give effect to a constitutional right.

⁴¹ [2003] 7 BLLR 631 (SCA).

⁴² *Chevron Engineering (Pty) Ltd v Nkambule supra* 635 par 18.

⁴³ *Chevron Engineering (Pty) Ltd v Nkambule supra* 635 par 15-16.

It is to be noted that the matter before this court did not concern a constitutional matter. The facts related to the dismissal of striking employees, which is a matter that traditionally falls under the exclusive jurisdiction of the labour courts and ultimately the Labour Appeal Court. Although the distinction between constitutional and other labour related matters was not considered in this decision, and although no reference had been made to the provisions of the LRA which clothes the Labour Appeal Court with ultimate appellate jurisdiction in matters that fall under the exclusive jurisdiction of the labour courts, this was the first case where the remaining hopes for a labour court with ultimate status in labour matters were dashed. In this case no mention was made of what tests the court would apply, and just how readily the Supreme Court of Appeal would be willing to grant leave to appeal from the decisions of the Labour Appeal Court.

In *NUMSA v Fry's Metals (Pty) Ltd*⁴⁴ the Supreme Court of Appeal confirmed its earlier decision in *Chevron Engineering* that parties dissatisfied with judgments from the Labour Appeal Court on matters other than constitutional matters, may take these on appeal to the Supreme Court of Appeal. This time the court did consider the provisions of the LRA that endeavour to vest final appellate powers with the Labour Appeal Court. However, Mpati DP and Cameron JA in a unanimous decision concluded that "the Constitution vests this court [the Supreme Court of Appeal] with power to hear appeals from the LAC in both constitutional and non-constitutional matters, and that the provisions of the LRA that confer final appellate power on the LAC must be read subject to the appellate hierarchy created by the Constitution itself".⁴⁵

Apart from merely interpreting its legislative provisions, the court for the first time sought to explain the rationale behind the court structure created by the Constitution. It held that if it were possible for the legislature to vest final appellate powers in the Labour Appeal Court, it would also be possible for the legislature to create final courts of appeal in other matters such as crime, welfare, environment, land contract, company law and administrative law. This could theoretically mean that all functions of the court could be assigned piecemeal to other appellate courts with equal status.⁴⁶ It held that the Constitution envisages a coherent appellate structure in which the Supreme Court of Appeal has authority "that is final in all matters, barring constitutional matters".⁴⁷

Having unequivocally assumed jurisdiction in labour matters, the court placed severe limitations on this right to appeal to the Supreme Court of

⁴⁴ [2005] 5 BLLR 430 (SCA). For a discussion of this case, see Irvine "Dismissal, Operational Requirements and the Jurisdiction of Courts" 2005 14(9) *CLL* 81-86.

⁴⁵ *NUMSA v Fry's Metal (Pty) Ltd supra* 436 par 16. The starting point of the court's decision was that "all public power that is wielded by the courts, emanates from the Constitution" (par 5).

⁴⁶ *NUMSA v Fry's Metal (Pty) Ltd supra* 440 par 26.

⁴⁷ *NUMSA v Fry's Metal (Pty) Ltd supra* 440 par 27.

Appeal.⁴⁸ It held that it is required of appellants to first petition the Supreme Court of Appeal and to persuade it that there are not only reasonable prospects of success, but also that there are special reasons as to why a second appeal should be allowed. The appellants in *Fry's Metals* failed to satisfy the court that there were reasonable prospects of success, and consequently the application for special leave to appeal was dismissed.

An interesting consequence of these developments is that legal representatives, who have now realised that the Constitutional Court and the Supreme Court of Appeal have the ultimate say in labour matters, have sought to abbreviate proceedings and curtail costs by appealing directly from the Labour Court to the Constitutional Court. In *Dudley v City of Cape Town*⁴⁹ the applicant applied directly to the Constitutional Court from the Labour Court for leave to appeal, thereby sidestepping the Labour Appeal Court and the Supreme Court of Appeal. At issue was the substantive question as to whether the implementation of affirmative action is a mere defence for employers, or whether it is also an enforceable right for employees.⁵⁰ The court held that there could be no doubt that the dispute gave rise to a constitutional matter and that the issues before it raised important questions about the implementation of affirmative action. The applicants raised strong arguments in respect of the importance of this decision in that it would give guidance to all designated employers, and the imperatives of saving time and costs.⁵¹ However, having assumed and confirmed its jurisdiction to consider constitutional matters in the labour relations law arena, the court declined to entertain the matter. It held:

“The LAC is a specialised appellate court that functions in the area of labour law. Both the LAC and the Labour Court ... are charged with the responsibility for overseeing the ongoing interpretation and application of labour laws and the development of labour jurisprudence ... In the circumstances the need to have the views of the LAC on the matters raised by the application outweighs other considerations.”⁵²

How ironic that, after having witnessed the full circle of labour court decisions making a stand for the retention of their exclusive jurisdiction in labour matters, and having lost it, the Constitutional Court shied away from its legitimate responsibility of hearing an all important constitutional matter in favour of obtaining advice and reflection on the matter from their brethren in the Labour Appeal Court, and this despite the imperatives of saving costs and time in the adjudication of labour matters.

⁴⁸ *NUMSA v Fry's Metal (Pty) Ltd supra* 442 par 35 the court held that “the path from the LAC to this court should not be untrammelled. The first is the imperative of expertise. The second is the imperative of expedition. The third (and only last in order of importance) is the workload of this court.”

⁴⁹ 2004 25 ILJ 991 (CC). The reference of the Labour Court decision is 2004 25 ILJ 305.

⁵⁰ Apart from the *Dudley* judgment, there was a conflicting decision, *Harmse v City Of Cape Town* 2003 24 ILJ 1130 (LC), by the Labour Court dealing with the same question.

⁵¹ *Dudley v City of Cape Town supra* 994 par 7.

⁵² *Dudley v City of Cape Town supra* 994 par 9 and 12.

2 CONCLUDING REMARKS

In my view, the drafters of the labour law dispensation for post-apartheid South Africa failed in attaining the goals they set for themselves in respect of the establishment of labour dispute resolution mechanisms that would solve the problems of the past. As it stands today, the labour courts' jurisdiction (especially with reference to the appellate structure) is in a complete state of disarray. Apart from the fact that the Labour Court and the High Court have concurrent jurisdiction in constitutional law, law of contract and administrative law matters involving labour relations, it is also possible to follow various routes of dispute resolution and appeal. From the conciliation and arbitration phase before the CCMA, a matter can be taken on review to the Labour Court, then on appeal to the Labour Appeal Court, with one more appeal to the Supreme Court of Appeal before ultimately taking the matter to the Constitutional Court. However, it is also possible to circumvent the Supreme Court of Appeal by appealing from the Labour Appeal Court directly to the Constitutional Court. It has now become apparent that there is no logical role and function for the Labour Appeal Court (and arguably the Labour Court) within the framework of courts as crafted by the drafters of the Constitution.⁵³ Taking into account that almost any labour matter could be brought under the ambit of a threatened violation of the constitutional right to fair labour practices, one cannot but conclude that there is no place in the sun for a labour court system in South Africa.

However, the drafters of South Africa's labour laws should not carry all the blame for the failures referred to above. The downfall of the Labour Appeal Court can at least partially be attributed to some of the unforeseen consequences that accompanied the implementation of the Constitution, and the continuing process of the constitutionalisation of labour law. The seeds of destruction for the not-all-that-carefully-worked-out framework of dispute resolution mechanisms were sown within both the LRA and the Constitution. Firstly, the LRA did not make provision for all labour disputes involving constitutional matters to be heard by the labour courts to the exclusion of the High Court, and secondly the Constitution leaves no room for a Labour Appeal Court as the highest court in either matters under its exclusive jurisdiction or constitutional matters.

Ultimately the imperatives sought to be attained in terms of the LRA, namely that of establishing expeditious and affordable labour courts with the necessary exclusive jurisdiction to develop a coherent body of jurisprudence for South African labour law, had to be weighed against the constitutional imperative of having one logical channel of courts flowing from the Small Claims Court, Magistrates Court, High Courts (and specialist tribunals and courts with equal status) to the penultimate Supreme Court of Appeal and

⁵³ It is to be noted that it is not only in the arena of labour law, but also in competition law where 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.

the highest Constitutional Court. In the final instance it was the Supreme Court of Appeal and the Constitutional Court that held that constitutional imperatives outweigh the goals sought to be attained by the labour community.

Against this background, one can only welcome the prospects envisaged by the Superior Courts Bill, namely that the labour courts will be abolished in their entirety, and that their functions will be transferred to the High Court and Supreme Court of Appeal. This will in all probability signal a new era in the development of South African labour law. It will be an era where the principles regulating the common law contract of employment, the notions of fairness as developed by the Industrial and Labour Courts, and administrative law and constitutional law principles, will all be stirred into one melting pot. This latest development will also sound the death knell for the lofty ideal of having an autonomous body of labour law for the South African labour community. Although the labour court saga probably reached its logical conclusion, it is in my view a pity that all ideals of a simple court structure with a relatively short lineage of appeal (that even dismissed employees can afford), should disappear under the developments taking place under South Africa's constitutional democracy.