THE CONCURRENT JURISDICTION OF THE LABOUR COURT AND THE HIGH COURT

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Abstract

An overview is given of the difficulties surrounding the concurrent jurisdiction of the Labour Court and High Court

The main categories of the jurisdictional dispute are identified and systemised. The main branches are those of statutory overlap and interpretation of statutes. Statutory overlap concerns matters remaining from the industrial court era, urgent applications, delict and law of contract. Statutory interpretation mainly involves the interpretation of provisions in the Bill of Rights of the Constitution.

An overview of the principles of jurisdiction with respect to the different courts, as well as a brief historical review of the development of such jurisdiction is given. Particular attention is given to the role of fundamental rights in the Constitution.

Broad principles are identified whereby the difficulties may be addressed.

Abstrak

'n Oorsig word verskaf van die probleme rakende die konkurrente jurisdiksie van die Arbeidshof en Hoër Hof.

Die hoofindelings van die jurisdiksionle dispuut word uitgeken en sistematies georden. Die hoofvertakkings is statutêre oorvleueling en die uitleg van wette. Statutêre oorvleueling behels sake vanaf die nywerheidshoftydperk, dringende aansoeke, delikte- en kontrakreg. Statutêre uitleg behels grotendeels voorskrifte uit die Handves van Menseregte in die Grondwet.

'n Oorsig word gelewer van die beginsels van jurisdiksie met betrekking tot die betrokke howe, sowel as 'n beknopte historiese oorsig van die ontwikkeling van dié jurisdiksie. In besonder word aandag geskenk aan die basiese regte verskans in die Grondwet.

Breë beginsels word uitgeken waarvolgens die jurisdiksionele probleme benader kan word.

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Chapter 1. Introduction

The topic of the treatise arose from the voices of concern raised about the cost in time and money of referring matters to a court lacking jurisdiction, being either the High Court or the Labour Court. Although the topic refers to concurrent jurisdiction, an analysis of such jurisdiction cannot be done without examining the jurisdiction of the respective courts as well. Where appropriate, reference will also be made to the jurisdiction of the CCMA.

To approach this problem, we first present an overview of the principles of jurisdiction with respect to the different courts, as well as a brief historical review of the development of such jurisdiction. Particular attention is given to the role of fundamental rights in the Constitution.

We identify and systemise the main categories of the jurisdictional dispute. The main branches are those of statutory overlap and interpretation of statutes. Statutory overlap concerns matters remaining from the industrial court era, urgent applications, delict and law of contract. Statutory interpretation mainly involves the interpretation of provisions in the Bill of Rights of the Constitution.

A clear demarcation of cases in the various categories is not possible. Cases will be categorised according to their main significance, but reference will be made to them in the other categories.

It would be too ambitious of a treatise at this level to present an authoritative solution to the jurisdictional dilemma. Broad principles, however, can be identified and these are presented in the final chapter.

A number of conventions will be followed:

Acronyms, such as LRA for Labour Relations Act, are defined throughout. Where there is too wide a separation between a subsequent use of the term and the first definition of its acronym, the definition will be repeated.

We tried to keep footnote references to the same matter to a minimum. Where a case is discussed in a section of the treatise, references to the case will be made to that section. However, where there is too large a separation between references to the same case, the references will for convenience be repeated in the footnotes. . An index of cases is provided in the appendices to facilitate the location of the cases in the treatise.

Unless where otherwise stated, references to sections in an Act will refer to those in the Labour Relations Act of 1995.

Reference to male pronouns must be construed as neutral in gender.

Chapter 2. Jurisdiction and its development in labour law

2.1. What is jurisdiction?

Van Zyl J succinctly summarises the concept of judicial jurisdiction in *Mgijima v Eastern Cape Appropriate Technology Unit & another* (see 5.5) at 296E–H:

> "Jurisdiction means 'the power or competence of a Court to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc' (per Watermeyer CJ in Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A) at 424. See also Ewing McDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A) at 256G). The question whether the jurisdiction of the High Court has been ousted and conferred to some other tribunal or court must be determined in the context of the presumption against legislative interference with the jurisdiction of the High Court. It is a well-recognized rule of statutory interpretation that the curtailment of the powers of a court of law will not be presumed in the absence of an express provision or a necessary provision to the contrary therein. In each case where this issue arises, the court will therefore closely examine any provisions which appears to curtail or oust its jurisdiction (see Lenz Township Co (Pty) Ltd v Lorentz NO & andere 1961 (2) SA 450 (A) at 455; Minister of Law & Order & others v Hurley & another 1986 (3) SA 568 (A) at 584; Steyn Die Uitleg van Wette (5 ed) at 79). "

In general, the LRA provides for three main dispute resolution systems:

- Industrial action, or `power play', for disputes of mutual interest;
- Arbitration for mainly disputes of right;
- Adjudication for rights disputes specifically designated in the Act.

For this purpose specialised fora were created, namely the Commission for Conciliation, Mediation and Arbitration ("CCMA") and the Labour Court. Jurisdiction is solely conferred to the appropriate body with respect to disputes of rights.

The LRA also recognises private dispute resolution mechanisms, e.g. section 147(6)(a), for which the Arbitration Act 42 of 1965 will be applicable. It must be

noted that this Act is not applicable, in terms of section 146, to arbitration under the LRA.

The creation of specialist fora is not a novel innovation. Overlap in jurisdiction between the fora has always been possible, leading to jurisdictional disputes. In this regard, the High Court has retained priority except where specifically excluded by a statute. In *Paper, Printing, Wood and Allied Workers Union v Pienaar NO & others*,[1] Harms J summarises aspects of the jurisdictional dilemma at 51A–C:

> "It would be anomalous to find that the self-same act or decision can give rise to a review in two Courts, one consisting of a Judge, the other of a Judge and assessors, that the two Courts are both accountable to the same appeal Court but that different legal principles should apply, depending on the applicant's choice of forum. If the Legislature's intention was to retain the existing review proceedings, I fail to understand why it would have introduced a procedure containing limited grounds of review. I am conscious that the Supreme Court jealously guards against a reduction of its common-law jurisdiction (Robinson v BRE Engineering CC 1987 (3) SA 140 (C)), but judicial jealousy cannot override legislative intent: cf Greaves v Opta Medical Co 1989 (1) SA 993 (W) ."

In specialist courts such as the Water Courts, the Court of the Commissioner of Patents, Special Income Tax Courts, and so forth, the jurisdiction of the courts has become clearly demarcated through time. There is little doubt that the jurisdiction of the ordinary divisions of the High Court has been ousted in these cases.

2.2. **Principles of jurisdiction: *CWU v Telkom***

Various principles underlying jurisdiction have been summarised by Southwood J in *Communication Workers Union & another v Telkom SA Ltd & another*[2] at 997I–998H: We present these below.

The jurisdiction of the High Court was rejected.

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[1] 1991 (2) SA 46 (T).
[2] (1999) 20 *ILJ* 991 (T).

2.2.1. **Without jurisdiction the judgment of a court is a nullity**

At 998I:

> "A court must have jurisdiction for its judgment and/or order to be valid. If the court does not have jurisdiction its judgment and/or order is a nullity. No pronouncement to that effect is required. It is simply treated as such - Lewis & Marks v Middel 1904 TS 291 and 303; SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren & others & the Taxing Master 1964 (1) SA 162 (O)at 164G-H; Trade Fairs & Promotions (Pty) Ltd v Thomson & another 1984 (4) SA 149 (W) at 183D-E."

2.2.2. **Jurisdiction means the power invested in a court**

At 998A:

> "Jurisdiction in this context means 'the power invested in a court by law to adjudicate upon, determine and dispose of a matter' - Ewing McDonal & Co Ltd v M & M Products Co 1991 (1) SA 252 (A) at 256G. "

2.2.3. **At what stage must jurisdiction be determined?**

At 998A–B:

> "The crucial time for determining whether a court has jurisdiction is the time when proceedings are commenced and once jurisdiction is established it continues to exist to the end of the proceedings even though the ground upon which it was established has ceased to exist - Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) at 310D. For purposes of the objection it must be established therefore whether this court had jurisdiction when the proceedings commenced: ie when the application was served on the respondents. "

2.2.4. **There is a presumption against legislative interference with the jurisdiction of the High Court**

At 998C:

> "[Jurisdiction] must be established bearing in mind that there is a presumption against legislative interference with the jurisdiction of the High Court and a clear provision is necessary to rebut that presumption - De Bruin v Director of Education 1934 AD 252 at 258; Lenz Township Co (Pty) Ltd v Lorentz NO & andere 1961 (2) SA 450 (A) at 455B-C."

2.2.5. **How does one raise objection against jurisdiction?**

At 998D–E:

> "The usual way of raising an objection to the jurisdiction of the court in trial proceedings is by way of a special plea but where it is apparent from the pleadings that the court has no jurisdiction the matter may be decided on exception - Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 759H-760E; Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk & andere 1980 (2) SA 441 (NC) at 448A; Dusheiko v Milburn 1964 (4) SA 648 (A); Herbstein & Van Winsen The Civil Practice of the Supreme Court of SA (4 ed) at 478-9."

2.2.6. **A Court may raise the question of jurisdiction *mero motu***

At 998F:

> "It has been held that a court has the power to dismiss a claim mero motu if it is clear ex facie the pleadings that it has no jurisdiction whatever to entertain such a claim - Viljoen v Federated Trust Ltd at 760F; Ex parte Pan African Tanneries Ltd 1950 (4) SA 321 (O) at 322-3."

2.2.7. **The Court of Appeal may *mero motu* raise the jurisdiction of a court *a quo***

At 998G:

> "Recently the Appellate Division raised and decided the question of jurisdiction mero motu on appeal even though no objection to the jurisdiction of the court was raised in the pleadings or in the course of trial - The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd 1996 (4) SA 1167 (A) at 1173J-1177D."

2.2.8. **In application proceedings the affidavits constitute both the pleadings and evidence.**

At 998H:

> "In application proceedings the affidavits constitute both the pleadings and the evidence - Radebe v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C-G; Hyperchemicals International (Pty) Ltd & another v Maybaker Agrichem (Pty) Ltd & another 1992 (1) SA 89 (W) at 92F-I."

2.3. **Historical background**

We briefly summarise the historical development of labour law in South Africa, looking specifically at the tribunals created to enforce agreements or to hear labour disputes.

2.3.1. **The Industrial Conciliation Act 11 of 1924**

The Act was the consequence of the revolt of white mineworkers on the Rand in 1922. The Act made provision for the registration of employers' organisations and trade unions, introduced collective bargaining, a system for settling disputes and the regulation of strikes and lock-outs. Pass-bearing African workers were excluded from the process.

Industrial councils were to be established by agreement between an employer organisation and one or more registered trade unions. Parties to industrial councils were expected to settle disputes between them. Agreements could by consensus be gazetted and become legally binding. Non-compliance with such agreements constituted a criminal offence to be heard in the ordinary courts.

2.3.2. **The Industrial Conciliation Act 36 of 1937.**

Largely the result of the Van Reenen Commission in 1935, the Act retained the basic structures of the 1924 Act. Pass-bearing African workers were to be represented at industrial council meetings by an inspector of the Department of Labour. Violation of industrial council agreements remained a criminal offence.

2.3.3. **The Industrial Conciliation Act of 1956**

Under this Act the Minister could appoint a permanent industrial tribunal that could, amongst others,

- conduct voluntary arbitrations requested by the parties to industrial councils or conciliation boards;
- conduct compulsory arbitrations for `essential services.'

2.3.4. **The Wiehahn Commission of 1977**

Born out of the industrial and political turmoil since the late sixties, the Wiehahn commission proposed a drastic overhaul of existing dispute resolution processes. The power of collective action was acknowledged, but this was to be balanced statutorily by the establishment of an industrial court. The jurisdiction of the industrial court was to be based on an extensive unfair labour concept.

The government accepted most of the recommendations and implemented them over the ensuing four years by means of amendments to the 1956 Act. The title of the Act also changed to the Labour Relations Act, but was referred to by its original year of promulgation, 1956.

The industrial court was accorded extensive jurisdiction in interpreting what constituted unfair labour practices. (This was in strong contrast to the restrictive codification of the later LRA 1995.) The court, however, did not have the status of a Supreme (High) Court and neither did its presiding officers have the status of judges of the Supreme Court.

Of particular significance was the division of disputes between disputes involving rights and those involving interests:

- Disputes of rights remained within the jurisdiction of the Industrial Court. Through interpretation of the unfair labour concept the decisions of the court formed a rudimentary jurisprudence on individual employment rights and collective labour law.
- Disputes of interest were to be resolved through bargaining and `power play' amongst the parties. Only non-adherence to the rules decided upon by all parties received the attention of the court.

2.3.5. **The Labour Relations Amendment Act 83 of 1988**

The amendments codified the unfair labour practice concept and incorporated certain unprocedural industrial actions in the definition of an unfair labour practice.

A Labour Appeal Court was established to be presided over by Supreme Court judges.

The hierarchy of courts ranged from the Industrial Court, the Labour Appeal Court and finally the Appellate Division acting under powers conferred by section 17. The Industrial Court did not have Supreme (High) Court status, and no provision was made for a court with such status between the Industrial Court and Labour Appeal Court. The Labour Appeal Court, in turn, was inferior in status to the Appellate Division.

The three-tier hierarchy of dispute resolution was clearly not conducive to the speedy restoration of industrial peace required for productive economic activity. Another three-tier hierarchy was introduced with the 1995 LRA, but with a more accessible entry-level and speedier time constraints.

2.3.6. **The Labour Relations Act 66 of 1995**

This Act was promulgated on 5 November 1996. The implications of this Act with regard to concurrent jurisdiction, as well as those of the other subsequent labour legislation, form the topic of this treatise.

2.4. **The need for a new judiciary**

Both the Interim Constitution 1993, as well as the final Constitution 1996 placed an obligation on the legislature to enact laws that give expression to the fundamental rights ensconced in the Constitution. This task is succinctly stated by Martin Brassey in the SA Journal of Human Rights in an article entitled *Labour Relations under the New Constitution*.[3] At 206 he states:

[3] 1994 SAJHR 179.

> "For 70 years our Legislature has been modernising our system of labour law, and for the last 20 years the labour courts have been doing the same under the aegis of the unfair labour practice. As a result, labour law already has a kind of charter of fundamental rights of its own. I accept that much still needs to be done, but I am not sure that the Constitutional Court is the best place to do it in. I tend to share the view that was expressed by McIntyre J in Re Public Service Employee Relations Act, the leading case on whether the [Canadian] Charter gives workers a right to strike:
>
> > `Labour law . . . is a fundamentally important as well as extremely sensitive subject. It is based upon a political and economic compromise between organised labour - a very powerful socio-economic force - on the one hand, and the employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate. . . . Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters I of disputes which arise from time to time. . . . Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems.' "

The Draft Negotiating Document in the Form of a Labour Relations Bill [4] gives an overview of the confusion and difficulties existing in the pre-1995 labour dispensation. Of relevance to this study are the jurisdictional problems summarised in Chapter VIII of the Explanatory Memorandum, appended to the Draft Negotiating document. It is stated:

> "The overlapping and competing jurisdictions and the use of different courts prevent the development of a coherent and developing jurisprudence on labour relations. Neither the Industrial Court nor the LAC has exclusive jurisdiction over labour matters: the Supreme Court retains its jurisdiction to review proceedings of the Industrial Court. Strikes and lock-outs may be interdicted in either the Industrial Court or the Supreme Court. Proceedings may brought in respect of breach of contract, breach of statutory duty or delict in relation to unlawful industrial action in the civil courts. Decisions of the registrar are decided by the Supreme Court. The criminal courts enforce industrial agreements, arbitration awards and a multitude of offences in the LRA [1956]."

[4] Explanatory Memorandum of the Draft Negotiating document in the form of the Labour Relations Bill *GG* 16529 of 10 February 1995 148.

The judiciary bodies envisaged to resolve the above named jurisdictional problems are the Commission for Conciliation, Mediation and Arbitration ("CCMA"), Labour Court ("LC")and Labour Appeal Court ("LAC"). The primary objective of the Labour Court would be both as a court of appeal and a court of first instance. The Labour Court, in particular, "is entitled to decline to hear a matter unless its is reasonably satisfied that the dispute has been referred to conciliation and that the parties have attempted to resolve the dispute." [5]

The LAC is intended to "hear appeals from the Labour Court. The Labour Appeal Court is entitled to confirm, amend or set aside any decision of the Labour Court. No appeal lies to the Appellate Division." [6]

In this study we consider to what extent the jurisdictional issues referred to in the extract from Chapter VIII, quoted above, have been resolved. We shall find that " breach of contract, breach of statutory duty or delict in relation to unlawful industrial action" remain as contentious as before

[5] *ibid* 151.
[6] *ibid* 151.

Chapter 3. Jurisdiction and powers

3.1. A new dispensation

The new dispensation in labour relations developed as an improvement on the Labour Relations Act 28 of 1956. Conciliation boards, the Industrial Court and the Labour Appeal Court were replaced in the Labour Relations Act 66 of 1995 ("LRA") with a new dispute resolution mechanism. As quoted in the previous chapter, one of the reasons for the establishment of the CCMA and the Labour Court was to rectify "the overlapping and competing jurisdiction and the use of different courts" for the resolution of labour disputes which "prevent the development of a coherent and developing jurisprudence on labour relation."

3.2. The establishment of the Labour Court

Section 66(e) of the Constitution of the Republic of South Africa 1996 ("the Constitution") makes provision for the establishment of a court of a status similar to that of a High Court which is established or recognised by an Act of Parliament. Section 151 of the LRA gives expression to this provision:

> 151. **Establishment and status of Labour Court**
>
> (1) The Labour Court is hereby established as a court of law and equity.
>
> (2) 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 of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction.
>
> (3) The Labour Court is a court of record.

3.3. The establishment of the Labour Appeal Court

The Labour Appeal Court is established in terms of section 167 of the LRA:

> 167. **Establishment and status of Labour Appeal Court**
>
> (1) The Labour Appeal Court is hereby established as a court of law and equity.

(2) 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 it exclusive jurisdiction.

(3) The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under it jurisdiction.

3.4. Jurisdiction of the Labour Court in terms of the LRA

The jurisdiction of the Labour Court is formulated in section 157:

157. **Jurisdiction of Labour Court**

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, 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.

(2) The Labour Court has 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, 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 threatened executive or administrative act or conduct by the State in its capacity an employer; and

(c) the application of any law for the administration of which the Minister is responsible.

(3) Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.

(4) (a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.

3.5. Jurisdiction in terms of the Basic Conditions of Employment Act

Section 77 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") stipulates the exclusive and concurrent jurisdictions of the Labour Court with respect to certain matters in the BCEA

.

77. **Jurisdiction of Labour Court**

(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.

(2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.

(5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.

3.6. Jurisdiction in terms of the Employment Equity Act

The Employment Equity Act 55 of 1998 ("EEA") assigns exclusive jurisdiction to the Labour Court in terms of section 49:

> 49 **Jurisdiction of Labour Court**
>
> The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where this Act provides otherwise.

3.7. Jurisdiction of the Labour Appeal Court in terms of the LRA

The jurisdiction of the LAC is formulated in section 173. The relevant sections pertaining to this treatise is reproduced below:

> 173. **Jurisdiction of Labour Appeal Court**
>
> (1) Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction:-
>
> (a) to hear and determine all appeals against the final judgments and the final orders of the Labour Court; and
>
> (b) to decide any question of law reserved in terms of section 158(4).
>
> (2) …….

3.8. Jurisdiction of the High Court

In terms of section 19(1)(a) of the Supreme Court Act 59 of 1959, a provincial or local division of the High Court has jurisdiction

> "over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance."

It is also a well-established rule of statutory interpretation that there is a strong presumption against the legislature ousting the jurisdiction of a court of law and that a clear legislative provision is required to displace this presumption.[7]

3.9. Jurisdiction or power?

[7] See *Lenz Township Co (Pty) Ltd v Lawrence NO & andere* 1961 (2) SA 450 (A) 455B.

Sections 157 and 158 distinguish respectively between the jurisdiction and powers of the Labour Court. This distinction appears to be a tenuous one. For instance, s 158(1)(e) confers jurisdiction and not simply a power on the Labour Court. In general, jurisdiction confers power on the court to grant an appropriate remedy, but having such power does not generally confer jurisdiction.[8] In *Schoeman and others v Samsung Electronics SA (Pty) Ltd* (see 11.4) Revelas J states "Section

> 158(1)(iii), which confers the power on this Court to "direct the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objectives" of the Act, does not confer such jurisdiction in this case. For example, to grant a divorce between two married employees might serve the objectives of the Act, and remedy a wrong in a particular case, yet this Court lacks the power to grant a divorce order. Jurisdiction and powers are two separate issues and should not be confused. A court either has jurisdiction or it does not."

3.10. **Concurrent jurisdiction based on case law**

Besides the statutory provision of concurrent jurisdiction, such jurisdiction may also be established by case law. Where a matter in the High Court has been challenged on the grounds that the Labour Court has exclusive jurisdiction and the jurisdiction of the High Court is accepted without ousting the Labour Court, then concurrent jurisdiction would be established in such matters.

That such a simple understanding could be reached is negated by a series of contradictory decisions that span the entire spectrum of the employer-employee relationship. As will be shown in the subsequent chapters, case law presents the litigant with a confusing array of possibilities where the merits of a matter become subservient to, and immersed in, wrangles on jurisdiction. This alone defeats the noble intention of the founders of the LRA to provide simple and inexpensive access to the labour tribunals.

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[8] See the comments by Landman J in *Moropane v Gilbeys Distillers & Vintenrs (Pty) Ltd* & another (1998) 19 *ILJ* 635 (LC) 636F.

Chapter 4. The difficulties

4.1. A word of warning by Marius Olivier

In his article, "*The civil courts, the labour court and the CCMA: Issues relating to jurisdiction in employment matters and forum shopping*,"[9] Marius Olivier anticipated some of the uncertainties that would arise from concurrent jurisdiction. At the time of publication, a year after the promulgation of the LRA, he already suggests at 786 that "certain problems exist … forum shopping is till alive and well. In the absence of encompassing statutory regulation this would render attempts to limit or oust reliance on other institutions in many instances a failure." Three years later, Zondo JP (see 4.3) echoes the same sentiments.

Olivier provides a succinct survey of the jurisdictional problems in labour law facing the courts. Presently, more than four years later, these problems remain largely unsolved. We shall deal with his reservations in the body of this treatise, but shall in this section briefly point out some of the main issues raised in his article.

Olivier points out that in the previous labour dispensation the Supreme Court could be approached on the basis of lawfulness, while simultaneously the Industrial Court could be approached on the basis of fairness. As will be shown in this treatise, the possibility to refer a dispute on a basis of interpretation to two different courts still exists and this accounts for most of the dilemmas facing the courts in labour litigation.

According to Olivier at 789, a reading of section 157(1) indicates that the Labour Court does not have jurisdiction to adjudicate disputes of a criminal, delictual, contractual and administrative law origin. At this stage we wish to comment that divesting unfair administrative procedures from unfair labour practices proved particularly tenuous. This interrelationship will be raised later in this treatise.

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[9] 1997 TSAR 786.

Olivier also states in the last paragraph of 789 that "it follows that only the labour court is empowered to adjudicate a breach of contract, a delict or other unlawful conduct which occurs within the context of an unprotected strike or lock-out." As will be shown, the High Court has determined that the Labour Court has indeed exclusive jurisdiction with respect to delict within such context, but that this does not generally hold true for breach of contract.

As far as criminal conduct within the employment relationship is concerned, Olivier states on 790 that this will have to be adjudicated outside the CCMA and Labour Court. On the same page he writes that "Changes to conditions of employment are essentially interest dispute amenable to be resolved by industrial action, should the parties not have agreed upon arbitration …" We shall see that certain changes to conditions of employment, such as lowering of salary and reduction of certain benefits, project the dispute within the ambit of the High Court.

The implications are pointed out on 792:

> "The implication is that in the event of an allegedly irregular dismissal based on misconduct or incapacity, such an employee can approach the high court on the basis of administrative law review or potentially on the basis of breach of contract, and simultaneously pursue his or her remedies before the CCMA. It is immaterial that the very same factual basis will be relied upon in all these proceedings, and that the outcome may for all practical purposes be the same. Even in the case of other employees, it is possible to lodge a contractual claim in the high court and simultaneously proceed on a basis provided for by the LRA before any of the LRA fora."

Such possibilities will be discussed in this treatise.

A further anomaly is pointed out on 792:

> "However, the position of civil servants in this regard is more precarious. In their case administrative law review remedies have to be pursued in the labour court (see 158(1)(b)). An inexplicable discrepancy is therefore apparent: in administrative law review matters employees attached to statutory bodes may approach the high court while civil servants may only rely on the labour court. There is no logic for the existence of this anomaly created by the new LRA."

Citing a number of cases, Olivier concludes that "a civil servant may, therefore, in the event of an allegedly irregular dismissal based on misconduct or incapacity have various options at his/her disposal: an unfair dismissal claim before the CCMA, judicial review in the labour court and contractual remedies in high court proceedings."

That Olivier's apprehension was borne out forms the central topic of this treatise.

4.2. **The Bisho court expresses its surprise**

In *Fredericks & Others v MEC Responsible for Education & Training in the Eastern Cape Province & others*[10] White J refers to a previous judgment:

> "In conclusion the court wishes to refer to the following extract from its judgment in *Nelson v MEC for Education in the Eastern Cape*, handed down on 26 April 2001:
>
> > `In conclusion this Court must express its surprise at the failure of the Executive to take steps to have the Legislature amend the LRA and thereby bring clarity to the present vague and inconclusive provisions prescribing the jurisdiction of the Labour Court. Section 157(1), which is presumably the defining section on the said jurisdiction, simply begs the question. To ascertain the parameters of the Labour Court's jurisdiction a litigant must closely examine an Act - the LRA - consisting of 214 sections and ten lengthy schedules. This is an impossible task for a legal novice and a daunting one for a legal practitioner. It is therefore not surprising that cases relating to the jurisdiction of the Labour Court are fast becoming legion.

> One would expect that a court bearing the stature of the Labour Court, which has Judges with special expertise hearing cases in the ever burgeoning field of labour law, would have its jurisdiction more simply and precisely defined than is presently the case.'

4.3. **Matters raised by Zondo JP**

In *Langeveldt v Vryburg Transitional Council & others*,[11] Zondo JP refers at [22] to the "unsatisfactory state of affairs which various statutory provisions have produced." At [23]:

> " An examination of the law reports over the past four years when the Labour Court became fully operational reveals a number of employment and labour matters which have come before various High Courts. In most of those cases the High Courts have been confronted time and again with the question of whether they had jurisdiction in such matters despite the existence of the Labour Court or whether only the Labour Court had jurisdiction in such matters. A reading of those cases clearly reveals the jurisdictional complexities which the present state of the law has produced."

The learned judge then proceeds to discuss a number of cases that illustrate the difficulties arising from the overlap in jurisdiction between the High Court and Labour Court.. He concludes at [65] and [66] that the new labour legislation does not effectively obviate the deficiencies of the old 1956 LRA:

> "[65] One of the deficiencies in the dispute resolution dispensation of the old Act which the stakeholders in the labour relations field sought to bury when they negotiated the new dispute resolution dispensation under the Act was that that system was uncertain, costly, inefficient and ineffective. Through the new system with its specialist institutions and courts which are run by experts in the field, the stakeholders and Parliament sought to ensure a certain, efficient, cost-effective and expeditious system of resolving labour disputes. The fact that the High Courts also have jurisdiction in employment and labour disputes completely undermines and defeats that very important and laudable objective and thereby undermines the whole Act.

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[10] (2001) 10 HC 1.1.1.
[11] (2001) 5 BLLR 501 (LAC).

> [66] To my mind, to allow this state of affairs to continue is illogical and makes no sense, especially as our country does not have an abundance of human and financial resources. As a country we should use our resources optimally. There should only be a single hierarchy of courts which have jurisdiction in respect of all employment and labour matters. If such disputes are required to be dealt with by a superior court of first instance, the appropriate court to deal with them is the Labour Court. If they are not required to be dealt with by a superior court, they should be dealt with by one or other of the specialist institutions which have been specially created by the legislature to deal with employment and labour disputes."

The learned Judge-President then proposes that the legislature and other organs of government consider the ousting of the High Court with regard to all employment and labour disputes:

> "[67] In the light of all the above I am of the opinion that serious consideration should 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 High Courts may presently have in employment and labour disputes be transferred to the Labour Court and all such jurisdiction as the Supreme Court of Appeal may have in employment and labour disputes be transferred to the Labour Appeal Court. The objective would be that there would only be one superior court - the Labour Court - which has jurisdiction to deal with employment and labour matters or disputes as a court of first instance and that appeals from such court would only lie to the Labour Appeal Court as a court of final appeal except in respect of constitutional issues where a further appeal would lie to the Constitutional Court."

4.4. **John Grogan: The jurisdictional jigsaw of section 191(5)**

Although not directly related to the topic of this treatise, it is worthwhile to refer to the comments of John Grogan in *Jurisdictional jigsaw,*[12] about another jurisdictional problem, namely that related to section 191(5), wherein, subsequent to an unresolved conciliation, a dispute may be referred to either arbitration or to the Labour Court. The choice lies entirely with the interpretation of the nature of the dispute by the applicant employee. As stated by Grogan:

[12] Employment Law, April 2000 Vol.16 No. 2.

> "Before the Labour Relations Act 66 of 1995 was promulgated on 5 November 1996**,** it was predicted in this journal that section 191(5) *would create the kind of jurisdictional puzzle that the drafters of the Act had set out to avoid*. Section 191 deals with disputes about dismissals. …[if] the dispute remains unresolved, the CCMA must arbitrate the dispute at the request of the employee if he or she "has alleged" that the reason for the dismissal "is related to the employee's conduct or capacity" (unless the conduct concerned involves participation in an unprotected strike), or because the employer made the continuation of the employment relationship intolerable, or if the employee does not know the reason for the dismissal. On the other hand, a dismissed employee "may", according to section 191(5)(b), refer the dispute to the Labour Court if he or she has alleged that the reason for the dismissal is "automatically unfair", based on the employer's operational requirements, related to his or her participation in an unprotected strike, or because of the enforcement of a closed shop agreement." [Author's emphasis]

We quote this passage at length since, as we shall see, the next "jurisdictional puzzle" facing the applicant employee "may" be a choice between High Court and Labour Court, and where an inconsiderate choice would have more serious consequences.

The question arises whether the "choice" the applicant has to make, is not already established by the description of the dispute referred to conciliation. Or, whether it were even required to refer the dispute to conciliation before proceeding to adjudication in the Labour Court. Referring to the case of *NUMSA v Driveline Technologies & another,*[13] Grogan points out the consequences of section 191 at Labour Court level:

[13] [2000] 1 BLLR 20 (LAC).

> " Had *Driveline Technologies been an ordinary civil case*, the appeal would have turned merely on whether the judge *a quo* had properly exercised his discretion to disallow the amendment. However, because the matter fell under the LRA, another avenue was open to the company. It argued, *inter alia*, that the union was precluded from amending its case to plead an automatically unfair dismissal because the union had not referred a dispute about an automatically unfair dismissal to conciliation. Since reference of a dispute to conciliation is a precondition to the adjudication of that dispute, it followed that the Court lacked jurisdiction to entertain the dispute. Landman J agreed with this argument. The three-man bench of the Labour Appeal Court (Zondo AJP, Conradie JA and Mogoeng AJA) did not." [Author's emphasis]

The LAC decision in this matter established the principle that the description of a dispute may be altered, or adjusted, after an unresolved conciliation. Its relevance to the topic of this treatise is whether a judicious change of description may then transfer the matter to the High Court. Although the writer has no knowledge of such an event being recorded, it is not inconceivable that it could occur under the provision of section 157(2).

In *Mgijima v Eastern Cape Appropriate Technology Unit & another,* (see 5.5) van Zyl J comments at 300G on the apparent ambiguity contained in section 191(5), implying that the section does not grant a licence to change to a forum outside the labour judiciary.

> "It should be pointed out that although the word 'may' is used in s 191 of the Act, it does not mean that the party concerned is given the option to another method of dispute resolution, but merely means that he has the right, should he wish to take the matter further, to proceed to that forum. (See Paper Printing Wood & Allied Workers Union v Pienaar NO & others 1993 (4) SA 621 (A) at 640A; (1993) 14 ILJ 1187 (A).)"

4.5. **The issues of contention**

The jurisdictional issues raised by Zondo JP and the learned authors above, as well as others, may be categorised as follows.

(a) Constitutional issues.

(b) Urgent applications.

(c) Delictual matters.

(d) Review of pre-1995 LRA matters.

(e) Law of contract.

(f) Dismissals being unconstitutional or unlawful.

(g) Employment benefits.

(h) Harassment and discrimination.

(i) Agency shop agreements.

(j) Promotion.

(k) Changes to conditions of employment.

(l) Transfer of employees.

(m) Refusal to appoint job applicants.

(n) Eviction.

These issues will be discussed in the ensuing chapters. A clear demarcation of cases within the above categories is not possible, and a selection of category will be made according to the most significant issue under consideration.

Chapter 5. Constitutional issues and interpretation of statutes

5.1. Fundamental rights in the Constitution

The interpretation of the stipulation on concurrent jurisdiction in section 157(2) of " in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution " gave, in essence, rise to almost all the disputes on the concurrent jurisdiction of the Labour Court and High Court. In particular, the fundamental rights under consideration are those relating to the following sections in the Constitution:

5.1.1. Labour relations

> 23. (1) Everyone has the right to fair labour practices.

The obligation to enact the rights under section 23 are contained in subsections (5) and (6):

> (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).

These obligations refer specifically only to *collective bargaining and the protection of unions ensconced in the collective agreements.* There is no clear indication in this section to enact "the right to fair labour practices."

The other constitutional principle relied upon in labour disputes relate to administrative justice:

5.1.2. Just administrative action

> 33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

The obligation on the legislature to enact these rights is given in subsection (3):

> (3) National legislation must be enacted to give effect to these rights, and must -
>
> a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> c. promote an efficient administration.

5.1.3. **High Courts**

The jurisdiction of the High Court is designated in section 169 of the Constitution:

> 169. A High Court may decide -
>
> a. any constitutional matter except a matter that -
>
> i. only the Constitutional Court may decide; or
>
> ii. is assigned by an Act of Parliament to another court of a status similar to a High Court; and
>
> b. any other matter not assigned to another court by an Act of Parliament.

Of relevance to the topic of this treatise are subsubsection 169.a.ii. and subsection 169.b. The question will arise whether "another court of a status similar to a High Court, " i.e. the Labour Court, is unambiguously assigned exclusive jurisdiction by the LRA to hear particular matters.

Should any law or regulation be found to be inconsistent with the Constitution the relevant court must apply section 172(1)(a) thereof. It provides:

5.1.4. **Powers of Court in constitutional matters**

> 172 (1) When deciding a constitutional matter within its power, a Court -

a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

b. …

(2)

a. The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

b. …

As the quoted section draws no distinction between courts there should be, in principle, no impediment to any court to entertain violations of constitutional principles in the workplace, except where an Act specifically assigns exclusive jurisdiction to a court.

A dispute on the constitutionality of any part of the LRA may have to be referred to the Constitutional Court. A claim for damages arising from the infringement of a constitutional right may even be referred directly to the Constitutional Court. Such a claim will be scrutinised for the availability of another forum to entertain the claim.

In *Fose v Minister of Safety and Security* [14] Kriegler J concludes at [99] that statutory and common-law remedies, as embedded in the LRA, for example, may be sufficient for such a purpose:

[14] 1997 (3) SA 786 (CC); 1997 (7) BCLR 861.

> '[99] There are powerful reasons for not excluding common-law and statutory relief from the ambit of s 7(4)(a). *Many recent statutes such as the Labour Relations Act seek to codify constitutional rights, and are expressly designed to provide suitable relief for the infringement of constitutional rights*. It would undermine the best efforts of the Legislature to exclude these remedies from a court's arsenal of remedial options. In the case of the final Constitution, the indications are more compelling, and I would have thought conclusive, that the drafters had no intention of excluding common-law and statutory remedies from the remedial scheme. [Author's emphasis]

The question that will arise in the discussions of the cases that follow is whether the LRA alone makes sufficient provision for the protection of those fundamental rights, in particular if they are not directly related to the workplace. This question lies at the heart of the jurisdictional concurrence of the High Court and Labour Court.

The various interpretations of the above sections will be discussed in the cases that follow in the body of this treatise. This chapter, in particular, will consider the specific diversities in interpretation.

Section 157(2) of the LRA expresses the entrenched superiority of the Constitution in determining the concurrent jurisdiction of the Labour Court with the High Court. This section relates to two main considerations, viz. the violation of fundamental rights in labour matters and the role of the State as employer. The significance of these considerations was emphasised by the amendments to this section by s14 of Act no. 127 of 1998 to introduce further certainty to its application.

We consider a number of cases where the constitutionality of a labour matter was raised.

5.2. ***Hoffmann v South African Airways***

The matter of *Hoffmann v South African Airways*[15] was heard in the Constitutional Court on 18 August 2000 before Ngcobo J.

In September 1996 the appellant, Mr Hoffmann, applied for employment as a cabin attendant with SAA. After being refused employment he unsuccessfully challenged the constitutionality of the refusal to employ him in the Witwatersrand High Court. The jurisdiction of the court was not raised.

The application was brought on the grounds that the refusal constituted unfair discrimination, and violated his constitutional right to equality, human dignity *and fair labour practices.*

The appeal was upheld and SAA was ordered to offer to employ Mr Hoffmann as a cabin attendant.

5.3. ***Perumal v Minister of Safety and Security & others***

In this matter[16] an application was brought to declare the transfer of the applicant as being unconstitutional and unlawful. The jurisdiction of the court was raised as a point *in limine.* Pillay J concluded that the transfer in this case was disciplinary action as contemplated in Item 2(1)(c) and that the dispute should have been referred to arbitration. The court accordingly had no jurisdiction to hear the dispute.

Although the jurisdiction of the High Court was not raised, the learned judge gives an informative summary on the constitutional implications of section 157(2). At [5]:

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[15] (2000) 21 *ILJ* 891 (W).
[16] (2001) 10 LC 1.1.11

> "Subsection 157(2) confers jurisdiction on the Labour Court to hear any dispute about the violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). The fundamental constitutional rights that may be adjudicated in terms of this subsection *are not restricted only to the labour rights referred to in section 23 of the Constitution. "* [Author's emphasis]

Furthermore, at [6]:

> "The element that brings a constitutional rights dispute within the purview of the Labour Court and not any other court in terms of the LRA, is the connection between a violation of rights and employment, labour relations and labour law "

At [7] the learned judge analyses the purpose of each paragraph in section 157(2):

> "Each paragraph has a distinct purpose. Paragraph (a) ensures that employment in the private sector is covered. It also enables effect to be given to the horizontal application of the constitutional right. Paragraph (b) manifests an appreciation for the complexity of the State acting as an employer. Its actions or conduct which could be the subject of a dispute, could be both executive and administrative. This paragraph enables both types of actions or conduct to be adjudicated before the same forum. It also minimises jurisdictional disputes as to whether the actions or conduct are in the executive or administrative.
>
> Paragraph (c) enables the Labour Court to adjudicate in matters involving employment and labour legislation other than the LRA, ie Basic Conditions of Employment and the Employment Equity Laws. As each paragraph has a distinct purpose it can stand independently of the others. The effect of each paragraph individually is enabling, logical and consistent with the primary objectives of the Act [LRA]. "

The question arises: If the Labour Court has specific powers to grant the relief sought in the High Court *for a violation of fundamental rights*, whether the High Court must refer the matter to the Labour Court? This aspect, as well as the impact of the State as employer, was considered in the following cases:

5.4. ***Mcosini v Mancotywa & another***

In this matter[17], brought before the High Court of Transkei, the applicant, who was the town clerk of Lusikisiki Municipality , was suspended from his duties with pay, pending the outcome of a disciplinary hearing by the mayor of Lusikisiki..

The applicant argued that the High Court did have jurisdiction in this matter since the Labour Court could not grant the relief sought in this matter (lifting of the suspension) as "the LRA was only concerned with trade union matters and not individual employees." Alternatively, the applicant claimed to be an employee of the state as municipalities constituted part of the third tier of government and therefore the court had concurrent jurisdiction with the Labour Court. Furthermore, and alternatively, the matter concerned a constitutional issue as the applicant alleged that the actions of the respondents *violated his fundamental right to just administrative action.*

Miller J first ruled that the state, as indicated in section 157(2) of the Act, was not the employer of the applicant and consequently that this section was not applicable in this matter. The learned judge also states at 1417C:

> "The fact that these actions of an employer in suspending an employee may violate various of the employee's fundamental rights does not alter the nature of the matter or the causa of the action which, certainly in this matter, remains a labour matter with the causa being the suspension of the applicant. The exclusive jurisdiction of the Labour Court cannot be avoided or side-stepped by alleging that a fundamental right, other than the right to fair labour practices, has been breached. The argument that this court has jurisdiction to hear this matter because it concerns a constitutional issue must therefore also fail."

Furthermore, at 1417G the learned judge states:

> "Because s 157(2) of the Act is not of application in this matter and because the relief sought in this matter can be granted by the Labour Court, this court does not have jurisdiction to grant such relief."

The above judgment pronounces that

[17] (1998) 19 ILJ 1413 (Tk).

(a) municipalities are not State employers;

(b) .even where fundamental rights, such as the right to just administrative action, are violated, the Labour Court, by virtue of its power to grant the relief sought, retains exclusive jurisdiction.

Comment:

(a) The facts and arguments in the above case are similar to those in *Vukaphi & others v Mayor of Lusikisiki Transitional Local Council & another* [18] where Miller J gave a similar ruling, rejecting the jurisdiction of the High Court.

(b) The Labour Appeal Court in *Langeveldt v Vryburg Transitional Council & others* (see 4.3) determined that local councils are indeed organs of state. It was, however, agreed by all parties that the LAC did have jurisdiction to hear the matter. Whether the HC had concurrent jurisdiction to hear the matter remains an open question.

In this matter [*Mcosini]* town councils must be considered as constituting the third tier of government and as such act as governing bodies of municipalities. Municipal employees are therefore appointed and employed by their town council, which would make them employees of the state at the third tier of government.

.

(c) In this treatise it will be shown that, despite the Labour Court having powers to grant the relief sought, such relief has also successfully been sought in the High Court.

5.5. ***Mgijima v Eastern Cape Appropriate Technology Unit & another***

[18] (1998) 7 HC 1.1.12.

In this matter[19] brought before the High Court of the Transkei Division, van Zyl J gives an exhaustive analysis of the constitutional principles affecting concurrent jurisdiction. As the learned judge deals comprehensively with most jurisdictional aspects, we shall analyse the decisions of the learned judge in detail.

The employee applied to the High Court for a declaratory order that his dismissal was an unfair labour practice in terms of Labour Relations Act 66 of 1995 and unconstitutional in terms of the Constitution 1996, and ancillary relief. [It must be noted that an application was brought before the High Court which was based on a provision in the LRA]

The facts of the case are summarised in the headnote at 292B–D:

> The applicant employee had been dismissed for misconduct by the first respondent, a statutory body over which the second respondent, the Premier of the Eastern Cape, exercised executive authority. In an application to the High Court the employee submitted that the termination of his employment amounted to an unfair labour practice and a procedurally unfair administrative action and as such constituted a violation of his entrenched rights contained in ss 23 and 33 of the Constitution 1996, and that the effect of s 157(2) of the LRA 1995 was that the High Court retained its jurisdiction in respect of the constitutionality of the actions of the state in its capacity as an employer. The respondents contended that the LRA conferred exclusive jurisdiction on the Labour Court to deal with unfair dismissals**.**
>
> The court dealt with the matter on the basis that the first respondent was an organ of the state and that the employee was a state employee for purposes of s 157 of the LRA."

The respondents raised a point *in limine* that the court did not have jurisdiction to hear the matter. At 296A-D the learned judge summarised the required preliminaries in action proceedings in that the onus of proving jurisdiction rests on the applicant. If no objection is raised against jurisdiction the court may raise it *mero motu.* (See also *Runeli v Minister of Home Affairs* in 10.1.)

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[19] (2000) 21 *ILJ* 291 (Tk).

The first respondent argued that the applicant's case was one of unfair dismissal specifically dealt with in chapter 8 of the LRA.

The applicant's response was that his dismissal amounted to an unfair labour practice and a procedurally unfair administrative action. These two unfair actions constituted a violation of the rights entrenched in sections 23 and 33, respectively, of the Constitution. On these grounds and with the State as employer, section 157(2) of the LRA ensures concurrent jurisdiction for the High Court in this matter.

The court decided to consider first the following two *hypothetical* examples:

(a) Whether the dispute about the fairness of a dismissal is a `matter' that is to be determined by the Labour Court.

(b) Whether such a dispute can also form the basis of a constitutional matter as envisaged by section 157(2) of the LRA.

The court's final decision on these two questions is affirmative for (a) and negative for (b). We now discuss the reasons for the court's decision.

With respect to example (a) the learned judge states at 302A–B:

> As indicated above, the applicant's case in the present matter is that his dismissal was unfair, which is denied by the first respondent. The dispute between the parties is consequently one as envisaged by s 191 of the Act which section provides for a dispute resolutive procedure that includes conciliation, arbitration and the Labour Court. The Labour Court will either act as a court of review (ie after arbitration and in terms of either s 145 or 158(1)(g) or as a court of first instance in terms of s 191(6)). Accordingly, a dispute about an unfair dismissal is a 'matter' as envisaged by s 157(1) of the Act and the first question must therefore be answered in the affirmative."

With respect to the second question, the learned judge emphasises the type of interpretation to be followed in analysing the intention of the legislature, specifically with regard to section 157(2) of the LRA. We deal with the various judicial considerations of this case in the following sequential paragraphs:

5.5.1. **The jurisdiction of the High Court with regard to violations of fundamental rights**

In this regard, section 101(3) of the Interim Constitution specifically confers a limited constitutional jurisdiction on the High Court. Section 103 deals with "other courts," but does not specifically confer constitutional jurisdiction on those courts. Section 169 (see 5.1.3) of the Final Constitution contains the same stipulation in modified form. Van Zyl J elaborates on this aspect at 302F–G:

> "Section 101(3) confers limited constitutional jurisdiction on the High Court which includes 'an alleged violation of any fundamental right entrenched in Chapter 3' and 'any dispute over the constitutionality of any executive or administrative Act'. Section 103 deals with 'other courts' (which would include the Labour Court) and *does not expressly confer any constitutional jurisdiction on such courts*. On the basis of the aforegoing provisions 'other courts' have in the absence of an Act of parliament conferring such jurisdiction been found to have jurisdiction to enquire into any alleged violation of a fundamental right. (See for example Mendes & another v Kitching NO & another 1996 (1) SA 259 (E) and Port Elizabeth Municipality v Prut NO & another 1996 (4) SA 318 (E).)" [Author's emphasis]

5.5.2. **The jurisdiction of the Labour Court with regard to violations of fundamental rights**

According to the learned judge, at 302H, such jurisdiction is conferred on the Labour Court by virtue of the LRA:

> "*The effect of s 157(2) is to confer limited constitutional jurisdiction on the Labour Court*. It is clear upon a reading of s 101(3) of the interim Constitution and s 157(2) of the Act that their wording is identical save to the extent that with regard to the Labour Court it is limited to constitutional issues arising out of the employer-employee relationship where the state is the employer." [Author's emphasis]

5.5.3. **Could the High Court be ousted by a provision of the Constitution?**

This would be the case if an Act of Parliament assigns a specific matter to another court. The learned judge states at 302I:

> "In terms of s 169 of the final Constitution the High Court may decide constitutional matters, save for those which are reserved for the exclusive jurisdiction of the Constitutional Court as well as 'any other matter not assigned to another court by an Act of Parliament' "

5.5.4. **May any competent court be approached where a fundamental right is violated?**

Section 38 of the Constitution provides that a "competent court" may be approached for any violation of a fundamental right. The learned judge refers to this section at 302A–B:

> "The enforcement of charter rights are dealt with in s 38 of the final Constitution:
>
> 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights.' "

5.5.5. **Which court must be approached for a violation of section 23?**

The long title of the LRA specifies the "competent court" to hear labour disputes subservient to "section 27" [sic. Should be section 23] of the Final Constitution. In this regard the learned judge states at 303B–C:

> "It is stated in the long title to the Act that its intention is, inter alia, 'to give effect to section 27 of the Constitution . . . to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration' and 'to establish the Labour Court and Labour Appeal Court as superior Courts with exclusive jurisdiction to decide matters arising from the Act'"

Comment: It must be noted that there is only reference to section 23. (Section 23(1) states that "Everyone has the right to fair labour practices.") Section 33, the right to "Just administrative action," does not feature as being assigned to a specific competent court.

5.5.6. **The Labour Court as a court of competence**

This is made clear at 303I–304A:

> "Having regard to the aforegoing provisions of the Act, there is no doubt that the Labour Court and the Labour Appeal Court are courts of law with judicial authority in terms of the final Constitution (s 165(1)). Moreover, it functions as such on the same level in the hierarchy of courts such as the High Court. It is a superior court with the same status as the High Court. The powers of the court are in most respects similar to those of the High Court. Clearly, in my view, and having regard to the aforementioned provisions and the general scheme of the Act, it was the intention of the legislature in passing the Act to create a specialist court with exclusive jurisdiction in respect of those matters which are to be determined by it."

5.5.7. **It was the purpose of the legislature to create a specialist court.**

The learned judge affirms "that it was the clear intention of the legislature to create specialised fora to deal with labour related matters wherever the Act provides for specific dispute resolution procedures." (At 306A) In support of this view, the learned judge quotes from Du Toit et al[20] on the approach to be followed in interpreting the contents of the LRA:

> " 'By explicitly endorsing a purposive approach, the Act modifies the common law of interpretation of statutes, at least in so far as the interpretation of this Act is concerned. No longer are the objects of the statute simply textual aids to be employed where the language of the statute is ambiguous or obscure. Rather, they must inform the interpretive process from its inception. The Act, in other words, must be read in the light of its objects.
>
> A further effect of the interpretation clause is privilege [sic] the objects of the Act in the hierarchy of "rules' governing the interpretation of statutes.. Thus, where a particular provision of the Act is capable of two mutually destructive interpretations, one which advances the objects of the Act, and the other which respects a "presumption' of interpretation (for example that the legislature did not intend to alter the common law more than is necessary), the courts must, all other things being equal, follow the mandate given to them in the interpretation clause and adopt the former interpretation.

[20] D du Toit *et al*, *The Labour Relations Act of 1995* Butterworths 2nd ed 1998.

> The purposive approach is not unfamiliar to our labour law jurisprudence. The Industrial Court and Labour Appeal Court employed it liberally in their construction of the Labour Relations Act, particularly when giving content to the unfair labour practice concept.' "

5.5.8. **Unfair dismissal or violation of fundamental right?**

That these two actions constitute the same unlawful action is affirmed by the learned judge at 307I–308A:

> .Whether the applicant's case is viewed as a dispute about an unfair dismissal or as a violation of a fundamental right, it has its origin in precisely the same right, ie the right to fair labour practices as enshrined in s 23 of the final Constitution. It is clear from the provisions of the Act that the concept of fair labour practices is central to both the purpose and the substance of the Act. As the long title as well as s 1 of the Act clearly shows, the purpose and intent of the legislature was to give effect and content to the right to fair labour practices."

5.5.9. **A distinction may lead to `forum shopping'**

If a distinction is drawn between unfair dismissal and a violation of a fundamental right it may lead to "forum shopping." At 308C:

> "In my view it could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter under the provisions of s 157(2) of the Act. In my view it would run counter to the purpose and objects of the Act with which I have dealt earlier in this judgment. To conclude otherwise would mean that the High Court is effectively called upon to determine a right which has been given effect to and which is regulated by the Act. To hold otherwise would be to ignore the remainder of the provisions of the Act and would enable the astute litigant simply to bypass the whole conciliation and dispute resolution machinery created by the Act. This may give rise to 'forum shopping' simply because it is convenient to do so or because one of the parties failed to comply with the time-limits laid down by the Act as contended by the first respondent in the present matter."

5.5.10. **Violation of the right to just administrative action**

It was commented by the author in 5.5.5 that section 33, the right to just administrative action, is not referred to in the long title of the LRA. The applicant

sought, *inter alia*, an order declaring that the decision of the respondent is "unconstitutional and inconsistent with provisions of ss 23 and 33 of the Constitution…" Would a violation of section 33 fall outside the ambit of the LRA? The learned judge is of the opinion that it does not. At 309C–D:

> "As indicated, it is also alleged by the applicant that the actions of the first respondent constitute a violation of his fundamental right to just administrative action. This in my view does not change the fact that this matter is concerned with a labour dispute as contemplated by the Act. It would, on the applicant's case, be equally appropriate to allege that his fundamental right to fair labour practices was infringed. As stated, procedural fairness as raised by the applicant in the present matter forms part of the right not to be unfairly dismissed. Further, as I will indicate hereunder, the rights entrenched in s 33 of the final Constitution have been given effect to in the Labour Court's jurisdiction to review governmental action which falls within the exclusive jurisdiction of the Labour Court. *Accordingly, the argument that this court has jurisdiction to hear this matter because it concerns a constitutional issue must therefore fail."*[Author's emphasis]

5.5.11. **The High Court does not have jurisdiction in this matter**

In the final analysis, at 309D, the learned judge dismisses the argument that the court *in casu* has jurisdiction because the matter concerns a constitutional issue.

5.6. **Other cases**

5.6.1. ***POPCRU v Minister of Correctional Services & others***

In contrast to matters brought to the High Court on the basis of a violation of fundamental rights in the workplace, an urgent application was brought in the above case[21] to the Labour Court on the same principle. The application relied on section 157(2) of the LRA, which grants concurrent jurisdiction to the Labour Court to intervene where fundamental rights of individuals are threatened by the state.

The Police & Prisons Civil Rights Union ("POPCRU") sought an urgent interim interdict in the Labour Court against the first respondent from proceeding with a

[21] (1999) 8 LC 1.8.1; (1999) 20 ILJ 2416 (LC).

disciplinary enquiry against certain of its union members. Previously the first respondent had launched an application for certain interdictory relief against 34 individual employees and members of the union in the Natal Provincial Division of the High Court.

The Court considered whether it was entitled to intervene prior to the hearing of a disciplinary enquiry against the union members. It found that the Labour *Court could intervene in the same circumstances as the High Court* could, namely only if in the particular circumstances a grave injustice might result. The Court concluded that if it did not grant the relief sought it would lead to grave injustice and that justice might not by other means be attained.

At [59] Jali AJ concludes:

> "[59] I do believe that intervention by this court will be appropriate where the unreasonableness of the action which the state intends to take is so gross that it could be inferred that it is acting mala fides or with an ulterior motive. As it might be inferred in this case. Accordingly, I believe that the provisions of s 157(2) of the Labour Relations Act call for me to intervene in circumstances where the fundamental rights of individuals are threatened by the state. The very state which in terms of s 7(2) of the Constitution is expected to respect, protect, promote and fulfil the rights in the Bill of Rights."

5.6.2. ***Coetzee v Comitis & others***

In this matter [22] the jurisdiction of the High Court was not raised. The court dealt with the constitutionality of certain rules enforced by the employer (a football club) relating to the release of an employee (a soccer player) from such club to be able to go and be employed by (play for) another employer (another club). A declaratory order was given on 6 December 2000 by Traverso J with Ngwenya J concurring. It was declared that "the constitution and regulations of the National Soccer League are inconsistent with the Constitution and invalid to the extent that players whose

[22] 2001 (1) SA 1254 (C).

contracts with clubs have terminated are not entitled to claim a free transfer and/or to be declared a free agent."

The matter concerned two issues germane to labour practices, namely the transfer of employees and the expiry of employment contracts. In the case of soccer players these two issues go together. Although couched in legalistic terminology, the rules of the administration of professional soccer are reminiscent of the conditions of the Industrial Revolution. At 1271A–B the learned judge quotes Wilberforce J pertaining to a similar case heard in 1963 in Britain:

> " 'The transfer system has been stigmatised by the plaintiff's counsel [in the Bristish case] as a relic from the Middle Ages, involving the buying and selling of human beings as chattels; and, indeed, to anyone not hardened to acceptance of the practice it would seem inhuman, and incongruous to the spirit of a national sport.' "

It was the opinion of the court [Traverso J] that the rules governing the transfer of soccer players violated the most basic values underlying the Constitution.

Comment: Although clearly a labour matter, the hermetic rules and procedures of the National Soccer League created an impression of a law unto themselves. The matter could have been brought to the Labour Court via the CCMA, but this issue was not raised by any of the parties, nor *mero motu* by the court. The matter was purely considered on the basis of a violation of fundamental rights related to employment conditions.

5.6.3. ***Ntabeni v MEC for Education***

In *Ntabeni v MEC for Education,*[23] Mbenenge AJ considered the fundamental rights of the applicant, an educator, in seeking an order declaring the withholding of payment of her emoluments as unlawful. Judgment was given on 3 May 2001.

The respondent raised the issue that the court had no jurisdiction to entertain the application, The learned judge found that the court did have jurisdiction on the

basis that the claim was largely founded on sections 23 and 33 of the Constitution, and gave his reasoning as follows:

> "Upon a proper construction of section 157(1) of the Labour Relations Act of 1995**,** it is clear that the section being subservient or subordinate to the Constitution and other provisions of the Labour Relations Act, has to be construed as such. (See also *B Sekeleni v Premier of the Eastern Cape & Another*, unreported decision of the Full Court of this Division by Zilwa AJ (concurred with by Van Zyl and Maya JJ) under Case 1015/99.) Other than section 169 of the Constitution of the Republic of South Africa of 1996 which confers jurisdiction on the High Court in constitutional matters, section 157(2) to which section 157(1) subservient, does, in my view, take cognisance of the fact that the High Court has jurisdiction in respect of any other alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa of 1996, and arising from employment and from labour relations or any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as employer. "

5.6.4. ***Mbayeka & another v MEC for Welfare, Eastern Cape***

This case is discussed in 10.3. Of relevance to this chapter is the statement of the High Court in paragraph 19 that "the presence of the labour content in a dispute cannot be used as a basis for excluding the jurisdiction of the High Court by simply defining it as a labour dispute." The Court accepted that it had jurisdiction to hear the matter.

5.6.5. ***Fredericks v MEC Eastern Cape Province.***

This case, which is discussed in 10.4, was brought to the High Court on the grounds of a violation of the right to equal treatment before the law, and to lawful, reasonable and fair administrative action, as spelt out respectively in sections 9 and 33 of the Constitution. The Court found that it did not have jurisdiction to hear the matter.

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[23] (2001) 10 HC 7.1.1.

Chapter 6. Matters arising before 11 November 1996

The 1995 LRA came into effect on 11 November 1996. The transitional arrangements for any dispute, excluding strikes and lockouts, arising before that date is governed by item 21(1) of schedule 7 of the LRA:

> "Any dispute contemplated in the labour relations laws that arose before the commencement of this Act must be dealt with as if those laws had not been repealed."

As the Labour Court was only created with the 1995 LRA, such transitional arrangements would imply that the High Court retains jurisdiction in certain matters arising before 11 November 1996.

6.1. Review of Industrial Court decisions

Before the advent of the 1995 LRA decisions of the Industrial Court were reviewable by the then Labour Appeal Court, as well as by the then Supreme Court.[24] In terms of the transitional arrangement of 21(1) of schedule 7, these powers presently remain so with the High Court.

The Labour Court, being a specialist court in labour matters and equal in status to the High Court, would accordingly inherit those powers of review.

In *Food & Allied Workers Union & others v Scandia Delicatessen cc & another* an application to the High Court to convert an Industrial Court order into a High Court order was unsuccessful.[25] It was regarded as an indirect attempt to confer jurisdiction on the High Court on a matter for which provision had been made in the Labour Court.

Similarly, in *Communication Workers Union and another ("CWU") v Telkom SA Ltd & another* (see 2.2) , the High Court rejected jurisdiction with respect to a

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[24] See, for instance, *Babcock Engineering Contractors (Edms) Bpk v President Industrial Court & another* (1993) 14 *ILJ* 111 (T).
[25] (1999) 20 *ILJ* 1003 (D).

declaratory order when an attempt was made to make the order an ancillary to an application to review a decision of the Industrial Court.[26]
We consider a number of significant cases in detail.

6.1.1. ***PPWAWU v Pienaar NO & others***

The comments and decisions of Botha JA in *Paper, Printing, Wood and Allied Workers' Union (PPWAWU) v Pienaar NO & others* [27] are referred to in a number of cases involving disputes on current jurisdiction. These will be referred to in the appropriate sections of this treatise.

This Appellate Division hearing brought to finality the dispute about the powers of the Supreme Court (now High Court) to review proceedings of the Industrial Court. Under the LRA 1956 the Labour Appeal Court was established to review, amongst others, proceedings of the Industrial Court. A dispute arose on whether the Supreme Court also retained its common-law jurisdiction to review such proceedings.
Botha JA offers two reasons why the Supreme Court is not ousted:

1. ".No reason suggests itself why it would be difficult or inconvenient in practice to cope with a dual system of review in relation to proceedings in the industrial court. " (At 640G–H)

2. "… if it were to be held that the jurisdiction of the Supreme Court has been ousted, it would mean that the common-law grounds of review have been abrogated to the extent that they are wider than the statutory grounds. Since no reason can be found for such a result, it is unlikely that the Legislature intended to bring it about." (At 640J)

The learned judge of appeal concludes at 641A–B:

[26] (1999) 20 *ILJ* 991 (T).
[27] 1993 (4) SA 621 (A).

> "In the final analysis, I conclude that the considerations mentioned in the preceding paragraph must, by a narrow margin, carry the day. The Legislature's true intention is left in doubt by the fact that the pointers to an intention of the Legislature to replace the review jurisdiction of the Supreme Court with that of the Labour Appeal Court are sufficiently counterbalanced by the lack of pointers to an intention to reduce the ambit of the grounds of review. Consequently, the Legislature has not manifested a clear intention of curtailing the pre-existing rights of parties aggrieved by the decisions of the industrial court to seek redress by way of review. In the result, the review jurisdiction of the Supreme Court has not been ousted.

Although the powers of the Labour Appeal Court of the LRA 1956 has been replaced by those of the Labour Court of the LRA 1995, the above reasoning may be applied, *mutatis mutandis,* to the present jurisdictional dispute.

6.2. **Industrial Council agreements**

Collective agreements concluded before the commencement of the LRA 1995 are, according to item 13(2) of Schedule 7, deemed to have been concluded in terms of the LRA 1995.

6.2.1. ***Kritzinger v Newcastle Plaaslike Oorgangsraad & Others***

To facilitate some of the governmental changes subsequent to 1994, an Industrial Council agreement was promulgated for the transition to the Local Transitional Council ("TLC") system of government. This agreement, R5190 in Gazette 1257 of 12 November 1993, read with an industrial council circular setting out retrenchment policy and guidelines, intended to guarantee the employment rights of municipal employees. The agreement was promulgated in terms of section 48(1)(a) of the LRA 1956.

In *Kritzinger v Newcastle Plaaslike Oorgangsraad & Others* [28] the applicant sought an order in the High Court declaring his employment with the first respondent TLC to be redundant in terms of the Industrial Council agreement. The matter was

[28] (1999) 20 ILJ 2507 (N).

heard on 18 September 1998 and an order was made by the court on 28 June 1999.

The first respondent raised two points *in limine,* one being that the court did not have jurisdiction to adjudicate in the matter. In evaluating the argument of the first respondent, Patel JA (as he then was) referred to a number of principles underpinning any dispute on jurisdiction:

(a) Onus of establishing jurisdiction.

With regard to the above-named onus, the learned judge states at 2512D:

> "It is trite law that the applicant bears the onus of establishing that this court has jurisdiction. To that end the applicant must set out sufficient facts in his founding affidavit to justify a conclusion that this court indeed has jurisdiction: Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others 1974 (4) SA 362 (T) at 368H."

Comment: A difficulty arises if the applicant acts in good faith in accepting the court's jurisdiction and sees no need to justify such an assumption in its founding affidavit. It is generally unusual to raise the matter of jurisdiction of a High Court. Only in the event of the respondent objecting to the jurisdiction in its answering affidavit would the applicant be afforded an opportunity in its replying affidavit to counter the objection. To leave such objection for a point *in limine* without informing the applicant, either at a pre-trial conference or otherwise, would be highly prejudicial to the applicant in discharging its onus.

(b) Would the High Court have no jurisdiction if the same is enjoyed by the Labour Court?

The first respondent raised the point *in limine* that "this court has no jurisdiction since the same is enjoyed by the Labour Court." In response, the learned judge firstly pointed out that although the applicant was threatened with dismissal, he was in fact not dismissed, and nor was any residual unfair labour practice perpetrated. Accordingly, chapter 8 of the LRA 1995 was not applicable. The remaining consideration was whether the applicant's reliance on the Industrial

Council agreement and its associated circular was compelling enough to oust the jurisdiction of the High Court? The learned judge commented at 2513H:

> "In terms of s 19(1)(a) of the Supreme Court Act 59 of 1959, a provincial or local division of the High Court has jurisdiction -
>
> > 'over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance'.
>
> In terms of this provision, the court certainly has jurisdiction over this matter."

(c) Presumption against the ousting of the jurisdiction of a court.

The learned judge affirms at 2513 I the rule against the ousting of a court's jurisdiction:

> "Further, it is a well-established rule of statutory interpretation that there is a strong presumption against the legislature ousting the jurisdiction of a court of law and further, a clear legislative provision is required to displace this presumption: Lenz Township Co (Pty) Ltd v Lawrence NO & andere 1961 (2) SA 450 (A) at 455B."

(d) The enforcement of an Industrial Council agreement.

It was pointed out by the learned judge that the industrial council agreement was promulgated prior to the LRA 1995, and in terms of item 12 of schedule 7 of the LRA 95 it retains its own identity. A breach of such an agreement could be heard in a plethora of courts. The learned judge quotes Landman J in this respect at 2514B:

> " As was stated by Landman J in Bargaining Council for the Clothing Industry (Natal) v Confederation of Employers of SA & others (1998) 19 ILJ 1458 (LC); [1998] 9 BLLR 928 (LC) at 933B-D:

> 'An industrial council agreement promulgated under the LRA 1956 was enforceable in a number of ways. In the first instance a breach of the agreement, in law a piece of delegated legislation, constituted a criminal offence. This offence could be tried in the Magistrate's Court and on account of its concurrent jurisdiction, also in the High Court or Supreme Court as it was known (see s 53 of the LRA 1956). In certain circumstances civil action could be pursued particularly where the attorney-general declined to institute criminal proceedings. The breach of an industrial council agreement could also have constituted an unfair labour practice (see Rycroft & Jordaan A Guide to SA Labour Law (2 ed Juta) at 145). It was also possible to obtain a mandatory interdict in the High Court (see Industrial Council for the Building Industry (Transvaal) v All Construction (Pty) Ltd & another (1980) 1 ILJ 123 (W)).'

This decision was confirmed by the Labour Appeal Court in Bargaining Council for the Clothing Industry (Natal) v Confederation of Employers of SA & others E (1999) 20 ILJ 1695 (LAC)."

(e) Can Industrial Court agreements be considered as collective agreements?

The learned judge agreed with the applicant that the industrial council agreement was not a collective agreement. (See 2514A) This lent further support for the jurisdiction of the High Court to hear the matter.

In conclusion the learned judge ordered that the application be referred for the hearing of oral evidence on the facts submitted in the papers. The jurisdiction of the court was confirmed.

6.3. **Collective agreements**

The matter of *Faku v Fidelity Guards Holdings (Pty) Ltd* [29] was held before Whitehead AJ in the High Court, South East Cape Local Division. It involved procedural fairness in dismissal and the right to a disciplinary enquiry. The jurisdiction of the court was not disputed.

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[29] (1998) 7 HC 7.2.2.

On 25 March 1998 the court directed the respondent to convene a formal disciplinary hearing, in terms of a Recognition and Procedure Agreement concluded with the Transport and Allied Workers' Union for settlement of disputes, into the alleged conduct of the applicant which led to his dismissal from the employ of the respondent on 2 July 1996.

Comment: The dispute arose on the date of dismissal, which preceded the commencement of the LRA.

See also *IMATU v Northern Pretoria Metropolitan Substructure and others*, which is discussed in 7.1.2.

6.4. **Contractual disputes**

In *Gaylard v Telkom SA (Ltd)*[30] and *Ackron & others v Northern Province Development Corporation,* [31] Revelas J affirmed that the Labour Court did not have jurisdiction to determine disputes about the application or interpretation of a contract of employment concluded before the LRA 1995 came into effect. The High Court retains jurisdiction in such matters and would only acquire concurrent jurisdiction with the Labour Court under section 77(3) of the BCEA.

6.5. **Appeals to the Labour Appeal Court**

In *Richard Sodo & 26 others v Government of the Eastern Cape & others* [32] counsel for the applicants, in seeming desperation, invited the court to make a finding as to which forum should decide the matter. Nicholson JA replied (at [11]) that the court `does not give advice nor should it decide a matter falling outside its sphere of competence.'

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[30] (1998) 19 *ILJ* 1634 (LC).
[31] (1998) 7 LC 5.5.1.
[32] Labour Appeal Court case No NHE 28/2/1 21 September 1999, unreported.

The dispute arose after the applicants' employment was terminated pursuant to rationalisation of the public service on 31 January 1996. The relief was sought by virtue of the provisions of the Labour Appeal Court sitting as a tribunal in terms of the Special Tribunal Act 30 of 1995. This Act was passed in response to section 237(4) of the Interim Constitution, No 200 of 1993, which provides that:

> 4(a) The labour appeal court established by section 17A of the Labour Relations Act, 1956 (Act 28 of 1956), sitting as a special tribunal in terms of an Act to be passed by Parliament, shall be competent to determine any claim or dispute of right in terms of a law regulating as at 1 November 1993 employment in an institution referred to in section 236(1) and arising out of the implementation of this section and section 236.

The difficulty which the applicants encountered was that the Labour Relations Act 1956 was repealed by the Labour Relations Act 66 of 1995 and that it was, or no longer could be, possible to constitute an appeal court under the 1956 Act. The learned judge found (at [6]) that the relief sought was `clearly not an appeal from the Labour Court, nor has that Court reserved for the decision of this Court any question of law that arose in those proceedings as provided in the latter sub-section.'

The order made declared that the Court did not have jurisdiction to hear the application.

6.6. **Appeals to the Supreme Court of Appeal**

Although now only of historical interest, the *BTR Sarmcol* saga illustrates one of the jurisdictional perplexities resulting from the overlap of the provisions of the 1956 LRA with those of the 1995 LRA. The spate of industrial litigation, described in the SCA judgment in *Betha & others v BTR Sarmcol (A division of BTR) Dunlop Ltd*,[33] as the most protracted this country has ever known, finally ended up with the SCA hearing an appeal during September 1997 that was lodged from a Labour Appeal Court created in terms of the 1956 LRA. It is informative to chart the chronology of this dispute from Industrial Court ("IC") to SCA:

- Dismissal of striking workers on 3 May 1985.
- Application for reinstatement during July 1986.
- On 7 May 1986 the Minister refers the dispute to the IC. Came before IC in 1987 and application dismissed in September 1987.
- IC's decision taken on review to the Natal Provincial Division of the then Supreme Court. Court sets aside decision of IC.
- Appeal by employer to SCA dismissed and the matter remitted for hearing *de novo* before a newly constituted IC.
- Matter heard afresh before IC in May 1994. Claim for reinstatement abandoned and replaced by one for compensation.
- On 17 October 1994 the IC held against the workers. Appeal against IC's decision to the Labour Appeal Court. ("LAC"). [Reported in 1996] Appeal dismissed but leave granted to appeal to SCA.
- Appeal heard on 8 September 1998.
- On 5 March 1998 majority decision of five member Bench in favour of appellants.

The above matter exemplifies the need, as expressed by the Explanatory Memorandum appended to the Labour Relations Bill, for a LAC as a final court of appeal intended to "hear appeals from the Labour Court. The LAC is entitled to confirm, amend or set aside any decision of the Labour Court. *No appeal lies to the Appellate Division*."[34] [Author's emphasis]

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[33] (1998) 7 SC 1.11.16; [1998] 8 BLLR 993 SCA.
[34] Explanatory Memorandum 151.

Chapter 7. Urgent applications

Most of the cases involving disputes about jurisdiction arose from urgent applications. Earlier uncertainties concerning the jurisdiction of the Labour Court and the procedural delay in referrals to the CCMA, contributed to relying on the established procedures for urgent applications to the High Court.

7.1. Interim relief, interdicts or declaratory orders

Section 158(1)(*a*)(iii) states that the Labour Court may make any appropriate order including "an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act,".* According to Grogan[35] this indicates that the jurisdiction of the court to grant interim relief, interdicts or declaratory orders is not confined to disputes over which it might have final jurisdiction. Grogan further remarks that the scope of this power had not yet been discussed by the court. Such uncertainty raises the possibility of concurrence of jurisdiction with the High Court, particularly in delictual matters.

When seeking an interdict in the Labour Court, the court is committed to apply the same standards as the High Court. As stated by Selikowitz J.[36]

> "The well known requirements for the grant of an interdict are (1) a clear right or a right prima facie established though open so some doubt; (2) a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted; (3) a balance of convenience in favour of the granting of interim relief and (4) the absence of any satisfactory remedy."

An interim order granted in *Police & Prisons Civil Rights Union v Minister of Correctional Services & others* (see 5.6.1) relied on the contingency that the Labour Court could intervene in the same circumstances as the High Court could.

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[35] Grogan *Workplace Law* 287.
[36] See *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C) 714B—C.

It is noteworthy that in *Hultzer v Standard Bank of SA (Pty) Ltd* [37] the Court does not consider loss of income as a motivation for urgency, but that according to Mlambo J a threat of dismissal would provide a better chance of establishing sufficient urgency.[38]

7.1.1. ***NAPTOSA & others v Minister of Education, Western Cape & others***

In the above matter[39] a group of teachers sought a declaratory order in the High Court that a unilateral change in their service benefits constituted an unfair labour practice in violation of their rights in terms of section 23(1) of the Constitution. The court first had to consider whether it had jurisdiction to hear a matter where a violation of fair labour practices with respect to service benefits is alleged.

Conradie J concluded at 120A-B that the court did indeed have jurisdiction:

> "…, the Labour Court's jurisdiction is specific. *Unless, in terms of s 157(1), it has been given jurisdiction by the LRA or any other law, it has none*. As far as the subject-matter of a dispute is concerned, the Labour Court, broadly speaking, in the field of individual labour relations has jurisdiction over the areas of security of employment (unfair dismissal, unfair suspension and the failure to re-employ or reinstate) and unfair treatment in relation to work opportunities (promotion, demotion, training and benefits). The present dispute does not fall within any of these categories. It involves the validity of a clause in the teachers' re-employment contracts. And although the parties to the dispute are persons over whom the Labour Court would have jurisdiction (see ss 209 and 213 of the LRA), I must conclude that this Court has jurisdiction to deal with the subject-matter of the dispute."[Author's emphasis]

Having passed the jurisdictional hurdle to *hear the matter*, the court then had to decide whether it had the jurisdiction *to grant the relief* requested in the third claim as stated at 117H:

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[37] (1999) 20 *ILJ* 1806 (LC).
[38] See *University of the Western Cape Academic Staff Union & others v University of the Western Cape* (1999) 20 *ILJ* 1300 (LC) 1340A.
[39] 2001 (2) SA 112 (C).

> "A declaratory order that the unilateral change of service benefits of temporary educators in 1998 and 1999 constitutes an unfair labour practice in terms of s 23(1) of the Constitution of the Republic of South Africa Act 108 of 1996."

This claim is specifically directed at a provision in the Constitution. The applicants argued that in such a case an employee may, instead of relying on the provisions of the LRA, rely directly on the Constitution (At 120D–E). The employee may then "approach the High Court instead of the Labour Court to resolve a dispute which, by the formulation of the claim, would have been turned into a fundamental rights dispute." The learned judge expresses the right to this procedure at 120H–121A:

> "The High Court has the primary responsibility for the enforcement of fundamental rights. It has jurisdiction to pronounce upon all violations of fundamental rights. This is plain from s 169 of the Constitution. The qualification in s 157(2) of the LRA is intended to restrict the competence of the Labour Court to fundamental rights issues in the employment sphere. The applicants have 'alleged' a violation of their fundamental right to fair labour practices. It does not matter whether the claim is good or bad. That goes to the merits. If it appears from supporting information that the allegation is without substance a Court may already at the stage of the jurisdictional enquiry decide that the case cannot concern a violation of a fundamental right and decline to exercise jurisdiction. This is not such a case. In this case and, I would think generally, once the allegation has been made, the High Court would have jurisdiction. "

. The learned judge elaborates further at 122B–D on the objective of the LRA to amalgamate the enforcement of fundamental rights with a resolving of labour disputes:

> "It is now time to examine the policy considerations underlying the LRA to determine whether the relief claimed by the applicants under s 23 of the Constitution would be appropriate.

> Section 1 of the LRA declares that one of the primary objects of the Act is 'to give effect to and regulate the fundamental rights conferred by s 27 of the Constitution'. Section 27(1) of the interim Constitution was almost identical to the present s 23(1). Another primary object of the LRA is 'the effective resolution of labour disputes' (s 1(d)). One would expect the LRA, if it were true to its stated objectives, *to marry the enforcement of fundamental rights with the effective resolution of labour disputes*. This is exactly what it seeks to do. It provides mechanisms for the enforcement of such labour practices as the Legislature considers to be fair and the suppression of any labour practice considered to be unfair. " [Author's emphasis]

Having established the jurisdiction of the court to hear the matter, as well as to grant the relief sought, the court then had to determine whether the relief claimed by the applicants in terms of section 23 of the Constitution would be appropriate. At 125D the learned judge pronounces on the nature of a declaratory order:

> "A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent … A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past."

It was mainly for this reason, supplemented by other considerations, that a declaratory order was deemed inappropriate and the application rejected.

Jali J concurred.

Comment: It is worth noting that, once the jurisdiction of the court was established, the only consideration was whether the relief sought in terms of a declaratory order was appropriate. No further reference was made to constitutional rights or unfair labour practices.

7.1.2. ***IMATU v Northern Pretoria Metropolitan Substructure & others***

In *Independent Municipal and Allied Trade Union (IMATU) v Northern Pretoria Metropolitan Substructure and others* [40] Van Dijkhorst deals comprehensively with some of the major considerations underlying concurrent jurisdiction. Because of

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[40] 1999 (2) SA 234 (T).

the importance of this case and the frequent reference to it, we shall analyse it in detail.

a declaratory order was sought in the High Court by the applicant. In response to a point *in limine* by the respondent, claiming that the High Court did not have jurisdiction, Van Dijkhorst J considered whether the High Court could intervene where a statutory provision exists for arbitration.

In the headnote at 235A–B:

> "The applicant applied to Court for an order declaring the first respondent bound to comply with the terms and conditions of a collective agreement entered into by the parties, which was subject to the provisions of the Labour Relations Act 66 of 1995 … The respondents raised the point in limine that the Court had no jurisdiction to adjudicate upon the matter."

We shall follow the reasoning of the learned judge in sequence according to the headings below.

The learned judge first considered the provisions of both the Arbitration Act 42 of 1965 and the LRA.

(a) Does the Arbitration Act exclude the jurisdiction of the High Court?

The learned judge discusses this question at 237H–238B. Section 3(2) of the Arbitration Act provides for the High Court, on good cause, to set aside an arbitration agreement or to order that it shall not have effect in a particular dispute. In terms of this Act the jurisdiction of the High Court is therefore not excluded. In particular, the Arbitration Act did not repeal the common law pertaining to arbitration.

(b) Is the Arbitration Act excluded by the LRA?

According to section 146 of the LRA , the Arbitration Act does not apply to any arbitration under the auspices of the CCMA.

(c) Disputes about collective agreements are subject to the LRA.

In terms of item 13(2) of Schedule 7 to the LRA, all collective agreements concluded prior to the commencement of the LRA are deemed to have been concluded in terms of the LRA. (See 237A) This implies that the common-law powers of the High Court in respect of arbitrations have to be considered in terms of the LRA.

(d) The LRA prescribes arbitration as the final dispute resolution process.

Section 24 of the LRA requires that a dispute on a collective agreement must follow the route of conciliation and arbitration.

(e) May arbitration be circumvented by a referral to the High Court?

The learned judge comments at 238E that "Under the common law the court did not easily bypass an arbitration agreement…" and at 238F that "at common law an arbitration agreement was a bar to litigation of first instance in the courts of law." At 238H it is stated that "It is an inescapable characteristic of arbitration that (at least in first instance) it ousts the jurisdiction of a court of law to deal with that particular dispute."

(f) What if the collective agreement does not specify arbitration?

At 238I–J the learned judge states, "Where there is no such clause in the collective agreement section 24(2) equates that situation to the situation where there is one and s 24(4) and (5) lay down the same procedure in both cases." It follows that conciliation and then arbitration is the only route of dispute resolution with regard to collective agreements.

(g) Does arbitration in general exclude the ordinary courts?

It is the learned judge's contention, at 239B, that "wherever the Act [the LRA] provides for dispute resolution by arbitration, that concept in the context of the Act excludes resort to the ordinary courts of law for dispute resolution." The learned judge then proceeds to substantiate his averment.

(h) The LRA compels the parties to refer the dispute to the CCMA.

The learned judge states at 239G:

> "It would therefore be incongruous that a party can bypass the entire structure of the Act and institute proceedings in this Court as the applicant seeks to do. It is clear that the Act intends to compel parties to refer disputes to conciliation and if necessary to arbitration (or in some instances to the Labour Court)."

(i) The dispute has not yet even reached the Labour Court.

The learned judge comments at 239I:

> "Considerations such as these would be rendered nugatory if a party were permitted to move directly to the High Court with a dispute that could at this stage not be brought before the Labour Court as it was still subject to arbitration."

(j) Concurrent jurisdiction may give rise to forum shopping.

At 240C:

> "Concurrent jurisdiction may give rise to 'forum shopping'. This is evident in the present case. For unlike the applicant, the aggrieved members have followed the route of conciliation/arbitration and we have parallel cases about the same subject-matter. In addition concurrent jurisdiction may lead to conflicting irresoluble decisions of the Labour Court and High Court on the same issue."

(k) May the High Court intervene after arbitration?

It is made clear at 241A–C that the High Court's residual review jurisdiction over arbitrations is excluded by section 157(1) read with section 145.

(l) Is there a conflict between the LRA and the Supreme Court Act?

The learned judge replies at 241D:

> "Insofar as it may be argued that there is a conflict between the Act [LRA] and the Supreme Court Act 59 of 1959 pertaining to the jurisdiction of the High Court, the answer is to be found in s 210 of the Act which states that in such a case the provisions of the Act will prevail.

The learned judge furthermore interprets the use of the word `may' in section 24(5) of the LRA as follows:

> "The use of this word does not indicate that the party concerned has the option of another method of dispute resolution. It merely means that he has the right, should he wish to take the matter further, to proceed to that forum. (Compare Paper, Printing, Wood and Allied Workers' Union v Pienaar NO and Others 1993 (4) SA 621 (A) at 640A.)"

(m) The High Court does not have jurisdiction.

The learned finally concludes at 244C:

> "I hold therefore that this Court has no jurisdiction to adjudicate upon a dispute about the interpretation or application of a collective agreement as referred to in the Labour Relations Act 66 of 1995."

7.1.3. **Other cases.**

See also *Coetzee v Comitis & others* in 5.6.2..
Mgijima v Eastern Cape Appropriate Technology Unit & another in 5.5.

7.2. **Status quo relief**

Section 43 of the 1956 LRA granted relief in terms of "status quo" orders whereby temporary reinstatement of an employee was ordered pending the outcome of the dispute in terms of section 191 of the said Act. Status quo decisions by the Industrial Court were, however, reviewable by the High Court.[41] In the matter of *Fordham v OK Bazaars (1929) Ltd*,[42] Revelas J concluded that was sought was a status quo order for which no provision was made in the 1995 LRA and declined the relief sought. In later decisions the Court held that temporary reinstatement is permissible in appropriate circumstances.[43]

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[41] See *Babcock Engineering Contractors (Edms) Bpk v President Industrial Court & another* (1993) 14 *ILJ* 111(T).
[42] See *Fordham v OK Bazaars (1929) Ltd* (1998) 19 *ILJ* 1156 (LC).
[43] See, inter alia, *SA Chemical Workers Union & others v Sentrachem* (1999) 20 *ILJ* 1597 (LC); *NUM v Elandsfontein Collieries (Pty) Ltd (2)* Labour Court case no. J801/1998 and n 38.

In *University of the Western Cape Academic Staff Union & others v University of the Western Cape* [44] the confluence of Labour Court and High Court in granting interim relief is expressed by Mlambo J as

> "[11] The fact that the Labour Court is established as a court of law equal in status to a provincial division of the High Court must mean that the power given the Labour Court to grant urgent interim relief is not dissimilar to the power of the High Court to grant urgent interim relief. The absence in the Act of a provision similar to s 43 [1956 LRA] does not, in my view, mean that *the Labour Court lacks the power to grant urgent interim relief in dissimilar cases*."[Author's emphasis]

7.3. **Simultaneous applications to CCMA and to Labour Court**

Although not directly relevant to the question of concurrence between the Labour Court and High Court, the circumstances that led to a simultaneous referral to the CCMA and the Labour Court in *University of the Western Cape Academic Staff Union & others v University of the Western Cape supra* merits consideration.

In the said case, Mlambo J comments[45] : "In the SACCAWU matter Landman J stated, without considering the issue, that he was prepared to assume, for purposes of that judgment, that this court does in fact have jurisdiction to grant urgent interim relief pending the finalisation of the matter before another forum such as the commission."
Mlambo J furthermore comments at 1303A: "In certain circumstances the detrimental consequences of such conduct cannot be addressed by an award after arbitration or adjudication has taken place."

7.4. ***Olivier v University of Venda***

This case, in particular, illustrates the pros and cons of forum shopping when seeking interim relief.

7.4.1. **The facts**

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[44] n 38 1302I.
[45] n 38 1302C[46] *Olivier v University of Venda* Thohoyandu case no 3/2000.

Judgment in this matter was given by Preller AJ on 19 April 2000.[46] The judgment reflects on a number of issues germane to the implications of concurrent jurisdiction.

The applicant sought an order setting aside the decision of the Principal of the University of Venda to implement with immediate effect the recommendation of a disciplinary committee that the applicant be dismissed for misconduct, while awaiting the outcome of his appeal against that recommendation.

The applicant expressed the fear that it would taken an inordinately long time to finalise the appeal, during which time he would receive no income from the respondent. The judge referred to the unfairness of such a decision, remarking that if the respondent could delay the matter long enough, the applicant would be forced by economic realities to take up other employment. If the dismissal were not in order, such delay would result in a gross injustice.

The comments of the judge highlight an intrinsic difference in the approach of the two courts concerning dismissal pending appeal. The only authority that the respondent could find to support its contention that a dismissal is not suspended pending an appeal was contained in a passage from *Edgars Stores v SACCAWU & another*:[47]

> "Its [i.e. the union's] contention was that the dismissal did not become final until the internal appeal procedure had been exhausted, a submission which the commission and the Labour Court, correctly, rejected.' "

In contradistinction to this viewpoint, the judge averred that the common law rule as stated in *South Cape Corporation v Engineering Management Services* [48] be upheld:

> " …it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal…"

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[47] (1998) 19 *ILJ* 771 (LAC) 774F.
[48] 1977(3) SA 534(A) 544H--545A.

The judge subsequently ordered that the decision to dismiss the applicant be set aside and that the applicant be reinstated in his former position pending the outcome of the appeal against his dismissal.

7.4.2. **Significance**

The significance of the judgment lies therein that (i) the High Court heard a matter that could readily have been referred to the CCMA (Flow diagram 12 of the LRA) with possible review by the Labour Court and (ii) the contrasting opinions whether dismissal should be enforced pending appeal.

The applicant's circumstances and the Labour Court's reluctance to consider loss of income as grounds for urgency, clearly mitigates against seeking an urgent order in the Labour Court. Following the CCMA route is equally hazardous as referral to this body provides no assurance that dismissals for misconduct would be stayed pending internal appeal or referral to the CCMA. In *Hultzer v Standard Bank of SA (Pty) Ltd*, [49] for example, it was found that the Labour Court may grant urgent relief to dismissed employees pending resolution of disputes by CCMA, but only in exceptional circumstances.

7.5. ***Mireskandari v Minister of Home Affairs & others***

The jurisdiction of the High Court was not disputed in *Mireskandari v Minister of Home Affairs & others.*[50] The court had to consider whether the applicant had a right to be heard before a decision was taken to terminate his services with the University of Transkei and be deported from the country. The application succeeded with judgment given by Sangoni, AJ on 26 September 1997.

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[49] (1999) 20 *ILJ* 1806 (LC).
[50] (1998) 7 HC 7.2.1.

Chapter 8. The effect of delict on concurrence.

Soon after the Labour Court came into operation a number of cases was brought before the High Court involving acts of intimidation, assault and violence. These cases highlighted the jurisdictional confusion and conflict confronting the courts. The judgments in these cases established the Labour Court's prerogative to hear matters involving strikes.

The nature of the disputes may be classified as follows:

8.1. Seeking a High Court interdict against intimidation and related acts by striking workers.

In the cases discussed in the subparagraphs below, *Mondi Paper, Sappi, Coin Security* and *Fourways Mall* striking workers engaged in criminal acts and other acts of misconduct against non-striking co-employees. The High Court was approached for an interdict to restrain the striking workers from such acts.

8.1.1. *Mondi Paper (a Division of Mondi Ltd) v PPWAWU & others.*

This matter of *Mondi Paper (a Division of Mondi Ltd) v Paper, Printing, Wood and Allied Workers Union (PPWAWU)& others*.[51] was heard in the Durban and Coast Local Division before Nicholson J.

The applicant employer was engaged in wage negotiations with the first respondent union when a dispute was declared. The wage dispute was referred to the CCMA and the union notified the employer of its intention of proceeding with a strike. This notice was repeated, informing the employer that a strike would commence on a particular date. After the strike had commenced, the employer alleged that sabotage was taking place, that incidents were occurring during the course of picketing and that non-striking employees were being intimidated. The

[51] (1997) 18 *ILJ* 84 (D).

employer obtained a rule *nisi* in the High Court interdicting certain conduct of the union and other persons.

On the return day the court had to consider:

1. whether the High Court had jurisdiction or whether the Labour Court had exclusive jurisdiction; and
2. whether the action of the strikers constituted group conduct or whether the employer could identify the individual perpetrators.

The applicant submitted that the conduct of the strikers is ordinary delictual conduct which is within the jurisdiction of the High Court and that the onus to show that the High Court's jurisdiction has been ousted in indeed a heavy onus. Nicholson J concurred with the latter opinion.

After remarking at 88H that section 158 of the LRA,

> "…provides the powers of the Labour Court which are extremely wide and include the making of any appropriate order, including inter alia the grant of urgent interim relief, an interdict and an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the Act."

the learned judge stated at 90D - E:

> " The actions of the offending employees fall within the purview of the powers of the Labour Court. The incidents relating to the intimidation of non-striking employees at home are still examples of improper demonstrating in support of a strike. They are, moreover, necessary and incidental to a resolution of that dispute. In any event the notion that the Supreme Court should have jurisdiction for that limited purpose and that the other incidents which constitute improper picketing pure and simple should be referred to the Labour Court offends against the court's duty to avoid proliferation and multiplicity of court proceedings with their attendant costs."

With regard to the applicant's submission that the actions of the respondents should be regarded as group conduct, the learned judge stated at 92A:

> " Mr Wallis for the applicants has asked me to consider the respondents as a group whose group conduct is sought to be restrained and submitted, on that basis, that the fact that there may be individual members who had not perpetrated the acts complained of does not warrant a refusal of relief. I do not think, however, that the evidence before me is sufficient to establish membership of a group in the sense contended for. The only fact which is common to all the respondents is that they stayed away from work yesterday. The tender, to which I have referred, not to proceed further against any person who can be identified as innocent prior to the return date, is also in my view no answer to the problem. There is no justification for making an order against a person without proof of his complicity and then requiring him to establish his innocence."

Horwitz AJ agreed, stating at 93A:

> "It seemed to me that [the applicant] was arguing that a different standard of proof was applicable in interim interdicts against employees involved in these situations. Not surprisingly no authority was cited for such a startling proposition. The evil of intimidation of employees by striking workers and the unlawful blocking of transport to company premises can never be condoned. Juxtaposed against that evil is that of a court granting orders against 'innocent non-participants' without evidence. The latter evil seems to me to outweigh the former. It seems to me that the whole court system will lose the respect of the public at large if it grants orders against 'innocent non-participants."

The rule was consequently discharged for the lack of jurisdiction.

8.1.2. ***Sappi Fine Papers (Pty) Ltd (Adamas Mill) v Paper, Printing, Wood and Allied Workers Union & Others.***

This matter[52] was heard on 22 August 1997 in the South Eastern Cape Local Division before Nepgen J.

The relief sought in this matter and the circumstances were substantially the same as in *Mondi Paper v PPWAWU supra.* After negotiations between the parties had failed, some of the respondents engaged in a protected strike, but without agreement on strike rules. The employer was granted an urgent order in the form of rule *nisi* that the strikers be evicted from the employer's premises. Evidence was presented that the strikers had embarked on disruptive and intimidatory toyi-

toyi processions, had adopted an aggressive attitude to non-striking employees, had assaulted one of them and had committed acts of sabotage.

It was contended by the respondents that the employer had not made out a *prima facie* case against any of the further respondents by failing to identify the individuals allegedly committing unlawful acts. It was furthermore contended that no factual or legal basis existed to support the allegation that certain of the further respondents associated themselves with, or supported such unlawful conduct, or to establish the unlawfulness of any such association or support.

The next respondents challenged the jurisdiction of the court on the basis that

1. in terms of the LRA the Labour Court had exclusive jurisdiction to grant relief of the nature sought by the applicant; and, as an alternative
2. the court had no jurisdiction to grant any relief relating to any alleged unlawful conduct committed during the course of a picket or to grant relief which in any way affected the powers of the CCMA in relation to the determination of picketing rules.

Counsel for the applicant employer criticised the decision in the *Mondi* case, according to the learned judge at 250G in that

> "… the Mondi case was wrongly decided, pointing out that it would appear from the judgment that Nicholson J was not referred to the 'important provisions' of ss 67 and 68 of the Act. He [counsel] contended that if those provisions were taken into account it would follow, on a proper interpretation of the Act, that the exclusive jurisdiction of the Labour Court referred to in s 157(1) of the Act is exclusive jurisdiction in relation only to those matters referred to in s 68(1) of the Act, and that in respect of all other matters the High Court has concurrent jurisdiction, particularly *'in respect of matters relevant to unlawful activity in either strikes within or outside the provisions of the Labour Relations Act*' (the quotation is from counsels' heads of arguments)." [Author's emphasis]

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[52] (1998) 19 *ILJ* 246 (SE).

Counsel for the further respondents countered the above argument, according to the learned judge at 250H – 251B, by referring to the section 68(1) and contending that

> "…the restrictive interpretation sought to be placed on those provisions by [counsel for the applicant employer] is not justified. He submitted that it is clear, by virtue of the provisions of s 158(1) of the Act, that the Labour Court has the necessary jurisdiction to grant all of the relief sought by the applicant in this matter. After referring to the provisions of s 157(1) of the Act relating to the exclusive jurisdiction of the Labour Court, [counsel] contended further that on a proper construction of s 68(1) of the Act exclusive jurisdiction is granted to the Labour Court in two specific instances, the first being where a strike or lock-out does not comply with the procedural and substantive provisions of ss 64 and 65 of the Act; and, secondly, where conduct in contemplation or furtherance of any strike or lock-out, including a protected strike or lock-out, does not comply with such provisions, "

In summary, counsel for respondents counters the allegation of unlawful conduct as delict which should be heard in the High Court, by submitting that the conduct does not comply with the provisions of the LRA and which must then be heard in the Labour Court.

Both parties agreed that the relief sought could be granted by the Labour Court, but the applicant employer averred that this did not oust the High Court, which would have given the Labour Court exclusive jurisdiction. It was submitted by the applicant employer that even in the case of protected strikes, unlawful activity constituting an offence remains a delict or breach of contract and is subject to civil legal proceedings in the High Court. The exclusive jurisdiction of the Labour Court, according to counsel, is limited to the non-criminal activity referred to in sections 68(1)(a) and (b).

The learned judge, however, was of the opinion that section 68(1) of the Act does deal with strikes which are not conducted in terms of the provisions of the Act. He states at 257D:

> "The question that immediately comes to mind is why the legislature would have considered it necessary to provide, in s 157(1) of the Act, that 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' if it was intended to limit such exclusive jurisdiction to those matters referred to in s 68(1) of the Act. If it was merely intended to refer to the same exclusive jurisdiction as that which had already been conferred on the Labour Court in terms of s 68(1) of the Act, it would have been simple to do so in specific terms. In my judgment the very distinction which [counsel for applicant] seeks to draw between the matters that were intended to be dealt with in s 68(1) of the Act, and those which are dealt with elsewhere in terms of the Act illustrates why his argument cannot be upheld. As was pointed out by [counsel for applicant] , s 68(1) of the Act deals with strikes which are not conducted in terms of the provisions of the Act. The purpose of s 68 of the Act is to bring such strikes within the ambit of the Act, and it is for this reason that one finds specific provisions in s 68(1) of the Act which confer upon the Labour Court exclusive jurisdiction to deal with such matters as well. To hold otherwise would, in my judgment, defeat the very object of the Act."

That the Labour Court can prevent unlawful conduct by granting urgent interim relief in the same way as the High Court is provided by the Labour Court having "authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of provincial division of the Supreme Court has in relation to the matters under its jurisdiction."

Concerning the ousting of the High Court in a matter that appears to be of concurrent jurisdiction, the learned judge states at 258G:

> "The presumption against the ousting of the jurisdiction of courts is rebutted where the legislature has clearly indicated its intention to do just that. What the legislature has done in the present instance has been to establish a court, equal in status and authority to the High Court, to deal exclusively with labour matters."

Comment: Delictual conduct in furthering the aims of a strike becomes a labour dispute about whether there is compliance with the provisions of sections 64 and 65 or not. Including the jurisdiction of the Labour Court in labour matters excludes the jurisdiction of the High Court with respect to the equivalent civil matterThe jurisdiction of the criminal courts is retained.

8.1.3. ***Coin Security Group v SA National Union for Security Forces***.

This matter,[53] heard on 31 October 1997 in the Cape Provincial Division before King DJP, involved similar circumstances to those of *Mondi Paper v PPWAWU* and *Sappi Fine Papers v PPWAWU supra.*

The applicant employer submitted that the strike was not protected and that the striking workers had committed numerous unlawful acts during the course thereof. It was furthermore submitted that section 68 should be interpreted restrictively and that such unlawful actions did not fall within the ambit of `in furtherance of ' the strike. The applicant's counsel submitted that the court's jurisdiction had not been ousted as such conduct did not constitute conduct in furtherance of the strike. Counsel made this submission in the context of the presumption against an ouster of the court's jurisdiction. The learned judge commented as follows at 47G – 48A:

> "In this respect, the judgment of Botha JA in Paper Printing Wood & Allied Workers Union v Pienaar NO & others 1993 (4) SA 621 (A); (1993) 14 ILJ 1187 (A) is, with respect, instructive. On the authority of this decision a distinction is to be drawn between, on the one hand, legislative interference with the jurisdiction of the courts in favour of some extra-judicial form of redress, for example a statutory tribunal, where the jurisdiction of the court will only be found to have been ousted if it appears by necessary implication to be the intention of the legislature, and only to that extent, and, on the other hand, where the enquiry involves, on the one hand, this court and, on the other, a special judicial forum, particularly a forum equal in rank with the High Court, the existence of such a specialist court -
>
> > 'points to a legislative policy which recognizes and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of the ordinary courts' (at 637B).
>
> In such a case - and it is the case here - there is - 'substantially less reason ... for closely scrutinizing the provision in question or for jealously guarding against interference with the jurisdiction of the ordinary courts' (at 637C). "

The learned judge continued at 48C:

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[53] 1998 (1) SA 685 (C).

> "There is, in my view, accordingly no warrant for a restrictive interpretation of the word 'furtherance' in the context of s 68 of the Act. In this section the legislature has provided the Labour Court - and the Labour Court only - with a mechanism for the control and prevention of illegal strikes and conduct that is concomitant therewith. Bearing in mind that a strike as defined comprises not only a refusal to work but also a retardation or obstruction thereof, it seems clear that what is comprehended by 'furtherance' is at least any conduct which is engaged in during the course of a strike, is pursuant thereto and serves to advance it."

The learned judge concluded with "I am … fortified in my opinion by the views expressed by Nicholson J in Mondi Paper … and by Nepgen J in Sappi Fine Papers…" and that "the Labour Court had exclusive jurisdiction to grant the relief sought, the High Court had no jurisdiction to do so and the latter court therefore had no jurisdiction to grant the rule nisi."

The approach in the above case was criticised by Van Dijkhorst J in a subsequent decision of *Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Substructure & others.* (See 7.1.2) The learned judge states at 243C-E):

> "In Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers & others 1998 (1) SA 685 (C) at 690 King DJP, on the authority of the judgment of Botha JA in Paper Printing Wood & Allied Workers Union v Pienaar NO & others , sought to draw a distinction between legislative interference with the jurisdiction of the High Courts in favour of some extra-judicial form of redress, for example a statutory tribunal, where the jurisdiction of the court will only be found to have been ousted if it appears by necessary implication to be the intention of the legislature, and only to that extent, and, on the other hand a specialist court equal in jurisdiction to the High Court like the Labour Court. With respect, it is not a question of distinction but remains a question of interpretation of the relevant statute, irrespective of the nature of the tribunal concerned. The factor that the specialist tribunal is a court obviously carries weight, but remains just a factor in interpretation.'"

8.2. High Court interdict against intimidation and related acts by non-striking workers.

In this case there is no strike but the workers engage in acts of violence and assault against either their employer or the management, or one of more of their

co-employees, in order to resolve a dispute or to exert pressure on the employer to concede to certain demands. A case in point is *Minister of Correctional Services and another v Ngubo and others*.

8.2.1. ***Minister of Correctional Services and another v Ngubo and others.***

In this matter[54] certain employees of the Department of Correctional Service, employed at a prison in Pietermaritzburg, objected strongly against the appointment of a certain person as provincial commissioner of the department in KwaZulu-Natal. In demanding her removal from the post, the employees engaged in acts of assault and intimidation and physically removed the official from her office. The official and her employer, the Minister, sought an interdict against the particular employees to restrain them from their acts of violence.

Zondo JP, in *Langeveldt v Vryburg Transitional Council* (see 4.3) at [29], does not express his view on the correctness or otherwise of the conclusion of Levinsohn J with regard to jurisdiction, but the learned judge president states `If, however, it is correct that the conduct of the employees was not connected in any way with any of the objectives of the Act, this would be inconsistent with the Act which gives the purpose of the Act as being to, *inter alia,* "*advance… labour peace…*" [emphasis by Zondo JP]" '

On the other hand, Zondo JP emphasises that one of the primary objectives of the LRA is the promotion of "the effective resolution of labour disputes." According to the learned judge the conduct of the employees in this case undermined labour peace and that section 1(d)(iv) accordingly appropriately refers to the lawful effective resolution of disputes. Consequently the learned judge raises his concern that if Levinsohn J is correct on the question of jurisdiction, then there would be considerable jurisdictional overlap between the High Court and Labour Court.

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[54] (2000) 21 *ILJ* 313 (N).

Comment: The question arises whether any delictual, or even criminal activity, within an employment environment, could be resolved by the Labour Court in the interests of establishing "labour peace." Broadly speaking, such actions should be measured against whether they relate to disputes of rights, or are of mutual interest. In this case there is clearly no dispute of rights. Does the forced removal of an official constitute the furtherance of the mutual interest of labour peace?

Furthermore, in the event that the Labour Court obtains exclusive jurisdiction to hear matters of intimidation and assault in the workplace, would this preclude the offended party to seek relief for damages in the civil court? If such an anchor of the common law were to be reserved for the Labour Court, it would necessarily require an appropriate provision for damages in labour legislation.

On the other hand, such delictual disputes could then be transformed into disputes on whether the actions are workplace related or not. Would a factory worker assaulting his manager in the local country club because of an incident in the factory constitute a dispute related to labour peace? Or, in the above matter, would the dispute be labour-related if the official were assaulted outside the workplace? Would there be a distinction between an individual worker committing acts of intimidation and a group of workers doing the same? These are some of the contingencies that the legislature has to consider in centralising the jurisdiction to hear matters of delict.

8.3. **Acts of intimidation by strikers against non-employees**

The spirit of our labour legislation, in particular that of the LRA, is to regulate employer-employee relations in the workplace so as to promote labour peace and the fundamental rights of the Constitution. The question arises as to what extent persons outside the workplace are to be involved in promoting those principles. Provision is made for picketing to achieve this aim, but it is generally understood to be of a passive nature towards the public. We consider the following case in this regard.

8.3.1. ***Fourways Mall v SA Commercial Catering and Allied Workers Union.***

In this matter a dispute arose between the owner of a shopping mall and the members of CCAWU about the undue interference, during a picket and protected strike against a tenant, with members of the public entering the mall. [55] Despite a precautionary interdict granted by the Labour Court the members of the union conducted themselves in unlawful and unruly ways such as blocking the shopping entrances, preventing the public from gaining access and leaving it, verbally and physically abusing and intimidating members of the public, customers, employees, tenants and service providers.

On 2 October 1998 the applicant approached the High Court for urgent relief against the respondents on an *ex parte* basis. On the return day of the interim order the first respondent raised, amongst others, a point *in limine* that the court lacked jurisdiction to entertain the application.

In considering this submission, Claasen J referred to the cases of *Mondi Paper v PPWAWU, Sappi Fine Papers v PPWAWU* and *Coin Security Group v SANUSO* discussed in 8.1 *supra.* The learned judge recounted that the decisions in these cases held that the High Court's jurisdiction was ousted because of the labour dispute between the parties. In each case there was some form of relationship between the parties governed by LRA. In this matter no such relationship existed between the parties. At 756F the learned judge comments:

> "However, no such labour relation exists between the respondents and/or its members on the one side and the applicants on the other. It is also common cause that the individuals whose conduct is complained of are in fact all members of the two respondents. The applicants in this case are common law owners of the shopping centres. They have no relationship whatsoever with the members of the two respondents, either in contract or by statute. *The nature of the dispute between them arises out of the law of delict as well as the law of property*."[Author's emphasis]

Referring to the rights of the applicants, the learned judge states at 756H:

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[55] 1999 (3) SA 752 (W); (1999) 20 *ILJ* 1008.

> "The applicants have a fundamental, as well as constitutional, right to ply their trade and enjoy their property to the full and the law will not tolerate the frightening off of custom [sic] by labour troubles, reprisals, fear of unpleasantness et cetera"

At 757B the learned judge confirms that:

> "The Labour Relations Act, in my view, was never intended to deal with this kind of dispute. The long title to the Labour Relations Act sets out clearly that the Act is intended to 'govern labour relations' and to provide procedures for the 'resolution of labour disputes'. "

This point *in limine* was consequently dismissed.

Zondo JP, in Langeveldt *v Vryburg Transitional Council* (see 4.3), disagrees with this decision on the basis of the provisions of sections 67(2), (6) and (8) of the LRA. According to the learned judge at [38], "A judge of the Labour Court would have known these provisions and would have considered what their effect was on the matter." In [39] he states:

> "Although the provisions of section 67(2) and (6) would not have presented any difficulty in the granting of relief in respect of acts of a criminal nature such as intimidation, assaults and damage to property, they may well have presented a difficulty in respect of any order relating to acts which were not of a criminal nature such as the chanting, toyi-toying and demonstrating in which strikers may have engaged in furtherance of their protected strike in the vicinity of the landlords' properties. In the absence of any provisions in a statute or ordinance to the contrary, *such acts do not constitute criminal offences.* In terms of section 67(2) such acts, when performed in contemplation or in furtherance of a protected strike, do not constitute delicts. In terms of section 67(6) such acts *enjoy immunity from a challenge by way of civil legal proceedings.* [Author's emphasis]

Comment: This conflict of views between judges of the High Court and Labour Court lies at the heart of the jurisdictional dispute. It comprises a conflict of interpretation of law and its constitutional principles, a matter which can only be resolved by the Constitutional Court. Inevitably, as suggested by Zondo JP, a solution can only be achieved by an overhaul of the labour legislation to clearly delineate the jurisdiction of the labour court in these matters.

Chapter 9. Law of contract

9.1. Unlawful repudiation of contract or unfair dismissal?

Although inherently involving an employee-employer relationship, the interpretation and enforcement of contracts of employment do not fall under the exclusive jurisdiction of the Labour Court. Until the introduction of the BCEA relief for breach of contract had to be sought in the High Court only, although the reasons for such a breach might also have placed it within the ambit of the Labour Court In *Gaylard v Telkom SA (Ltd)* and *Ackron & others v Northern Province Development Corporation* (see 6.4). Revelas J affirmed that the Labour Court did not have jurisdiction to determine disputes about the application or interpretation of a contract of employment and would only acquire that jurisdiction under section 77(3) of the BCEA.

Section 77(3) of the BCEA reads

> "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

The section extends the prevailing jurisdiction of the civil courts to hear disputes concerning contract of employment, to that of the Labour Court..

The route to the Labour Court commences with the CCMA and whereas certain matters germane to the contract of employment, such as loss of income, is not accommodated by the LRA, the BCEA will oblige the CCMA to consider such matters. An advantage lies therein that the arbitration route will be less costly and more expeditious than litigation in the civil courts.

On the other hand, the amount of compensation awarded respectively in the Labour and High Courts could differ considerably. In the CCMA and Labour Court compensation is limited by the provisions of section 194 of the LRA and is also

taxable. The High Court may award full damages and which will also not be taxable. Section 195 of the LRA furthermore states

> "An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the *employee* is entitled in terms of any law, collective agreement or contract of employment."

In principle this allows an employee to claim both damages in the High Court and compensation in the CCMA or Labour Court.
If one first considers whether the Labour Court may have exclusive jurisdiction in dealing with a breach of the employment contract, the central issue to be decided is whether an unlawful breach of contract constitutes an unfair dismissal in terms of the LRA. With regard to concurrent jurisdiction, the central issue is whether an unlawful breach of contract *also* constitutes an unfair dismissal.

If the Labour Court has exclusive jurisdiction, the next issue would be whether it would be equitable for the aggrieved employee to be limited in compensation according to section 194 when the remaining term of the contract, for example, would have entitled him to a larger claim for damages in the High Court. Could any provisions in the LRA or BCEA accommodate this discrepancy? These questions will be considered in the discussions on the cases in the following subparagraphs.

9.2. ***NUMSA v Vetsak Co-operative Ltd.***

Before the enactment of the Constitution the principles of common law remained dominant in the interpretation of contracts of employment. With the advent of the Labour Relations Act 28 of 1956 and its establishment of the Industrial Court, the concept of an unfair labour practice first raised the question of the relationship between breach of contract and that of unfair dismissal. After the Constitution this question became one of whether the LRA adequately accommodates the constitutional principles of *just and fair*, i.e. lawful and equitable, labour practices. The uneasy bond between common law and labour legislation remains, albeit couched in constitutional terms.

The relationship between unlawfulness and fairness in labour practice was raised in 1996 by Nienaber JA in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd.*[56]:

> "The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them - and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair - and that would depend on the facts of the case. There is no sure correspondence between unlawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair . . ."

The above considerations received further elucidation after the enactment of the LRA, as discussed in the cases of the subparagraphs below.

9.3. ***Jacot-Guillarmod v Provincial Government Gauteng & others***

An example of pre-BCEA forum shopping is found in *Jacot-Guillarmod v Provincial Government Gauteng & others.*[57] In this case the employer and employee concluded a fixed term contract of employment of five years but the employer terminated it prematurely. This was regarded as a repudiation of the contract of employment by the employee, but he accepted the repudiation and sued in the High Court for damages amounting to the salary he would have received for the balance of his contract period. This amounted to more than two million rand.

The employer filed a special plea that the High Court did not have jurisdiction to hear the matter and that the Labour Court had exclusive jurisdiction in terms of section 157(1) of the LRA. Le Roux J accordingly held that the High Court did have

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[56] 1996 (4) SA 577 (AD) 592F – H.
[57] (1999) 20 *ILJ* 1689 (T).

jurisdiction based on a simple enforcement of a contract of employment. The learned judge states at 1694F– J:

> "It is quite clear to me that the legislature had no intention whatsoever of infringing the right of a High Court to hear an ordinary common-law action in connection with a contract of employment. If any further authority for this is needed, s 195 of the Labour Relations Act, in my view, goes a long way towards making it clear that that was the intention. This section reads:
>
> 'An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.'
>
> It seems clear that the legislature could not have intended that the procedure set out in the eighth chapter should be employed and then for the balance an action should be instituted in the High Court, because limits are placed on the compensation which can be awarded in terms of the section by the Labour Court.
>
> I have reached the conclusion that the simple enforcement of a contract of employment is not a matter which falls within the ambit of the Labour Relations Act and that the Labour Court certainly has no exclusive jurisdiction. "

This uncertainty has now been laid to rest by section 77(3) of the BCEA.

9.4. ***Fedlife Assurance Ltd v Wolfaardt***

Judgment in this significant case was given on 18 September 2001. Judgment was given by Nugent AJA, with Howie, Mpati JJA concurring, that the common law is retained in seeking remedies for the premature termination of an employment contract. Froneman AJA dissented.

9.4.1. **The issue**

In *Fedlife Assurance Ltd v Wolfaardt* [58]the Supreme Court of Appeal considered the jurisdictional problem when a breach of employment contract is referred to the High Court. The issue before the Court was whether the Labour Court had exclusive jurisdiction to hear such matters.

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[58] (2001) 10 SCA 1.1.1.

9.4.2. **The facts**

The facts are briefly stated at [5]:

> "The appeal arises from an action that was instituted by the respondent against the appellant in the Witwatersrand Local Division of the High Court in which he claimed damages for breach of contract. The claim is singular only in that the contract is one of employment. In his particulars of claim the respondent alleged that the contract was for a fixed term of five years commencing on 1 December 1996 and that appellant repudiated the contract by purporting to terminate it with effect from 31 December 1998 on the grounds that the respondent's position had become redundant. The respondent alleged that he had elected to accept the appellant's repudiation (with the result that contract came to an end and he claimed damages in consequence of the breach."

9.4.3. **The appellant's submission**

The appellant's submission is stated at [8]:

> "The main submission on behalf of the appellant was that an action of that nature is no longer cognisable in our law and that the employee concerned (in this case the respondent) has no remedies other than those provided for in Chapter VIII of the 1995 Act [LRA]. "

It was further argued at [11] that

> "…the effect of the 1995 Act has been on the one hand to confer on employees the rights and remedies provided for in Chapter VIII in the event of dismissal and on the other hand to deprive them of their common-law remedies. The chapter is thus said to be not only comprehensive but also exhaustive insofar as it provides for remedies upon dismissal. … It was submitted that the material inroads made by the legislature upon the right of employers to terminate contracts of employment in accordance with their terms must necessarily have been intended to be balanced by the abrogation of employees' rights to enforce such contracts at common-law either by way of claiming specific performance or by way of claiming damages."

The effect of the LRA, according to the appellant at [12] is

> "… the common-law right to enforce a fixed-term contract of employment has been abolished by the 1995 Act. Such a contract must then take its place alongside any other employment contract that may be terminated at the employer's will provided the termination does not constitute an unfair dismissal as contemplated by Chapter VIII of the 1995 Act/"

9.4.4. **The influence of the constitution.**

Did the Constitution, and thereafter the LRA, deprive an employee of their common-law right not to have an employment contract unlawfully terminated?

At [15] Nugent AJA declares:

> "However, there can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term contract of employment. Thus irrespective of whether the 1995 Act was declaratory of rights that had their source in the Interim Constitution or whether it created substantive rights itself, the question is whether it simultaneously deprived employees of their pre-existing common-law right to enforce such contracts, thereby confining them to the remedies for "unlawful dismissal" as provided for in the 1995 Act."

9.4.5. **The LRA and common law.**

Is the LRA intended to replace the common-law rights associated with an employment contract? Nugent AJA considers this presumption at [16]:

> "In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and *a fortiori*, not to deprive parties of existing remedies for wrongs done to them. … The continued existence of the common-law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed-term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of Rights and it is appropriate to invoke the presumption in the present case. "

Furthermore, at [17]:

> "The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so. "

9.4.6. **Section 186(b) of the LRA.**

The extension in section 186(b) of the LRA to include non-renewal of a fixed term contract within the definition of a dismissal, does not imply that a premature termination of such a contract is also accommodated as a dismissal in the LRA. This is made clear at [18]:

> "The clearest indication that it had no such intention is section 186(b) which extends the meaning of "dismissal" to include the following circumstances:
>
> "(A)n employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."
>
> It is significant that although the legislature dealt specifically with fixed-term contracts in this definition it did not include the premature termination of such a contract notwithstanding that such a termination would be manifestly unfair. The reason for that is plain: the common-law right to enforce such a term remained intact and it was thus not necessary to declare a premature termination to be an unfair dismissal. The very reference to fixed-term contracts makes it clear that the legislature recognised their continued enforceability and any other construction would render the definition absurd. …. The absurdity does not end there. If it were so that a plaintiff such as this is confined to a claim for "compensation" in terms of section 194, where the employer proves that "the reason for dismissal is a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements" and "that the dismissal was effected in accordance with a fair procedure" the plaintiff would not be entitled to any compensation. That would be the combined effect of section 188(1)(a) and (b); section 192; section 193 and section 194. Such a result could never have been the intention of the legislature. "

9.4.7. **Sufficiency of the LRA.**

From the above considerations it follows that the LRA is not exhaustive of the rights and remedies available to the employee whose contract of employment has been terminated. This is summarised in [22]:

> "In my view Chapter VIII of the 1995 Act is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the constitutional dispensation and the common-law or merely from a construction of the 1995 Act itself I do not think the respondent has been deprived of the common-law right that he now seeks to enforce. A contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law. "

9.4.8. **Unlawful or unfair?**

This distinction is clarified in [27]:

> "Whether a particular dispute falls within the terms of section 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the "fairness" of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the termination constituted a "dismissal" as defined in Chapter VIII)"

9.5. ***Fedlife Assurance Ltd v Wolfaardt*** **(Minority dissenting judgment)**

9.5.1. **Dissenting judgment by Froneman AJA.**

Froneman AJA gave a dissenting judgment in the above matter. The learned judge states at the end of [32] that " It is my view of the effect of the Constitution on our common-law of employment that compels me to a different conclusion than that of Nugent AJA in this matter. "

9.5.2. **Assumptions.**

The learned judge's judgment is based on two assumptions:

(1) That the LRA gives effect to and regulates the fundamental labour rights conferred by the Constitution (section 1(a)).

(2) That the LRA promotes the effective resolution of labour disputes in terms of the Constitution (section 1(d)(iv)).

9.5.3. **Unfair dismissal and unlawful breach of contract.**

Does unfair dismissal arise from an unlawful breach of contract?

In essence, Froneman AJA reverses the priority given by Nugent AJA to the unlawful nature of the termination of contract compared to its unfair dismissal aspect. The learned judge quotes from *NUMSA V Vetsak Co-operative Ltd supra* in that there "is no sure correspondence between unlawfulness and fairness" and that the fairness of a dismissal would depend on the facts of the case. In [36] the learned judge of appeal avers that "The crucial initial question is thus whether the dispute about the termination of his contract is a dispute `about the fairness of a dismissal' under section 191(1) [LRA] or not." **Do the facts of the case present a dispute about an unfair dismissal?**

The learned judge raises this question in [37]:

> "It is important, at this stage, to emphasise that what is in issue here is narrow and very particular: namely whether the dispute resulting in the dismissal of an employee, following upon an unlawful repudiation of the employment contract by his employer, is a "dispute about the fairness of a dismissal" under section 191 of the Act. "

9.5.5. **The dispute is about an unfair dismissal.**

This question is answered in [38]:

> "Is the present dispute a dispute about an unfair dismissal? It certainly appears to me to be the case. In ordinary terms, untrammelled by legal interpretation, it seems unfair that one party to a bargain should be allowed to go back on his word by dismissing someone before the promised time for the termination of his contract of employment arrives. "

9.5.6. **Does the LRA deny a dismissed employee his right to the remainder of his employment contract?**

The learned judge avers that section 195 entitles the employee to claim such a remnant. At [41] it is stated:

> "It may be an objectionable feature of the statute if it deprives employees, on dismissal, of the right to enforce bargained terms in their contracts of employment that would put them in a better financial position than that which the statute itself provides for. Section 195 ensures that this may not occur (compare the similar approach in section 4 of the Basic Conditions of Employment Act 75 of 1997 (the BCE Act)). "

Furthermore, at [42]:

> "I would imagine that our law of employment, infused with these values, would make provision both for a system that guarantees that employees may be entitled to claim as their financial due that which they bargained for, over and above basic statutory entitlements, as well as for a right not to be unfairly dismissed. I happen to think that this is what the Act [LRA] (and the BCE Act in a different context) achieves, albeit perhaps not to the fullest extent possible. … Dismissal upon an unlawful breach of contract by an employer is an unfair dismissal. And the Act deals fully with the consequences of an unfair dismissal. "

The learned judge emphasises this entitlement in [43]:

> "The respondent's claim is capable of being seen as a claim for a monetary benefit that he bargained for and is entitled to under section 195 of the Act in addition to the compensation that may be awarded under section 194, namely as damages in lieu of specific performance (compare De Wet and Van Wyk, *Kontraktereg en Handelsreg* 5ed, 208-212). "

9.5.7. **Does section 77(3) of the BCEA assign concurrent jurisdiction to the High Court?**

The learned judge interprets this section reciprocally, i.e. as lending a similar residual competence to the Labour Court. At [45]:

> "The High Court does not need the BCE Act to give it jurisdiction in a matter concerning a contract of employment. It has that residual competence in any event, although it may be attenuated by statutory provisions such as section 157(1) of the Act. What section 77(3) does is to give the same residual concurrent competence to the Labour Court, something that [this] court [High Court] does not enjoy without specific statutory authority."

9.6. **Other cases.**

9.6.1. ***Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation & another***

In the above matter[59] the appellant was given a 7% salary increase by the respondent, but after about five months was informed that the increase had been "unlawful", that the increase had been revoked and that the appellant was required to repay the monies received in lieu of the increase. The appellant considered the action as an unilateral decrease in his salary and referred the matter to the CCMA. The commissioner decided that the employee should have first exhausted his in-house grievance procedure remedies before approaching the CCMA. The appellant's attempts to institute such a grievance procedure were fruitless and he consequently referred the matter to the High Court.

The respondent raised a preliminary point that the court did not have jurisdiction to hear the matter. After hearing argument, Friedman JP declared at 492D:

> "The instant matter relates to a dispute between the parties concerning a term of the contract of employment, namely the applicant's salary. There is no question of collective bargaining or issues of peace in the workplace and matters incidental thereto. The issue is basically a common-law one in connection with a contract of employment."

With the jurisdiction the High Court established, the learned judge also levied criticism on the state of affairs related to jurisdiction. At 492A it is stated:

> "Since the enactment of the Labour Relations Act, there has been a tendency particularly by practitioners to subsume all matters concerning employer and employee under the aegis and authority of the said Act.
>
> This has resulted in a blind lunge towards simplification. This is a dangerous tendency, because then the practice of labour law becomes like an inverted pyramid balanced insecurely on a slender apex.

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[59] (2000) 21 *ILJ* 481 (B).

> To restate the position, the law of employer and employee is underpinned on common law and labour legislation, notably the Basic Conditions of Employment Act and the Labour Relations Act."

9.6.2. **Other cases**

(a) Lowe v Commission on Gender Equality The appeal of *Lowe v Commission on Gender Equality* [60] was heard by a Full Bench of the Witwatersrand Local Division. That matter ultimately turned on the question whether there had been a lawful termination of the contract of employment of the employee by the employer. The judgment of the Full Bench was handed down on 15 December 2000.

(b) Schoeman and others v Samsung Electronics SA (Pty) Ltd

This case is discussed in 11.4. Relevant to this section is the averment by Revelas J that contractual disputes fall outside the jurisdiction of the Labour Court:

> "This factor together with the provisions of section 24 in my view, indicate that *contractual disputes were deliberately excluded in the Act*." [Author's emphasis]

However, section 77(3) of the BCEA does now confer concurrent jurisdiction on the two courts.

Comment:

The question of unilateral changes to an employee's salary remains contentious within the LRA. Provision is made in Item 2(1)(b) of Schedule 7 of the LRA for the CCMA to hear matters concerning changes to benefits, and one must conclude that the omission of salary disputes in the LRA is a further indication that the legislature intended that such matters remain within the ambit of the common law as applied to the contract of employment.

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[60] Appeal case no A5019/00 Wits Local Div.

Chapter 10. A question of interpretation

The uncertainty surrounding jurisdiction arises mainly from differences in the interpretation of the law. The following cases exemplify these differences.

10.1. ***Runeli v Minister of Home Affairs***

The possibility exists for an employee to bring proceedings in the High Court on the grounds that a dismissal is unlawful or unconstitutional, and at the same time refer the matter to the CCMA on the grounds of the dismissal being unfair. This would particularly be the case where no specific reference is made in the LRA to a type of dismissal not listed in Chapter VIII of the LRA. Such an omission may invest the High Court with jurisdiction to hear the matter. Such a situation was considered in *Runeli v Minister of Home Affairs*.[61]

The applicant, an employee in the Department of Home Affairs, was charged with misconduct and arraigned before a disciplinary hearing. He was found guilty, but received a final warning. Subsequently, he unexpectedly received a letter of dismissal. After his employer refused appeal, he applied to the High Court for a rule *nisi* to declare his dismissal unlawful and of no force and effect. Jafta J *mero motu* raised the issue of jurisdiction.

On behalf of the respondents it was contended that the High Court lacked jurisdiction because s 157(1) of the LRA 1995 provided that the Labour Court had exclusive jurisdiction in respect of all labour issues, including unfair dismissal, specifically dealt with in the LRA. Jafta J decided that the High Court did have jurisdiction and based his decision on a number of considerations. These considerations and the judgment arising therefrom were criticised by BPS van Eck and S Vettori[62] We discuss the considerations of Jafta J, followed by the comments of van Eck and Vettori:

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[61] (2000) 21 *ILJ* 910 (Tk).

[62] *Does the High Court have concurrent jurisdiction with the Labour Court to hear unfair dismissal disputes?* 2000 Obiter 490.

10.1.1. **The High Court is only ousted in matters codified in the LRA as being assigned exclusively to the jurisdiction of the Labour Court.**

The court was of the view that the expression in s 157(1), "all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court" has to be accorded its ordinary grammatical meaning. So, matters on which the Labour Court must, in terms of s 157(1), have exclusive jurisdiction are those which are to be considered and decided by it as set out in other sections of the Act or in other laws. Perusing the LRA, Jafta J found that only sections 66(3), 67(3)(b) , 69(11), 103(1) – (4), 105, 111(3) – (4), 141(4) – (5) and 145 specifically set out matters which are to be decided by the Labour Court and in which it therefore has exclusive jurisdiction. Had the legislature intended that the Labour Court should have exclusive jurisdiction *in all matters covered by that Act* it should have said so in section 157(1).

At 918E the learned judge expresses his view on the interpretation to be followed:

> "Generally, the language used in a statute or a section of a statute should be given its ordinary grammatical meaning unless doing so would lead not just to an absurdity but to such an absurdity which could never have been intended by the legislature. The departure from the literal meaning is in other words, justified only in cases where such meaning does not accord with the clear intention of the legislature"

Referring to the sections 66(3) to 145 quoted above, the learned judge concludes, at 919A, that the literal meaning must be applied to the phrase, "all matters that elsewhere in terms of this Act …" :

> "The common factor in all those sections is that they stipulate matters to be taken to the Labour Court for adjudication, which clearly demonstrates that the words 'all matters that elsewhere in terms of this Act are to be determined by the Labour Court' refer to those sections. They set out, in my view, matters which the legislature intended the Labour Court to have exclusive jurisdiction on. Such an interpretation does not do any harm to the basic principles that words used in a statute should be given their literal meaning and that effect must be given to every word in a section. Had the legislature intended that the Labour Court should have exclusive jurisdiction in all matters covered by the Act it could have simply said so in s 157(1)…"

According to van Eck and Vettori, section 157 could also be interpreted to have exactly the opposite meaning: They state on page 492:

> "By applying a literal interpretation to this section it may be argued that the Labour Court has exclusive jurisdiction in all matters provided for in the LRA, except of course for the exceptions specifically provided for in section 157…. The fact that the LRA specifically states over which matters the High Court and the Labour Court have concurrent jurisdiction, by implication means that the High Court lacks jurisdiction over the matters covered by the LRA."

10.1.2. **A court's jurisdiction is ousted only if it appears to be the intention of the legislature by necessary implication.**

Jafta J refers to the criticism of van Dijkhorst J, quoted in 8.1.3, and is in agreement with the learned judge's view that "the jurisdiction of the court will only be found to have been ousted if it appears by necessary implication to be the intention of the legislature…" Jafta J elaborates further at 918E:

> "Generally, the language used in a statute or a section of a statute should be given its ordinary grammatical meaning unless doing so would lead not just to an absurdity but to such an absurdity which could never have been intended by the legislature. The departure from the literal meaning is in other words, justified only in cases where such meaning does not accord with the clear intention of the legislature."

Van Eck and Vettori regarded the approach of the court as too narrow when basing its findings on the interpretation of section 157 only. In the last paragraph of their page 492 they state:

> "It failed to take into consideration the complete picture and paid scant attention to the purpose of the LRA as a whole. Jafta J did not go further than the limited wording of section 157 to determine the jurisdiction of the High Court."

10.1.3. **Exclusive jurisdiction of the Labour Court would be inconsistent with the provisions of section 195 of the LRA.**

Briefly, section 195 states that any compensation awarded because of a dismissal in terms of the LRA, "is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law..."

The "other amount" can be interpreted, amongst others, as arising from a judgment in the High Court. Read with the limitations of section 194 the court adduced that section 195 would be meaningless if the Labour Court had exclusive jurisdiction to hear all dismissal disputes. This would, in particular, be prejudicial to an employee who could be entitled to a larger amount in terms of a law outside the jurisdiction of the Labour Court. The learned judge affirms at 922A that:

> " …the dispute raised falls within the ambit of chapter 8 of the Act and to hold that the Labour Court has exclusive jurisdiction would run against the clear intention of the legislature as set out in s 195. It would mean that the limited compensation provided for in s 194 substitutes any claim the employee might be entitled to in terms of some other law or in terms of the employment contract itself. Consequently no effect would have been given to the provisions of s 195. ……..
>
> In the circumstances I find that the Labour Court does not have exclusive jurisdiction in respect of all matters covered in chapter 8 but, as it appears above, its exclusive jurisdiction is limited to matters listed in subsections (5)(b) and (6) read with s 157(1)"

Van Eck and Vettori simply states that the limitations of section 194 applies to *unfair dismissals only.* It does not preclude a dismissed employee from claiming other amounts due to him arising from his conditions of service.

Comment: The two opposing viewpoints on interpreting section 157 respectively reflect *inclusio unius est exclusio alterius* (Jafta J) and *alterius unius est exclusio inclusio* (Van Eck and Vettori). For this Jafta J relies on a literal-grammatical interpretation of the statute, whereas Van Eck and Vettori relies on a context-based purposive approach. These differing interpretations lies at the heart of the jurisdictional polemic.

10.2. ***Kilpert v Buitendach & another***

In this matter the applicant hedged his jurisdictional bets by parallel applications to the CCMA as well as to the High Court.[63] The applicant applied to the High Court

[63] (1997) 18 *ILJ* 1296 (W).

to review and set aside a decision by the respondents to dismiss him following a guilty decision by a committee of enquiry. On the same facts the applicant also referred a dispute of unfair dismissal to the CCMA

Sutherland AJ is of the view that the High Court has a historical precedence over the Labour Court in matters of common law relating to the administration of a contract of employment. The learned judge states at 1298J–1299A:

> "It is of course true that any argument in support of the relief sought by the applicant before the High Court will rely to some extent on equitable considerations and the self-same contentions will be advanced in the fora created by the Labour Relations Act. However, equitable considerations are not the exclusive preserve of labour relations legislation. The common-law, and in particular the administrative branch of the common-law, has long embraced equitable considerations whose origins owe nothing to the Labour Relations Act. Therefore any overlap in the debate conducted before the High Court in regard to a review of a decision and the debate conducted before the fora created by the Labour Relations Act concerning the inequities of the decision is purely fortuitous and inconsequential."

The learned judge further emphasises this view at 1299D:

> "Therefore, for example, the Labour Relations Act does not appear to confer on any of the fora established under its terms jurisdiction to adjudicate on contractual claims or delictual claims or claims based on administrative law remedies. What the text of the Act appears to do is to identify that certain matters are reserved for the Labour Court."

At 1300H the learned judge also interprets the seeming irreconcilable prescriptions of sections 194 and 195 as assigning some jurisdiction to the High Court with regard to the termination of employment:

> "Section 195 expressly states that the provisions of s 194 provide for an amount which is obtainable by an aggrieved party in addition to any other amount 'to which the employee is entitled in terms of any law, collective agreement or contract of employment'. This provision therefore contemplates a civil action flowing from the termination of the contract of employment."

10.3. ***Mbayeka v MEC for Welfare, Eastern Cape***

In *Mbayeka and another v MEC for Welfare, Eastern Cape,*[64] the court rejected the purposive approach adopted in the *Mgijima* case (see 5.5) and stated as follows in paragraph 19:

> "(19) I respectfully disagree with the interpretation preferred in the *Mgijima* case. It is quite clear that the Court in that matter adopted a purposive approach in construing section 157(2) and felt obliged to accept the meaning which would give effect to the objects of the Act, even though it seems to me that the Legislature intended different consequences to follow. Firstly, it appears to me that the court in *Mgijima* approached the question of interpretation as if section 157(2) granted jurisdiction to the High Court and not to the Labour Court. It is significant to note that the High Courts retain the constitutional jurisdiction given to them by the Constitution itself and the Labour Court was merely permitted in terms of the section to enjoy limited constitutional jurisdiction under the circumstances set out therein.
>
> One of the prerequisites for the Labour Court to exercise constitutional jurisdiction is that the dispute must arise from employment and labour related matters. If this condition does not exist the Labour Court would have no constitutional jurisdiction to hear a matter relating to the violation of a basic right in Chapter 2 of the Constitution. So, the presence of the labour content in a dispute cannot be used as a basis for excluding the jurisdiction of the High Court by simply defining it as a labour dispute. Concurrent jurisdiction exists only where the dispute arises from employment agreements. It further appears to me that all prerequisites must collectively be proved to exist before the Labour Court can begin to enjoy the jurisdiction to deal with labour disputes which have constitutional content. In my view the provisions of section 157(1) are irrelevant to the proper construction of section 157(2) simply because the two subsections provide for separate and incompatible notions. It may be said that they are mutually destructive. Therefore there is no need for limiting the wide language of subsection (2) to the actual constitutional substance of the dispute between the parties before the provisions of section 157(2) can be invoked. The purpose of the section, in my view, *was not to deprive the High Court of its jurisdiction but to grant the Labour Court additional constitutional authority."* (Author's emphasis)

10.4. ***Fredericks v MEC Eastern Cape Province***

White J gave extensive consideration to the question of interpretation to determine jurisdiction in *Fredericks & others v MEC Responsible for Education & Training in*

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[64] [2001] 1 All SA 567 (Tk).

the Eastern Cape Province & others.[65] A group of 56 educators in the Department of Education and Training of the Eastern Cape Province applied for an order declaring that "the decision taken by the … respondents not to grant voluntary severance packages to the applicants be set aside…"

The respondents contended, *in limine*, that the court did not have jurisdiction to hear the matter and that it fell within the exclusive jurisdiction of the Labour Court.

The applicants responded that the court did have jurisdiction to hear the matter in that the Department's refusal to grant severance packages to the applicants, after it had already granted such packages to other educators, was a violation of the rights of the applicants to equal treatment before the law, and to lawful, reasonable and fair administrative action, as spelt out in sections 9 and 33 of the Constitution, respectively. Therefore, as this was a constitutional matter, the terms of section 169 of the Constitution bestowed jurisdiction on the High Court.

In support of this contention, the applicants relied on the decisions in *Runeli v Minister of Home Affairs* (see 10.1) and *Mbayeka v MEC for Welfare* (see 10.3). The learned judge proceeded to give an exhaustive analysis of the interpretation of statutes with regard to the matter before the court, concluding that a *context-based purposive* interpretation is the appropriate one to follow. We quote the learned judge in full:

[Begin quote]
"In *Driedger on the Construction of Statutes*, Third Edition, by Sullivan, at 64, the learned author states:

> "In current practice, the purpose of legislation is taken into account in every case and at every stage of interpretation, including determination of the ordinary meaning."

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[65] (2001) 10 HC 1.1.1.

The learned author then refers to *McBratney v McBratney* (1919) 59 SCR 550 at 561, and concludes:

> "In this passage Duff CJ asserts two principles that govern judicial reliance of purposive interpretation:
>
> (1) Where the ordinary meaning of legislation is ambiguous or otherwise unclear, the interpretation that best accords with the purpose of the legislation should be adopted.
>
> (2) Where the ordinary meaning is clear, but an alternative interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted."

The following extract from *Jaga v Dönges NO and another* 1950 (4) SA 653 (AD) at 662G, was quoted with approval in *Mckelvey and others v Deton Engineering (Pty) Ltd and another* [1997] 3 All SA 569 (A) at 575:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, it's apparent scope and purpose, and, within limits, it's background."

In *S v Mhlungu and others* 1995 (3) SA 867 (CC), Sachs J held as follows:

At 914H

> "The preferred approach, as I have indicated, is not to search for what is general and what is specific, but rather to seek out the essential purposes and interest to be served by the two competing sets of provisions, and then, using a species of proportionality, balance them against each other."

At 915I

> "By emphasising the way in which context can modify the plain meaning of words, it conforms to overwhelming international practice."

At 916E

> "Whatever Anglo-centric legal tradition might be, contemporary Anglo-centrism would in fact support rather than undermine a context-based, purposive approach. Membership of the European Union has had its effect on English Judges. Lord Denning explained the approach of European Judges in the following terms:
>
> > '(They) adopt a method which they call in English by strange words - at any rate they were strange to me - the "Schematic and teleological" method of interpretation. It is not really so alarming as it sounds. All it means is that the Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation. They lay down the law accordingly.'"

At 917F

> "Realise that the approach I am suggesting is relatively new in South Africa and involves a utilisation of proportionality that is a little different from its normal employment in other countries. Yet I find it particularly helpful in dealing with cases such as the present."

These findings are apposite to the apparent contradictions in subsections 157(1) and (2) of the LRA.

In *Stopforth v Minister of Justice and others* [1999] 4 All SA 383 (A) at 391D Olivier JA stated:

> "In analysing the jurisdiction of the Amnesty Committee it is clear that a purposive interpretation should be given to the TRC Act. In *Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A) at 903 Ogilvie Thompson JA made it clear that:
>
> 'Even where the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction'."

Lastly in *High School Carnarvon v MEC for Education* [1999] 4 All SA 590 (NC) at 601 the court held as follows:

> "It is a recognised canon of construction that the Act as a whole must be looked at when interpreting a particular section. Even when the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction."

[End quote]

The learned judge concludes:

> "This Court, with respect, agrees with the finding and approach in the *Mgijima* case, and declines to follow the *Runeli* and *Mbayeka* cases. It agrees with the submission by Mr *De Bruyn* [for the respondents] that the purposive canon of interpretation must be applied in deciding the meaning and extent of section 157(2). Reading the LRA as a whole it is manifest that the Legislature intended to establish the Labour Court as a specialist court to hear and resolve labour disputes. It follows that the Legislature must have intended that the provisions of section 157(2) afforded the Labour Court exclusive jurisdiction not only in respect of labour disputes, but also in respect of the constitutional issues which are part and parcel of those disputes.
> ……
> The court therefore finds that because the dispute in this matter is founded on a collective agreement between an employer and its employees, and also relates to possible unfair labour practices, it resorts under the provisions of the LRA and the sole jurisdiction of the Labour Court and that this Court has no jurisdiction to hear the dispute."

10.5. **Comments**

The controversy about the jurisdiction of the two courts is aptly illustrated by the different judicial views in the above cases. The opposing camps can be distinguished according to their mode of interpretation of statutes, namely the *literal-grammatical* compared to the *context-based purposive* approach.

Chapter 11. Benefits and remuneration

The jurisdictional uncertainty surrounding the interpretation of `benefits' requires a study on its own. Item 2(1)(b) of Schedule 7 of the LRA defines one particular form of a residual unfair labour practice as "the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee." Item 3(1) stipulates that

> "Any party may refer a dispute about an alleged unfair labour practice in writing to–
>
> (a) a council if the parties to the dispute fall within the registered scope of that council ; or
>
> (b) the Commission, if no council has jurisdiction."

However, item 4(1) also states

> "The Labour Court has the power to determine any dispute that has been referred to it in terms of item 3 on terms it deems reasonable, including, but not limited to, the ordering of reinstatement or compensation."

The employee is now faced with a choice where he *may* refer the dispute to the Commission, or to the Labour Court which has the *power* to determine the dispute. Faced with a semantic conundrum, the hapless employee is further perplexed by the possibility of referring his matter to a civil court. As quoted previously, section 77(3) of the BCEA allows a civil court "to hear and determine any matter concerning a contract of employment…" Benefits are invariably part of a contract of employment. Decisions by commissioners in some cases, which will be discussed below, that the CCMA does not have jurisdiction to hear certain disputes concerning benefits and that these should have been referred to civil courts, do not really exemplify the simplicity of dispute resolution, or to rectify "the overlapping and competing jurisdiction and the use of different courts" envisaged by the compilers of the new labour legislation.

The confusion is mainly due to a lack of clear differentiation between benefits and remuneration. In *Schoeman & another v Samsung Electronics SA (Pty) Ltd*, (see 11.4) Revelas J says the following about benefits and remuneration:

> 'Commission payable by the employer, forms part of the employee's salary. It is a quid pro quo for services rendered, just as much as a salary or a wage. It is therefore part of the basic terms and conditions of employment. Remuneration is different from "benefits'. A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract.
>
> Item 2 of Schedule 7 of the Act lists a *numerus clausus* of types of disputes. In my view, if the legislature wanted to list something as important as remuneration as a dispute under the heading of "Residual Unfair Labour Practices", this would have been done.'

But Grogan comments as follows:[66]

> "By benefits the legislature seems to envisage all the rights which accrue to an employee by virtue of the employment relationship – from wages through leave to additional matters like pension, medical aid, housing subsidies and so on.'

Some of the uncertainty concerning the relationship between benefit and remuneration was relieved with the introduction of section 77(3) of the BCEA:

> '"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. "

Section 77(1) of the BCEA assigns exclusive jurisdiction to the Labour Court in all other matters contained in the BCEA except those specifically excluded:

> "Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92. "

From this one must conclude that the Labour Court, in terms of section 35 of the BCEA, has exclusive jurisdiction to consider claims for unpaid wages

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[66] J Grogan, *Employment Law,* vol 12 no 4 of April 1996 69. [67] (2000) 21 *ILJ* 700 (CCMA).

Normally both benefit and remuneration form part of an employment contract. The application of this requirement will be discussed in the cases enumerated below. Some CCMA cases are also discussed for the enlightening comments by the commissioners.

11.1. ***Public Servants Association obo Geustyn v Provincial Administration: Western Cape***.

In this matter[67] the applicant referred a dispute to the CCMA, alleging that by refusing to grant her a voluntary separation package the employer was guilty of unfair conduct as contemplated in item 2(1)(b) of schedule 6 to the LRA.

The respondent contended that the action taken by the employer, being a `threatened executive or administrative act by the State, in its capacity as employer' should have been be referred in terms of section 157(2)(b) to the Labour Court .

The commissioner considered whether section 157(2)(b) should be interpreted restrictively, i.e. whether the section applies only if the constitutionality of a decision by a state organ is questioned. I was decided that the section should not be interpreted as such and that it is applicable to any decision by a state organ. The matter then falls outside the jurisdiction of arbitration by the CCMA. If the section is to be interpreted restrictively, then recourse would have to be sought in the civil courts:

> " In the circumstances it would appear meet not to dismiss the application on the merits but rather to uphold the contention of [the respondent] that the matter, in fact, properly belongs in the Labour Court. (Although it seems to me that it is intended by the Act that the Labour Court should have concurrent jurisdiction with the High Court in matters relating to labour relations the effect of a restrictive interpretation of 'constitutionality' would be that the applicant *may have to approach the High Court*.) [Author's emphasis]

11.2. ***NEHAWU and Government of the Eastern Cape***

In this CCMA matter [68] a dispute arose from a claim by some 53 officials of various departments of the Government of the Eastern Cape for overtime pay allegedly owing to them. Commissioner Grogan ruled on 23 April 1999 that the Commission had no jurisdiction to entertain the matter:

> "The presumption that the legislature intended excluding from the ambit of the unfair labour practice definition claims for unpaid remuneration is further strengthened by the fact that the *Labour Court is given exclusive jurisdiction to entertain claims concerning unpaid wages owing under the BCEA, and concurrent jurisdiction with the civil courts for claims under contracts of employment*. If the CCMA were to entertain such claims under item 2(1)(b***),*** *it would usurp the jurisdiction of the Labour Court and/or the civil courts.* That the BCEA is not yet applicable to the State as employer does not alter this position. *Public servants who are owed wages in terms of their contracts can still sue in the civil courts*. In my view, this is the procedure that the applicants should have utilised in this case." [Author's emphasis]

11.3. ***Lander v Global Resorts SA .***

In this matter,[69] heard during 2000, the employee referred a dispute to the CCMA, claiming that he had been unfairly constructively dismissed from his employment, and that the employer party had failed to pay him six different benefits to which he claimed entitlement in terms of item 2(1)(b) of schedule 7 to the LRA. Conciliation failed to resolve the dispute, and the certificate of outcome described the dispute as concerning 'an alleged unfair dismissal'.

The commissioner examined the six claims to benefits submitted by the employee, and found that, with the exception of a claim to an incentive bonus, they all resorted under remuneration or were contractual claims He consequently ruled that the CCMA did not have jurisdiction to hear the matter.

Comment: If the only dispute referred to the CCMA was that the "employer's conduct constituted a constructive dismissal of the applicant;" section 194 would have limited the amount of his claim to far less than the outstanding benefits. It

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[68] (1999) 8 CCMA 6.7.2..
[69] (2000) 21 *ILJ* 1009 (CCMA).

appears that the best route to have followed would have been a referral for constructive dismissal to the CCMA and the claims for outstanding benefits to either the Labour Court or High Court in terms of section 77(3) of the BCEA. This example very well illustrates the jurisdictional dilemma facing an employee who needs to refer what is essentially a single dispute to two separate forums.

11.4. ***Schoeman & another v Samsung Electronics (Pty) Ltd.***

This case,[70] with judgment given by Revelas J on 10 June 1997, established a precedent for the interpretation of employment contracts within the LRA, particularly with regard to the relationship between remuneration and benefits. The application was dismissed on the grounds that the court lacked jurisdiction to hear the matter.

The dispute arose from a unilateral reduction of the first applicant's sales commission from 0,5% to 0,23%. She would consequently suffer a reduction in her annual income of approximately R42 000,00 per annum.

A conciliation meeting before the CCMA on 10 March 1997 left the matter unresolved. The matter was then scheduled for arbitration on 9 May 1997. On the same day, this application came before the Labour Court. By agreement the matter was postponed to 19 May 1997 for hearing on a final basis. The respondent conceded that the matter was urgent at that stage.

The first applicant sought to enforce the basic terms and conditions of her contract of employment with the monetary relief consequent thereto.

The learned judge analysed the relationship between commission, salary and benefits as follows:

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[70] (1997) 2 LC 1.1.10; (1999) 20 *ILJ* 200 (LC).

> "Commission payable by the employer, forms part of the employee's salary. It is a *quid pro quo* for services rendered, just as much as a salary or a wage. It is therefore part of the basic terms and conditions of employment. Remuneration is different from "benefits". A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract."

The Court consequently considered the conduct of the respondent in this regard as a breach of the employment contract between the parties

Referring to the powers of the Labour Court in this regard, the learned judge states:

> "None of the aforesaid sections confer jurisdiction on this Court to enforce contracts of employment, in my view. Section 158(1)(iii), which confers the power on this Court to "direct the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objectives" of the Act, does not confer such jurisdiction in this case."

The learned judge then gives an overall interpretation of the powers and functions of the Labour Court and the CCMA:

> "None of the aforesaid sections confer jurisdiction on this Court to enforce contracts of employment …. A less technical interpretation of the Act also cannot confer jurisdiction on this Court. Even collective agreements may not be enforced by the Labour Court. Such disputes may only be arbitrated. In terms of section 24 of the Act, all disputes relating to the application and interpretation of collective agreements must be arbitrated by the CCMA. The Labour Court may only entertain appeals against such arbitration awards. *The Labour Court's powers and functions largely have to do with collective disputes, whereas issues relating to individual employees mostly fall within the scope of the CCMA.* This factor together with the provisions of section 24 in my view, indicate that contractual disputes were deliberately excluded in the Act." [Author's emphasis]

The learned judge concluded that the matter could neither be adjudicated by the Labour Court, nor by the CCMA. The application was dismissed with no order as to costs.

11.5. ***Conjwa & others v Postmaster General, Transkei & another***

In this matter[71] an appeal was lodged with the Transkei High Court against am order of the court *a quo* not to grant a rule *nisi* calling upon the respondents to show why

> "2.1 the decision of the First Respondent to reduce the salaries of the Applicants should not be declared invalid, of no force and legal effect;"

The rule *nisi* was issued on 22 September 1994 and the order was made on 2 February 1995. Judgment on appeal was given on 26 February 1998. The appeal succeeded and the order of the court *a quo* was set aside.

No reference was made to any labour legislation or to the jurisdiction of the Labour Court . *The matter was solely decided on the right to fair administrative action as envisaged by the Interim Constitution*.

The first respondent was entitled to correct the applicants' salaries by virtue of the provisions of section 38 of the Public Service Act 1994. However, according to the court of appeal, the manner in which such provisions are implemented must be subservient to the principles of administrative justice:

> "… the appellants were entitled to administrative action that was rational and procedurally fair as envisaged by the provisions of section 24 of the interim Constitution. Fairness required that the respondents, before implementing section 38, should have informed the appellants of the basis for their conclusion that the salaries and salary scales as contained in the April minute were incorrect and that their salaries should be reduced by the implementation of the provisions of the section 38. … There was no apparent reason for prompt action or any other reason justifying exclusion of the appellants' right to procedurally fair administrative action and none has been advanced by the respondents."

Comment: The original dispute arose before the 1995 LRA came into effect. It is a moot point whether such matter could today be referred to the Labour Court as an unfair labour practice resorting under an unilateral change to conditions of

[71] (1998) 7 HC 6.7.2.

service. In terms of section 77 of the BCEA a decrease in salary may be referred to either the Labour Court or the High Court.

The constitutionality of the provisions of section 38 could also be attacked under section 157(2)(b) of the LRA in either the High Court or Labour Court.

11.6. ***Dyani v Director-General for Foreign Affairs & others***

This matter was brought on appeal to the Transkei High Court and judgment was given on 5 March 1998.[72]

The appellant brought application proceedings in the court *a quo*, *inter alia,* to declare the respondents' decision to regard his absence from official duty as vacation leave without pay, as invalid and of no force and legal effect. Two of the grounds on which the application was brought were

> "2. Declaring the decision of the First, Second and Third Respondents regarding the applicant's absence from official duty in the same Ministry and for the same period as vacation leave without pay as constituting *an unfair labour practice.*
>
> 3. Declaring the decision of the same Respondents regarding the applicant's absence from official duty for the same period as vacation leave without pay *unconstitutional*." [Author's emphasis]

No reference was made to labour legislation.

The court *a quo* dismissed the application. No date of judgment is given in the report under consideration.

The appeal succeeded, wherein Jafta AJ stated:

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[72] (1998) 7 HC 6.7.3

> "Consequently, I am persuaded that the Court *a quo* should have been satisfied that the [Public Service] Commission failed to apply its mind before arriving at the conclusion that the appellant failed to report for duty after his sick-leave as well as that such failure "dictates" that the period from 13 January 1990 be regarded as vacation leave without pay. The appellant has succeeded in establishing one of the common law review grounds, namely, the Commission has, in the exercise of its discretion, failed to apply its mind properly to the matter before it.

Despite references to "unfair labour practice" and declaring the "decision … unconstitutional", the appeal succeeded purely on common law review grounds.

Chapter 12. Harassment and discrimination

According to section 6(3) of the Employment Equity Act ("EEA"), harassment is considered a form of discrimination. The prohibition of discrimination is central to Chapter 2 of the Constitution (the "Bill of Rights") and which has now found expression in the Promotion of Equality and Prevention of Discrimination Act ("PEPD") Harassment, as a form of discrimination, has now found a niche in both labour law and criminal law and, as before, remedy may also be sought in the civil court. The variations are plentiful. In a recent case, still before the court,[73] applications were simultaneously brought to the CCMA and in the High Court. The jurisdiction of the court will primarily be determined whether the harassment occurred in the workplace or not. The EEA is clearly intended for harassment of an employee by its employer, but would harassment amongst fellow employees also qualify for the CCMA or Labour Court? Particularly where an employee acts on instructions from an employer to harass another employee.

12.1. Discrimination with respect to benefits

In the well-publicised case of *Langemaat v Minister of Safety & Security & others*[74] an application was brought declaring the refusal to provide medical scheme benefits to the applicant's lesbian partner to be unconstitutional. The section of the Constitution relied upon was section 9(3):

> 9. Equality
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

The matter was heard on 28 January 1998 in the High Court, Transvaal Provincial Division before Roux J. An order was made declaring the actions of the respondent unconstitutional and directing the respondent to consider the

[73] Dr Margaret Orr of UNISA has referred two matters of the same factual content to both the CCMA and High Court.
[74] (1998) 7 HC 6.7.4.

registration of the applicant's partner as a dependant in terms of the rules of the respondent's medical scheme.

Comment: The court was not asked to consider its jurisdiction in the matter even though it involved the benefits related to the applicant's conditions of employment. It can be mooted that the applicant could equally well have brought the application under Item 2(1)(b) of Schedule 7 of the LRA and raised the constitutionality of the regulations of the medical scheme in the Labour Court. Accordingly, the Labour Court and High Court would have had concurrent jurisdiction under section 157(2) of the LRA.

However, since the introduction of the EEA, the explicit prohibition of discrimination in the workplace in terms of section 6(3) of the EEA, read with its section 49, gives exclusive jurisdiction to the Labour Court to hear matters such as the *Langemaat* case.

Chapter 13. Agency shop agreements

The constitutionality of the agency shop agreement remains a contentious one.[75] [76] [77] The main bone of contention is section 25(1) which provides "the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but eligible for membership thereof."

Section 157(2) confers concurrent jurisdiction to hear such matters on both the Labour Court and High Court. The main thrust would be recourse to section 18 of the Constitution which enshrines that "Everyone has the right to freedom of association. " On the other hand, the Constitution also provides in section 23(6) that

> "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). "

An application to oppose the enforceability of an agency shop agreement will then have to test section 25(1) of the LRA against the limitation clause, section 36(1), of the Constitution. Whether such an application should be brought before the Labour Court or High Court would be a strategic consideration.

Such an application was brought in *Greathead v SACCAWU*. [78] The application was first brought in the High Court (Witwatersrand Local Division) for an order declaring that the agency shop agreement infringed the applicant's right to freedom of association, freedom to make political choices and the right to freedom from servitude or forced labour.

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[75] A A Landman, "The closed shop rides again – a surprise from the New Labour Relations Act" 1995, *Contemporary Labour Law* 11 13–14.
[76] A A Landman, "Hey Ho Silver and the `Freerider' rides free again", 2001 ILJ 856.
[77] C Thompson, "Labour-management relations". Current Labour Law, 1998, 16.
[78] (2001) 22 *ILJ* 595 (SCA).

Blieden J dismissed the application on the grounds that it was limited to an attack only on the agreement, and not on the constitutionality of section 25 of the LRA. The Supreme Court of Appeal ("SCA") subsequently upheld the appeal on grounds other than constitutional grounds. From the judgment it does not appear if the jurisdiction of the High Court, or even that of the SCA itself, was considered.

The LRA is clear about the route a dispute concerning the *interpretation and application* of an agency shop agreement must take in that "… any party to the dispute may refer the dispute in writing to the Commission…" If the dispute remains unresolved at conciliation, it must then be referred to arbitration. According to section 143 the arbitration award is final and binding, but may be subject to review in the Labour Court.

On the other hand, it is unlikely that the CCMA would have jurisdiction to hear a dispute on the *validity, or legality,* of an agency shop agreement. According to Landman ,[79] "it would seem that the Labour Court and not the High Court or the SCA would have jurisdiction to declare the agency shop agreement invalid or to rectify it, if it is capable of rectification." Nevertheless, the judgment of the SCA now has the force of law.

On the other hand, in the *Greathead* case the SCA treated the agency shop agreement as a contractual agreement, which would bring it within the ambit of the High Court and the SCA. However, considering an agency shop agreement as a collective agreement, Landman argues [80] [81] that such an agreement has the force of law, not *ex contractu* but by virtue of section 23 of the LRA.

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[79] n76 857.
[80] n76 858. [81] A A Landman, "Collective agreements – Which judicial pigeon hole for new Bargaining Agreement?", 1996 *Contemporary Labour Law* 71.

In the final analysis of the *Greathead* case, the agency shop agreement was fatally defective in that it did not provide for the amount deducted from non-union members' wages to be paid into a separate, conscientious objector's fund administered by the Department of Labour. No pronouncement was made on the constitutionality of the agency shop agreement, and neither has any clarity emerged on the appropriate jurisdiction.

Chapter 14. Miscellaneous applications

14.1. Eviction

Under the previous LRA the Supreme Court could grant an eviction order in favour of the employer on the basis of a lawful dismissal of his employee, while the Industrial Court could order reinstatement on the basis of an unfair, though lawful, dismissal. This contingency is still possible.

According to Zondo JP in *Langeveldt v Vryburg Transitional Council* (see 4.3)at [59], "There is little doubt that a High Court would have jurisdiction to deal in one way or another with an eviction of an employee from the employer's accommodation." However, if such eviction is concomitant with an unfair labour practice the jurisdiction of the Labour Court would come into effect. The learned judge president furthermore states in the same paragraph:

> "…it does not appear that the Labour Court would have jurisdiction to deal with such a matter unless it can be said that (a) section 77(3) of the BCEA confers such jurisdiction or (b) such eviction constitutes a unilateral change of terms and conditions of employment of such employees as contemplated in section 64(4), or (c) such eviction can be said to fall within the ambit of an `unfair act or omission… relating to the provision of benefits to an employee' as contemplated in item 2(1)(b) of schedule 7."

The learned judge president also raises the possibility in [60] that an eviction dispute could be split between the courts: an employer seeking an eviction order in the High Court and the employee opposing it in the Labour Court.

If an employment contract stipulates that an employee must vacate his living quarters on the termination of his contract , then the High Court may order such eviction after the *lawful dismissal* of an employee. Such an order was made by the High Court *in Harmony Gold Mining Co Ltd v United Peoples Union of SA and others.* [82]

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[82] OFS Provincial Division, case no 4895/97 (unreported),

14.2. **Spoliation order**

In *Rammekwa v Bophuthatswana Broadcasting Corporation & Another* ("BBC") [83] the BBC terminated the applicant's services by notice dated 17 November 1997 on the grounds that her work permit was to expire in December that year. After the termination of her services the employee continued to reside in a flat that was the property of the BBC. The employee's water and power supply was cut off while she was residing in the flat. The applicant launched an application in the Labour Court for an order that the BBC and its successor, the SABC, reinstate electricity and water supplies to the flat.

The Labour Court, after granting a postponement, decided that it did not have jurisdiction to grant a spoliation order.

14.3. **Promotion**

The case of *Manakaza & another v Government of the Republic of South Africa & others* [84] held in the High Court, Transkei, with judgment given by Somyalo, JP on 19 February 1998, contains the elements and key words associated with the residual unfair labour practice defined in Item 2(1)(b) of Schedule 7 of the LRA as "the unfair conduct of the employer relating to the promotion, demotion or training of an employee…" Nevertheless, the jurisdiction of the court was not challenged.

Although there were only two applicants in this case, the alleged promotion of the first applicant was part of what was referred to as the "mass promotion" of officers in the Department of Prisons in Transkei during April 1994. According to the papers before the Court as well as evidence, approximately 2 000 officers of the Department of Prisons were "promoted" during this period and amongst these was a group of approximately 1 490 non-commissioned officers.

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[83] (1998) 19 *ILJ* 877 (LC).
[84] (1998) 7 HC 6.14.1.

The main argument revolved about whether a promotions committee had the authority to promote the applicants. The statutory power to promote staff was invested in the Commissioner of Prisons and the court considered whether the Commissioner could delegate such powers to a promotion committee. After considering the merits of the *delegatus non potest delegare* rule, it was decided by the learned Judge-President that

> "Insofar as the first respondent's promotion emanates from the promotions committee agreed on as indicated herein before, the Commissioner, in my view, had no statutory power to delegate his statutory duties. "

The powers to promote were indeed delegated by the legislature to the Commissioner:

> "Applying the principle laid down to the present case, it is clear to me that the legislature delegated powers and functions to a subordinate authority, the Commissioner where members were appointed and a specific chairperson."

In the case of the second applicant it was found that his request for increased emoluments, based on his alleged promotion, would have been in conflict with the moratorium placed on expenditure in terms of the Transitional Executive Council Act 51 of 1993.

Both applications were dismissed.

Comment: It could well be that the labour dispute was clouded and relegated to a lesser role by the greater political and administrative issue of accommodating large numbers of government employees of the former Republic of Transkei into the newly constituted RSA government service. As expressed by the learned Judge-President, " that in my view the evidence is symptomatic of the chaotic situation which prevailed at the time."

The validity of the *delegatus non potest delegare* rule as a High Court matter, taking into account the "chaotic situation," overshadowed any argument in terms of the principles of labour law. One can only assume that this was one of the reasons why the jurisdiction of the High Court was not challenged.

A jurisdictional dilemma would have arisen if this matter had only been considered in terms of labour legislation. According to item 2 of the LRA it is the CCMA or a council with jurisdiction, that deals with disputes concerning promotion. Such a dispute will be put to an end by arbitration. Neither the High Court, nor the Labour Court, would have jurisdiction to entertain and adjudicate such disputes under the LRA.

14.4. **Changes to conditions of employment**

See *NAPTOSA & others v Minister of Education, Western Cape & others* .in 7.1.1.

14.5. **Transfer of employees**

See *Perumal v Minister of Safety and Security & others* in 5.3and *Coetzee v Comitis & others* in.5.6.2.

14.6. **Refusal to appoint job applicants**

This possibility is mentioned by Zondo JP in *Langeveldt v Vryburg Transitional Council & others* at 519B. (See 4.3)

14.7. **Interpretation of a collective agreement**

Collective agreements concluded before the commencement of the LRA are, according to item 13(2) of Schedule 7, deemed to have been concluded in terms of the LRA.

See also

Mgijima v Eastern Cape Appropriate Technology Unit & another in 5.5;

Faku v Fidelity Guards Holdings (Pty) Ltd in 6.3;

IMATU v Northern Pretoria Metropolitan Substructure & others in 7.1.2.

Chapter 15. Summary

The reader will understandably be perplexed by the lack of consensus amongst authorities on where to go with what in the case of a dispute in the workplace. Difference of opinion is the substance of a legal system, but it is the task of the legislature to express the law in a way that will narrow down such differences. It is also understandable that such novel changes to our labour legislation will cause teething problems. After five years and a voluminous body of judgments the legislature should be able to identify the technical deficiencies in the legislation. The major aim of this treatise was to systemise those deficiencies and we shall briefly do so in this chapter.

Firstly, we classify the various judgments according to their decisions on the jurisdiction of the courts.

15.1. Jurisdiction of High Court not disputed

- *Hoffmann v South African Airways* (see 5.2).
- *Coetzee v Comitis & others* (see 5.6.2). Conditions of employment, transfer.
- *Faku v Fidelity Guards Holdings (Pty) Ltd* (see 6.3). Collective agreement.
- *Greathead v SACCAWU* (see chapter 13). Agency shop agreement.
- *Manakaza & another v Government of the Republic of South Africa & others* (see 14.3). Promotion.
- *Langemaat v Minister of Safety & Security & others* (see 12.1) Discrimination with respect to medical benefits.

- *Harmony Gold Mining Co Ltd v United Peoples Union of SA & others* (see 14.1). Eviction.

- *Mireskandari v Minister of Home Affairs & others* (see 7.5).

In the above cases the jurisdiction of the High Court was not raised by the parties, nor *mero motu* by the court.

15.2. **High Court jurisdiction upheld**

15.2.1. **Law of contract**

- *Jacot-Guillarmod v Provincial Government Gauteng & others* (see 9.3).
- *Fedlife Assurance Ltd v Wolfaardt* (see 9.4).
- *Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation & another* (see 9.6.1).
- *Lowe v Commission on Gender Equality* (see 9.6.2).

In these cases it was the court's opinion that disputes about contracts of employment belong to the High Court. Concurrent jurisdiction with the Labour Court would commence when the BCEA comes into effect for the parties involved.

15.2.2. **Others**

1. In *NAPTOSA & others v Minister of Education, Western Cape & others* (see 7.1.1) a declaratory order was sought in the High Court on the grounds that a unilateral change in service benefits constituted an unfair labour practice in violation of rights in terms of section 23(1) of the Constitution. Conradie J concluded that the High Court had jurisdiction to hear the matter, as well as to grant the relief sought.

2. In *Runeli v Minister of Home Affairs* (see 10.1) a declaratory order was sought in the High Court declaring the employee's dismissal unlawful. Jafta J decided that the High Court did have jurisdiction and based his decision on a number of considerations:

   - The High Court is only ousted in matters codified in the LRA as being assigned exclusively to the jurisdiction of the Labour Court.
   - A court's jurisdiction is ousted only if it appears to be the intention of the legislature by necessary implication.
   - Exclusive jurisdiction of the Labour Court would be inconsistent with the provisions of section 195 of the LRA.

3. In *Kilpert v Buitendach & another* the applicant applied to the High Court to review and set aside a decision to dismiss him following a guilty decision by a committee of enquiry (see 10.2). Sutherland AJ was of the view that the High Court had a historical precedence over the Labour Court in matters of common law relating to the administration of a contract of employment.

4. In *Olivier v University of Venda* (see 7.4), involving the suspension of an employee pending the outcome of a disciplinary hearing, the High Court's jurisdiction was upheld by Preller AJ.

5. In *Fourways Mall v SA Commercial Catering and Allied Workers Union* the owner of a shopping mall approached the High Court for urgent relief against a group of strikers unlawfully obstructing access to the shopping centre (see 8.3.1). Claasen J found that no labour relationship existed between the parties and that the dispute was consequently not governed by the LRA.

6. *Ntabeni v MEC for Education.* The learned judge found that the court had jurisdiction on the basis that the claim was largely founded on sections 23 and 33 of the Constitution. (See 5.6.3)

7. *Mbayeka and another v MEC for Welfare, Eastern Cape* (see 10.3). The Court rejected the purposive approach in construing section 157(2).

Comment: The decisions in the first four cases *supra* were based on a combination of common law, fundamental rights and law of contract. The decision in *Runeli* also relied largely on an interpretation of law. The *Fourways* was decided on delictual grounds.

15.3. **High Court ousted**

15.3.1. **Strikes.**

The cases of *Mondi Paper* (see 8.1.1), *Sappi Fine Papers* (see 8.1.2) and *Coin Security Group* (see 8.1.3) have in common that striking workers engaged in criminal acts and other acts of misconduct against non-striking co-employees. The first two mentioned cases involved lawful strikes, but in the *Coin Security Group* the strike was unprotected. In all three cases the courts ruled that strikes *per se* constitute a labour matter for which the Labour Court had exclusive jurisdiction.

15.3.2. **Urgent order against dismissal or suspension**

- *Communication Workers Union & another v Telkom SA Ltd & another* (see 2.2).
- *Mcosini v Mancotywa & another* (see 5.4). The applicant was suspended from his duties with pay, pending the outcome of a disciplinary hearing.
- *Vukaphi & others v Mayor of Lusikisiki Transitional Local Council & another* (see 5.4). Similar to *Mcosini supra.*

- *Mgijima v Eastern Cape Appropriate Technology Unit & another* (see 5.5). The employee applied to the High Court for a declaratory order that his dismissal was an unfair.
- *Mbayeka and another v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk) (see 10.3).

15.3.3. **Collective agreement**

- *Fredericks & Others v MEC Responsible for Education & Training in the Eastern Cape Province & others.* See 10.4.

15.4. **Labour Court has concurrent jurisdiction with High Court to hear disputes based on constitutional matters related to the workplace**

- POPCRU v Minister of Correctional Services & others (see 5.6.1).

15.5. **Jurisdiction of Labour Court rejected**

- *Perumal v Minister of Safety and Security & others* (see 5.3). Disciplinary action, transfer. The dispute should have been referred to arbitration. Jurisdiction of the High Court was not raised.

- *Rammekwa v Bophuthatswana Broadcasting Corporation & Another* (see 14.2) Spoliation order.

- *Schoeman and others v Samsung Electronics SA (Pty) Ltd* (see 11.4). Provision of benefits regarded as remuneration.

- *Gaylard v Telkom SA (Ltd)* and *Ackron & others v Northern Province Development Corporation* (see 6.4). Jurisdiction of Labour Court rejected.

15.6. **CCMA does not have jurisdiction**

- *Public Servants Association obo Geustyn v Provincial Administration: Western Cape* (see 11.1). Refusal to grant a severance package. The commissioner ruled that either the Labour Court or the High Court may have jurisdiction.
- *NEHAWU and Government of the Eastern Cape* (see 11.2). Unpaid wages. The commissioner advised that the matter be referred to the `civil courts.'
- *Lander v Global Resorts SA* (see 11.3). Dispute on remuneration.

15.7. **Matters arising before 11 November 1996**

- Kritzinger v Newcastle Plaaslike Oorgangsraad & Others (see 6.2.1). High Court jurisdiction upheld.
- *IMATU* v Northern Pretoria Metropolitan Substructure & others (see 7.1.2) Jurisdiction of High Court rejected.
- *Conjwa & others v Postmaster General, Transkei & another* (see 11.5). Jurisdiction of the High Court not disputed.
- *Dyani v Director-General for Foreign Affairs & others* (see 11.6). Jurisdiction of the High Court not disputed.
- *Gaylard v Telkom SA (Ltd)* and *Ackron & others v Northern Province Development Corporation* (see 6.4). Jurisdiction of Labour Court rejected.

15.8. **The influence of the Constitution**

Concurrent jurisdiction is statutorily described in section 157(2) of the LRA. Such concurrent jurisdiction is " in respect of any alleged or threatened violation of any fundamental right " arising from labour relations and any administrative act or conduct by the State as employer. The extent to which these violations apply to various employment circumstances formed the crux of the jurisdictional dispute in a number of cases. The pertinent cases where the Court ruled that the State was the employer are:

Perumal v Minister of Safety and Security & others.
Mgijima v Eastern Cape Appropriate Technology Unit & another.
POPCRU v Minister of Correctional Services & others..
NAPTOSA & others v Minister of Education, Western Cape & others.
Ntabeni v MEC for Education.
Mbayeka & Another v MEC for Welfare, Eastern Cape.

In *Coetzee v Comitis & others* the State was not an employer, but this matter was decided entirely on a violation of fundamental rights and without any reference to the jurisdiction of the court.

In *Kilpert v Buitendach & another* where the employer is a semi-state organ (a technikon) the jurisdiction of the High Court was disputed by the respondents, but the court decided that it did have jurisdiction. This decision was criticised in *Mgijima* and *IMATU.*

15.9. **Synopsis**

Matters concerning contract of employment, remuneration and benefits linked to wages fall within the domain of the High Court. The BCEA confers concurrent jurisdiction to the Labour Court in these matters.

Matters of delict arising in the workplace, except where strikes or lockouts are concerned, are heard by the High Court. Delictual acts arising from strikes or lockouts, regardless of their origin or legality, belongs to the jurisdiction of the Labour Court.

Disputes over the constitutionality of decisions or actions taken, are either heard by the High Court, or Labour Court, depending on the interpretation by the Court of the particular statute.

Matters arising before the commencement of the LRA are continued in the High Court subject to the transitional arrangements of item 21(1) of schedule 7.

No clear demarcation in jurisdiction exists for interim relief, interdicts or declaratory orders

15.10. **Final observations**

The courts are divided on jurisdiction with regard to the interpretation of statutes, particularly where a violation of fundamental rights in the workplace is alleged. The two schools respectively follow the *literal-grammatical* approach, or the *purposive contextual* approach.

The distinction between individual and collective labour disputes manifests, to some extent, in the jurisdiction of the courts. In cases where the jurisdiction of the High Court was accepted or where the Labour Court was ousted, the applicants were mostly individuals. Disputes involving group action were mostly accepted in the Labour Court.

Geographical location should play no role in determining jurisdiction between the Labour Court and the High Court. Nevertheless, it should be pointed out that proportionally more decisions were taken in favour of the jurisdiction of the High Court when heard in Umtata, about 600 km distant from Port Elizabeth, the seat of the Labour Court in the Eastern Cape.

Chapter 16. Conclusion

The cases discussed in this treatise bear testimony to what must have been a debilitating effect on a party who loses the day in court before even reaching the merits of his case. It surely presents a challenge to a lawyer who has to explain to his often unsophisticated labourer-client this peculiar aspect of justice. It should be avoided in the High Court and surely does not belong in the Labour Court where a simplicity of litigation is expected.

A number of voices of concern has been raised from the Bench on this state of affairs, with a plea to the legislature to solve the jurisdictional dilemma.

Solutions can broadly be classified as follows. The final and most reasonable solution would, in all likelihood, be an amalgam of the three.

16.1. Overhaul of legislation

A solution proposed by Zondo JP. is an overhaul of the labour legislation to clearly spell out the jurisdiction of the courts. This task has become focussed by the number of cases exemplifying the jurisdictional anomalies. If so decided, such an overhaul should proceed without delay to forestall further casualties in the theatre of jurisdictional combat.

16.2. Parties should consult beforehand on jurisdiction

In *Runeli v Minister of Home Affairs* Jafta J called upon the parties to address him on this issue of jurisdiction so as to avoid engaging in a futile exercise should it turn out that the dispute falls within the exclusive jurisdiction of another court. At 913E–914A the learned judge quotes the comments by MT Steyn AJ, as he then was, on the wasteful consequences a dispute on jurisdiction could entail:

> "There is ample authority that where it is doubtful, on the papers, whether the court has jurisdiction it may mero motu raise the point. In Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) M T Steyn AJ, as he then was, said at 760F:

> 'The Court has, however, in my opinion, the power to dismiss a claim mero motu, if it is clear ex facie the pleadings that it has no jurisdiction whatever to entertain such claim. This has often been done in the past. See Ex Parte Pan-African Tanneries Ltd 1950 (4) SA 321 (O) at 322-3.
>
> To allow a matter to go to trial where the court concerned has obviously no jurisdiction to adjudicate thereon would have *the effect not only of unnecessarily burdening the rolls of the Court but also of compelling the defendant to incur costs and to make sacrifices of his time and energy which could and should have been avoided.* No Court ought to allow this to happen.'

> I fully agree with the aforesaid views and I may add that it would be senseless to expect the court to give judgment in a matter in spite of its lacking jurisdiction, simply because there was no objection thereto. A judgment given by the court without jurisdiction amounts to a nullity. This is so even if the other party has consented to jurisdiction. A consent to jurisdiction where none exists cannot confer authority upon the court to entertain a dispute. It was with this principle in mind that I called upon the parties to address me on this issue so as to avoid engaging in a futile exercise should it turn out that the dispute placed before this court falls four-squarely within the exclusive jurisdiction of another court." [Author's emphasis]

Serious consideration should be given to introduce in the Rules of Court a provision that the jurisdiction of a court should be established in the preliminaries, preferably before a judicial officer of the court.

16.3. **Why not retain concurrent jurisdiction for all matters?**

Although remote, consideration should also be given to this option.

In *PPWAWU v Pienaar* Botha JA states at 640G–H:

> "The first is that the anomalies adhering to a system of concurrent jurisdiction (to the extent in which there is an overlapping of the grounds of review) are notional in character rather than of practical effect. No reason suggests itself why it would be difficult or inconvenient in practice to cope with a dual system of review in relation to proceedings in the industrial court. In argument before this Court reference was made to the possibility of what was called 'forum-shopping', but I am satisfied that the prospect of that kind of malpractice arising is too remote to be of any real consequence."

Concurrent jurisdiction for criminal and civil matters has existed since the inception of our modern legal system. A division into "specialist" judges in these two fields is not known, at least not in the RSA. One must therefore respectfully enquire whether such a division is strictly required for labour matters? The anomalies of overlap is presently on a scale which probably does warrant the erasure of such a division.

The assignment of concurrent jurisdiction by the BCEA in certain matters will, in future, also increase the number of cases referred to either of the two courts.

Appendix A : Index of cases

Ackron & others v Northern Province Development Corporation (1998) 7 LC 5.5.1., 58, 85, 131.

Babcock Engineering Contractors (Edms) Bpk v President Industrial Court & another (1993) 14 ILJ 111 (T), 52, 68.

Betha & others v BTR Sarmcol (A division of BTR) Dunlop Ltd (1998) 7 SC 1.11.16, 59.

Coetzee v Comitis & others 2001 (1) SA 1254 (C)., 49, 68, 126, 127, 133.

Coin Security Group v SA National Union for Security Forces 1998 (1) SA 685 (C), 72, 78, 80, 83, 130.

Communication Workers Union & Another v Telkom Ltd & Another (1999) 20 ILJ 1991 (T), 13, 52, 130.

Conjwa & others v Postmaster General, Transkei & another (1998) 7 HC 6.7.2., 115, 132.

Dyani v Director-General for Foreign Affairs & others (1998) 7 HC 6.7.3., 116, 132.

Edgars Stores v SACCAWU & another (1998) 19 ILJ 771 (LAC). 70.

Fedlife Assurance Ltd v Wolfaardt (2001) 10 SCA 1.1.1, 88, 92, 128.

Food & Allied Workers Union & others v Scandia Delicatessen CC & another (1999) 20 ILJ 1009 (D), 52.

Fordham v OK Bazaars (1929) Ltd (1998) 19 ILJ 1156 (LC)., 68,.

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 36.

Fourways Mall v SA Commercial Catering and Allied Workers Union 1999 (3) SA 752 (W), 72, 82, 129.

Fredericks & others v MEC for Education and Training Eastern Cape & others, (2001) 10 HC 1.1.1, 28, 51, 104, 131.

Fredericks & others v MEC for Education and Training Eastern Cape & others, Constitutional Court, December 2001, Case CCT 27/01, 142.

Gaylard v Telkom SA Ltd (1998) 19 ILJ 1624 (LC), 58, 85, 131.

Greathead v SACCAWU (2001) 22 ILJ 595 (SCA), 120, 121, 122, 127.

Harmony Gold Mining Co Ltd v United Peoples Union of SA and Others, OFS Provincial Division, case no 4895/97, 123, 128.

Hoffmann v South African Airways (2000) 21 *ILJ* 891 (W), 37,127.

IMATU v Northern Pretoria Metropolitan Substructure & Others 1999 (2) SA 234 (T), 58, 64, 126, 132.

Hultzer v Standard Bank of SA (Pty) Ltd (1999) 20 ILJ 1806 (LC), 62, 71.

Jacot-Guillarmod v Provincial Government, Gauteng 1999 (3) SA 594 (T), 77, 128.

Kilpert v Buitendach and Another (1997) 18 ILJ 1296 (W), 102, 129, 133.

Kritzinger v Newcastle Plaaslike Oorgangsraad and Others (1999) 20 ILJ 2507 (N), 54, 132.

Lander v Global Resorts SA (2000) 21 ILJ 1009 (CCMA)., 112, 132.

Langemaat v Minister of Safety & Security & others (1998) 7 HC 6.7.4., 118, 119, 127.

Langeveldt v Vryburg Transitional Local Council & Others (2001) 5 BLLR 501 (LAC), 29, 41, 81, 83, 123, 126.

Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation & Another (2000) 21 ILJ 481 (B), 95, 128.

Lowe v Commission on Gender Equality Appeal case no A5019/00 Wits Local Div, 96, 128.

Manakaza & another v Government of the Republic of South Africa & others (1998) 7 HC 6.14.1, 124, 127.

Mcosini v Mancotywa & another (1998) 19 ILJ 1413 (Tk), 39, 41, 130.

Mgijima v Eastern Cape Appropriate Technology Unit & another 2000 (2) SA 291 (Tk), 12, 32, 41, 68, 103, 107, 126, 131, 133.

Minister of Correctional Services and Another v Ngubo and Others (2000) 21 ILJ 313 (N), 80.

Mondi Paper (A Division of Mondi Ltd) v Paper, Printing, Wood and Allied Workers Union & Others (1997) 18 ILJ 84 (D)., 72, 74, 75, 76, 78, 79, 83, 130.

NAPTOSA & others v Minister of Education (Western Cape) & others 2001 (2) SA 112 (C)., 62, 126, 128, 133.

National Union of Metalworkers of SA v Vetsak Co-operative Ltd 1996 (4) SA 577 (AD)., 86, 87, 93.

NEHAWU and Government of the Eastern Cape (1999) 8 CCMA 6.7.2., 112, 132.

NUM v Elandsfontein Collieries (Pty) Ltd (2) Labour Court case no. J801/1998., 68.

NUMSA v Driveline Technologies & another [2000] 1 BLLR 20 (LAC), 31, 32.

Olivier v University of Venda, Thohoyandu case no 3/2000, 69, 129.

Perumal v Minister of Safety and Security & others (2001) 10 LC 1.1.11, 38, 126, 131, 133.

Police & Prisons Civil Rights Union v Minister of Correctional Services & others (1999) 8 LC 1.8.1, 48, 61.

Public Servants Association obo Geustyn v Provincial Administration Western Cape (2000) 21 ILJ 700 (CCMA)., 111, 132.

Rammekwa v Bophuthatswana Broadcasting Corporation & another (1998) 19 ILJ 877 (LC)., 124, 131.

Runeli v Minister of Home Affairs (2000) 21 ILJ 910 (Tk)., 42, 98, 105, 107, 129, 135.

SA Chemical Workers Union & others v Sentrachem (1999) 20 ILJ 1597 (LC)., 68.

Sappi Fine Papers (Pty) Ltd (Adam as Mill) v Paper, Printing, Wood and Allied Workers Union & Others (1998) 19 ILJ 246 (SE)., 72, 74, 78, 79, 83.

Schoeman & another v Samsung Electronics (Pty) Ltd (1999) 20 ILJ 200 (LC)., 25, 96, 110, 113, 131.

Sodo & 26 others v Government of the Eastern Cape & others Labour Appeal Court case No NHE 28/2/1 21 September 1999., 58.

South Cape Corporation v Engineering Management Services 1977(3) SA 534(A)., 70.

University of the Western Cape Academic Staff Union & others v University of the Western Cape (1999) 20 ILJ 1300 (LC)., 62, 69.

Vukaphi & others v Mayor of Lusikisiki Transitional Local Council & another (1998) 7 HC 1.1.12., 41, 130.

Appendix B : Bibliography: Articles and books

Author(s)	Journal	Title
BPS van Eck and S Vettori	2000 Obiter 490	Does the High Court have concurrent jurisdiction with the Labour Court to hear unfair dismissal disputes?
A A Landman	2001 *ILJ* 856	Hey Ho Silver and the `Freerider' rides free again.
A A Landman	1996 *Contemporary Labour Law* 71	Collective agreements – Which judicial pigeon hole for new Bargaining Agreement?
M P Olivier	1997 TSAR 786	The civil courts, the labour court and the CCMA, issues relating to jurisdiction in employment matters and forum shopping.
C Thompson,	Current Labour Law, 1998, 16.	Labour-management relations.
M Brassey	1994 SAJHR 179	Labour Relations under the New Constitution
D du Toit *et al*		*The Labour Relations Act of 1995* Butterworths 1998 2nd ed.
J Grogan		*Workplace Law* Juta 2000 5th ed.

Appendix C : Table of statutes

The Constitution of the Republic of South Africa 1996.

Labour Relations Act 66 of 1995.

Basic Conditions of Employment Act 75 Of 1997.

Employment Equity Act No. 55 Of 1998.

The Promotion of Administrative Justice Act 3 of 2000.

Appendix D : Addendum: Sequel to *Fredericks v MEC for Education and Training*

[Added after examination of dissertation]

At the time of the submission of this dissertation the judgment of the Constitutional Court in *Fredericks & 42 others v MEC for Education and Training, Eastern Cape & others*[85] had not been reported yet. O'Regan J gave judgment in favour of the Applicants. In the absence of any provision in the LRA purporting to assign exclusive jurisdiction in this matter to the Labour Court, the Constitutional Court concluded that the High Court did have jurisdiction in this case and that the High Court had erred in reaching the opposite conclusion.

The implications of this decision will be discussed by the author in a separate paper.

[85] Constitutional Court, 4 December 2001, Case CCT 27/01.