IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO:JA21/00

In the matter between

WILLIAM RALPH JOEY LANGEVELDT **APPELLANT**

AND

VRYBURG TRANSITIONAL LOCAL COUNCIL **1ST RESPONDENT**

J. HIEMSTRA N.O **2ND RESPONDENT**

J.P.STEMMET N.O **3RD RESPONDENT**

PREMIER (NORTH PROVINCE) **4TH RESPONDENT**

JUDGEMENT

ZONDO JP

Introduction

[1] The appellant, a former Town Clerk of Vryburg, brought a review application in the Labour Court to set aside the first respondent's decision to dismiss him. The Labour Court, per Stelzner AJ, dismissed his application with costs. With the leave of the Court a quo, the appellant now appeals against that judgement.

The relevant facts

[2] The appellant was appointed as the Town Clerk of the first respondent with effect from the 1st March 1997. During the first half of 1998 and following upon a certain investigation, he was charged with various acts of misconduct by the first respondent. Altogether there were 23 charges or allegations of misconduct preferred against him. The ensuing disciplinary inquiry into those charges was chaired by the third respondent at the request of the first respondent. The appellant denied all the charges. However, the result of the inquiry was that the third respondent found him guilty of some but not all of the 23 charges of misconduct and recommended his dismissal. Pursuant to the finding and recommendations of the chairperson of the disciplinary inquiry, the first respondent adopted a resolution in accordance therewith on the 29th June 1998 and dismissed him with effect from the 1st July 1998.

[3] Subsequently, the appellant noted an internal appeal against the third respondent's findings of guilt and the decision to recommend the appellant's dismissal. The first respondent appointed the second respondent as an appeal committee to hear the appellant's appeal. The second respondent upheld the appellant's appeal in respect of certain charges but, in the end, concluded that the dismissal should stand because the trust relationship between the parties had been destroyed. The second respondent issued his findings of the internal appeal on the 26th August 1998. On the 27th August 1998 the first respondent adopted the second respondents findings.

[4] Subsequent to the adoption by the respondent of the second respondents findings, the appellant referred his dismissal dispute to the North West Division of the South African Local Government Bargaining Council for conciliation. A meeting to conciliate the dispute was apparently held on the 2nd October 1998 but failed to produce an agreement between the parties. The appellant then requested that the dismissal dispute be arbitrated. The dispute was set down for arbitration by the Commission for Conciliation Mediation and Arbitration (**"the CCMA"**) on the 14th January 1999. However, the arbitration did not proceed on that day. Subsequently, the appellant decided to launch a review application in the Court a quo after he had been advised that the CCMA had

no review jurisdiction. There was no objection by the first respondent to the launch of the review application in the Court a quo. The arbitration was postponed indefinitely pending the outcome of the review. I have already indicated above that that application was dismissed with costs by the Court a quo. It is that order which is the subject matter of this appeal.

The appeal

[5] The first question which arises on appeal is whether the Court a quo had jurisdiction to entertain a review application relating to the decision of the first respondent, a local council, to dismiss the appellant. The appellant purported to bring this review application in the Labour Court in terms of section 158(1)(h) of the Labour Relations Act, 1995 (Act No 66 of 1995) (**"the Act"**). Sec 158(1)(h) gives the Labour Court power to "**review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law**". It was submitted on behalf of the appellant that the first respondent was an organ of state as defined in sec 239 of the Constitution of the Republic of South Africa, 1996 and that, therefore, when it makes a decision or performs an act, such decision or act can be said to be a decision or act of the State. Sec 239 of the Constitution defines an organ of state as meaning:-

"**(a) any department of state or administration**

in the national, provincial or local sphere of government; and

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer."

Counsel for the respondent did not argue against this submission. I am satisfied that the submission is correct and that the Court a quo did have jurisdiction to entertain the appellant's review application in terms of section 158(1)(h) of the Act.

Jurisdictional Problems in employment and labour disputes: A need for legislative intervention to streamline the dispute resolution system!

[6] At this stage of this judgement, I consider it my duty to raise a matter of grave concern regarding the dispute resolution system applicable to employment and labour disputes in our country. The problem is about the efficient utilisation of our resources, litigation costs and the effectiveness or otherwise of the dispute resolution

system. As our law presently stands there are employment or labour disputes or matters which:-

[a] only the Labour Court has jurisdiction to deal with;

[b] only the High Courts have jurisdiction to deal with;

[c] both the Labour Court and the High Courts have jurisdiction to deal with;

[d] the Commission for Conciliation, Mediation and Arbitration (**"the CCMA"**), bargaining councils, the Labour Court, the High Courts and the Constitutional Court have jurisdiction to deal with in one way or another.

[7] As a result there is much uncertainty and confusion concerning in which employment and labour matters each of the different courts and institutions has exclusive jurisdiction, has no jurisdiction, or enjoys concurrent jurisdiction with another court or institution. Although the jurisdiction of the CCMA presents problems, the most frequent difficulties relate to the overlap of jurisdiction between the Labour Court and the High Courts. Before I can demonstrate the uncertainty, confusion and unacceptable state of affairs that exist in this regard, I think it necessary to give an overview of the jurisdiction, powers and status of the Labour Court and the High Courts.

The Labour Court, its status and its judges

[8] In terms of sec 166(e) of the Constitution of the Republic of South Africa 1996, (**“the Constitution”**) provision is made for a court of a status similar to that of a High Court which is established or recognised by an Act of Parliament. The Labour Court is such a recognized court because sec 151(2) of the Act provides that it is "**a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a [High Court] has in relation to matters under its jurisdiction.**" Appeals from decisions of the Labour Court are dealt with by this Court, a court which enjoys the same status as the Supreme Court of Appeal in relation to matters which fall under its jurisdiction. The Labour Court is headed by a Judge President. Such Judge President is required to be a judge of a High Court and also to have knowledge, experience and expertise in labour law (sec 152(1)(a) and 153(2) of the Act). The Judge President is appointed by the President of the Republic **(“the President”)** on the advice of the Judicial Service Commission (**“the JSC”**) and the National Economic Development and Labour Council **(“NEDLAC”)** established by sec 2 of the National Economic Development and Labour Council Act, 1994 (Act 35 of 1994) after consultation with the Minister of Justice and

Constitutional Development. The Act also makes provision for a Deputy Judge President of the Labour Court. As in the case of the Judge President, the Deputy Judge President must also be a judge of a High Court and must have knowledge, experience and expertise in labour law. In respect of the appointment of the Deputy Judge President, the Judge President must be consulted (sec 153(1)(6) and (2)) of the Act).

[9] Judges of the Labour Court are appointed by the President on the advice of the JSC. The same occurs in respect of the appointment of judges of the High Courts. This is in accordance with sec 174(6) of the Constitution. However, there are additional requirements of a procedural nature which must be met in regard to the appointment of judges of the Labour Court. These are prescribed by the provisions of sec 153(1)(a),(b) and (4) of the Act. Sec 153(4) requires the President to appoint judges of the Labour Court on the advice of the JSC and Nedlac. In addition, those provisions require consultation with the Minister of Justice and the Judge President of the Labour Court in regard to the appointment of all judges of the Labour Court.

[10] In terms of sec 153(b) of the Act a person is required to be a judge of a High Court or a legal practitioner [1] who has

knowledge, experience and expertise in labour law in order to be eligible for appointment as a judge of the Labour Court. In other words, any judge of the Labour Court is either already a judge of a High Court when he is appointed as a judge of the Labour Court or if he is not, he/ she is, before appointment, a legal practitioner with knowledge, experience and expertise in labour law. In terms of sec 154(5)(a) of the Act the remuneration payable to a judge of the Labour Court must be the same as the remuneration payable to a judge of a High Court. In terms of sec 154(5)(b) of the Act the terms and conditions of appointment of a judge of the Labour Court must be similar to those of a judge of a High Court.

Jurisdiction and Powers of the Labour Court

[11] As the Labour Court is a court of a status similar to that of a High Court, it has power in terms of sec 172(2) of the Constitution "**to make an order concerning the constitutional invalidity of an Act of Parliament, a provincial Act or any conduct of the President.**" As is the case with orders of constitutional invalidity made by a High Court, an order of constitutional invalidity made by the Labour

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1.In terms of sec 213 of the Act this means “any person admitted to practice as an advocate or an attorney in the Republic.”

Court does not become operative unless it is confirmed by

the Constitutional Court. Sec 172(2)(b) provides that a court which makes an order of constitutional invalidity may grant "**a temporary interdict or other temporary relief to a party or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.**" Sec 169(b) of the Constitution provides that a High Court may decide "**any constitutional matter**" except a matter that "**is assigned by an Act Parliament to another court of a status similar to a High Court.**" This provision ensures that High Courts have no jurisdiction in constitutional matters which have been assigned to the Labour Court by an Act of Parliament.

[12] The primary provision in the Act which deals with the jurisdiction of the Labour Court is sec 157. However, there are other sections of the Act which confer jurisdiction on the Labour Court to deal with various disputes. The provisions of sec 157(1), (2) and (5) of the Act read thus:-

"**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, 1996, and arising from-

(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct by the State in its capacity as an employer; and

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

(3) …

(4) …

(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."

[13] Under sec 158(1) of the Act a list of powers of the Labour Court is provided. It includes the power to grant interdicts, urgent interim relief, declaratory orders, compensation and damages in circumstances contemplated by the Act, an order compelling compliance with provisions of the Act, to review, 'despite sec
145', the performance or purported performance of any function
provided for in the Act or any act or omission of any person or body in terms of the Act on any grounds that are permissible in law, to review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law and to deal with all matters necessary or incidental to performing its functions in terms of the Act or any other law.

[14] The provisions of sec 77(1) of the Basic Conditions of Employment Act, 1997 (Act No 75 of 1997) (**"the BCEA"**) mirror the provisions of sec 157(1) of the Act. The provisions of sec 77(1)-(5) read thus:-

"**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."

[15] Sec 68 of the Act is another section of the Act that confers jurisdiction on the Labour Court . Sec 68(1)(a) provides:-

"(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) to grant an interdict or order to restrain-

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or

(ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;"

[16] Sec 68(1)(b) confers **"exclusive jurisdiction"** on the Labour Court to **"order the payment of just and equitable compensation for any loss attributable to "**an unprotected strike or lock-out. Another section that confers jurisdiction on the Labour Court is sec 69. This section permits picketing by members or supporters of a registered trade union where such picketing is authorised by that union and is in

support of a protected strike or is in opposition to any lock-out. It requires the union and the employer to agree on picketing rules to be observed during a picket but says that, in the absence of such agreement , the CCMA may impose picketing rules on such parties. It then provides that, should a dispute about an alleged breach of such rules not be resolved by the CCMA through conciliation, such dispute must be referred to the Labour Court for adjudication. Picketing rules would normally include a prohibition of conduct such as intimidation, harassment, assault and other acts of violence during such picket or strike.

[17] The provisions of sec 191(5)(a) and (b) are also of relevance. Sec 191 provides for the procedure to be followed whenever "**there is a dispute about the fairness of a dismissal.**" Sec 191(5) provides that if, after attempts at conciliation have failed, such a dispute remains unresolved, it must be referred either to the CCMA or a council with jurisdiction for arbitration or to the Labour Court for adjudication. Whether such a dispute is referred to the CCMA, or, a council, for arbitration, or, to the Labour Court for adjudication, depends on the reason for dismissal as alleged by the employee. If, for example, the employee alleges that the reason for his dismissal is certain alleged conduct on his part, that dismissal dispute is required by sec 191 (5)(a) to be arbitrated by the CCMA or the relevant council.

[18] If, however, the employee alleges that the reason for dismissal is the employer's operational requirements (which includes retrenchments), the dismissal dispute is required to be referred to the Labour Court for adjudication (sec 191(5)(b)). Furthermore, there are certain reasons for dismissal which, if they were to be proved, would render the dismissal automatically unfair in terms of the Act. Such reasons include pregnancy or intended pregnancy or any reason related to pregnancy as well as cases where the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including but not limited to, race, gender, sex, ethnicity or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility. (sec 191(5)(b)(1) read with sec 187 (1)(e) and (f)). Automatically unfair dismissal disputes are required to be adjudicated upon by the Labour Court in terms of sec 191(5)(b) of the Act.

[19] It is also necessary to refer to the provisions of items 2, 3 and 4 of Schedule 7 to the Act. These items deal with residual unfair labour practice disputes and the process relating to their resolution. Item 2 (1) reads as follows:-

"**2. Residual unfair labour practices-**

For the purposes of this item, an unfair

labour practice means any unfair act or omission that arises between an employer and an employee involving

(a) .....

(b) 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;

(c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;

(d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement."

[20] Paragraph (a) of item 2(1) has been deleted from the Act. This is because sec 6 of the Employment Equity Act, 1998 now covers the matters previously covered by item 2(1)(a). Item 3 requires such disputes to be referred to conciliation. If conciliation fails, such disputes are required to be referred to the CCMA or a

council
with jurisdiction for arbitration.

[21] Against the above background reference can also be made to the

jurisdiction of the High Courts.[2] Sec 169 of the Constitution confers jurisdiction on a High Court to "**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."

[22] Sec 172 (2)(a) of the Constitution confers jurisdiction on, among other courts, a High Court to "**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." When deciding a constitutional matter which is within its competence, a High Court, like any court deciding such a matter, must declare that any law or conduct that is inconsistent with the

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2 Sec 166 (c) of the Constitution recognises what it refers to as**"the High Courts"**. Provincial and local divisions of what used to be called the Supreme Court in the pre-1996 era certainly fall within the ambit of the term "**High Courts"** as contemplated in sec 166 (c). The term may or may not be limited to such courts. One notes that sec 166(c) also refers to **"any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts."** From the fact that sec 166(c) refers to "High Courts" in the plural form as opposed to the High Court, it appears that, subject to the effect of the Supreme Court Act, 1959, which has not been repealed, it is not accurate to refer to such courts as provincial divisions of the High Court. Probably each is a High Court in its own right.

Constitution is invalid to the extent of such inconsistency (sec 172 (1)(a)). It also has power in such a case in terms of sec 172 (2)(b) to grant a temporary interdict or other temporary relief to a party or to adjourn the proceedings pending a decision of the Constitutional Court on the validity of that Act or conduct. In terms of sec 173 a High Court has the inherent power to protect and regulate its own process and to develop the common law taking into account the interests of justice. In terms of sec 19 (1)(a) of the Supreme Court Act, 1959 (Act No 59 of 1959) a High Court has **"jurisdiction in relation to all causes arising .... within its area of jurisdiction and all other matters of which it may according to law take cognizance**..." With some of the important statutory

provisions relating to the jurisdiction of the Labour Court and the High Courts having been dealt with, it is now appropriate to turn to the unsatisfactory state of affairs which various statutory provisions have produced.

Some of the jurisdictional problems arising from the overlap in jurisdiction between the Labour Court and the High Courts.

[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. Some of the cases are *Mondi Paper (a Division of Mondi Ltd) v Paper, Printing, Wood and Allied Workers Union & Others* (1997) 18 ILJ 84 (D); *Sappi Fine Papers (Pty) Ltd (Adam as Mill) v Paper, Printing, Wood and Allied Workers Union & Others* (1998) 19 ILJ 246 (SE); *Mcosini v Mancotywa & Another* (1998) 19 ILJ 1413 (TK); *Coin Security Group v SA National union for Security Forces 1998(1) sa 685 (c); Communication Workers Union &*

Another v Telkom Ltd & Another (1999) 20 ILJ 991 (T); Independent *Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others* (1999) 20 ILJ 1018 (T); *Fourways Mall v S A Commercial Catering and Allied Workers Union* 1999 (3) SA 752 (W); (1999) 20 ILJ *1008(W);Mgijima v Eastern Cape Appropriate Technology Unit & Another* 2000 (2) SA 291 (TK); *Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation & Another* (2000) 21 ILJ 481 (B); *Essack & Another v Commission ON Gender Equality* (2000) 21 ILJ 467 (W); *Kritzinger v Newcastle Plaaslike Oorgansraad and Others* (1999) 20 ILJ 2507 (N); *Jacot-Guillarmod v Provincial Government, Gauteng* 1999 (3) SA 594 (T); *Kilpert v Biutendach and Another* (1997) 18 ILJ 1296 (W); *McCulloc v Kelvinator Group Services of SA* (Pty) Ltd (1998) 19 ILJ 1399 (W); *Minister of Correctional Services and Another v Ngubo and Others* (2000) 21 ILJ 313 (N); *Hoffman v S.A. Airways* (2000) 21 ILJ 891 (W); *Claase v Transnet Bpk en 'n Ander* 1999 (3) SA 1012 (T).

[24] I do not propose discussing each of the cases in this judgement. I shall, nevertheless, highlight certain implications which emerge from some of them. The cases of **Mondi Paper**, **Sappi, Coin Security**, and **Fourways Mall** have a common feature. In each of them there was a strike and a High Court was approached for an interdict to

restrain
the striking workers from engaging, generally speaking, in acts of intimidation, assaults and other strike-related acts of misconduct. In **Mondi** Nicholson J, sitting in the High Court, Durban, discharged the rule nisi which had been granted by Levinsohn J in regard to such conduct. Nicholson J's basis for discharging the rule was that the High Court did not have jurisdiction to entertain such a matter because it was one of the matters in respect of which the Labour Court had exclusive jurisdiction.

[25] In coming to the above conclusion Nicholson J relied, inter alia, on the provisions of secs 69, 157 and 158 of the Act. He also relied at 90D on the circumstances as creating the **"jurisdictional milieu"** indicating that the case belonged in the Labour Court. The effect of the judgement was that, if employees engaged in certain criminal acts and other acts of misconduct in furtherance of a strike, the only court with jurisdiction to grant relief in respect of such acts is the Labour Court. In **Sappi's** case the Eastern Cape High Court was approached by an employer for relief similar to that in the Mondi case and in similar circumstances. The question whether the High Court had jurisdiction was also raised. Expressing general agreement with Nicholson J's conclusion in **Mondi**, Nepgen J concluded that a High Court did not have jurisdiction in respect of such a matter. King DJP, as he then was,

reached the same conclusion in the Coin Security matter.

[26] Two issues, which also raise the question of the overlap in jurisdiction between the High Courts and the Labour Court, which did not arise in the **Mondi, Sappi** and **Coin Security** cases, arose in two later cases. The one concerns a situation where there is no strike but employees engage in acts of intimidation and assault against either their employer or the management or one or more of their co-employees in order to resolve an employment or labour dispute or in order to put pressure on the employer to agree to certain demands. The question that arises in such a case is: Is it the High Court or the Labour Court that has jurisdiction to grant the employer an interdict or similar relief in such a case or do the two Courts have concurrent jurisdiction?

[27] This question arose in **Minister of Correctional Services and Another v Ngubo and Others (2000) 21 ILJ 313 (N)**. That was a matter in which certain employees of the Correctional Services Department, who were employed in a prison in Pietermaritzburg, objected to the appointment of a certain official of the department as the provincial commissioner of the department in KwaZulu-Natal and they demanded her removal from that position. In furtherance of their demand, the employees in that case engaged in acts of assault and intimidation and physically

removed the official from her office. The Minister, the employer, and, the official concerned, approached the High Court in Pietermaritzburg and sought an interdict against such employees in respect of such acts. Levinsohn J, before whom the matter came, concluded that the High Court did have jurisdiction.

[28] The basis of Levinsohn J's judgement was that the purpose of the conduct of the employees was "**not to resolve a dispute in respect of any matters of mutual interest between employer and employee**" (see 318J - 319. At 318B he said that in order for the Labour Court to have exclusive jurisdiction in respect of a matter, **"there must be a direct relationship between the matter or the dispute before it and a particular relevant aspect and objective of the LRA."** The learned Judge continued in the next sentence: **"A mere indirect and incidental one will not suffice."** Levinsohn J said at 318E that the intention of the employees in that case was **"ejecting [the official concerned] from her post as Provincial Commissioner and causing her to go back to Pretoria. They also sought to intimidate Buthelezi and Strydom to achieve similar ends."** He then went on to say:- **"None of the alleged actions, in my view, falls into any category connected with a particular objective of the LRA. To my mind what is disclosed is unruly and intimidating conduct of an**

unlawful nature."

[29] I do not propose expressing a view on the correctness or otherwise of the conclusion on jurisdiction that Levinsohn J reached in that case. 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... <u>labour peace...</u>"** (my emphasis). Sec 1 goes on to state that such purpose will be advanced by fulfilling the primary objects of the Act. In sec 1 (c) one of the primary objects of the Act is given as the provision of **"a framework within which employees and their trade unions, employers and employer' organizations can-**

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest;

(ii) ...."

[30] In sec 1 (d) (iv) the Act gives the promotion of **"the effective resolution of labour disputes"** as one of the primary objects of the Act. The conduct of the employees concerned undermined labour peace. The effective resolution of disputes contemplated in sec 1 (d) (iv) obviously refers to lawful effective resolution of disputes.

The conduct of the employees concerned clearly ran contrary to such an objective. If the conclusion to which Levinsohn J came is a correct reflection of our law, then there considerable jurisdictional overlap.

[31] There is another issue that would arise on the facts in the Ngubo matter if the applicant for the interdict was the official concerned and not the employer. That is: Would the Labour Court have had jurisdiction to grant her relief or would it have lacked jurisdiction on the basis that there was no employer- employee relationship between her and her intimidators/attackers? Would the Labour Court have had to conclude that the court with jurisdiction was the High Court? In other words would what is clearly a labour dispute have had to go to the High Court simply because of the lack of an employer-employee relationship?

[32] The other question which raises the issue of the overlap of jurisdiction between the Labour Court and the High Courts which did not arise in the **Mondi, Sappi** and **Coin Security** cases concerns the court which a party should approach for relief against strikers where the party is not the employer or ex-employer of the strikers and the strikers are employed by, for example, a neighbouring business but their conduct in furtherance of their strike is prejudicial to such party. The next question concerns the nature of the conduct which would entitle a party to

institute court proceedings. For example can such a party institute proceedings against strikers in the Labour Court despite the absence of an employer-employee relationship or must such party, because of the lack of such relationship, institute proceedings in a High Court?

[33] This issue arose in the **Fourways** matter. Edgars Stores Ltd (**"Edgars"**) operated one of its shops at the **Fourways Mall** Shopping Centre where it was a tenant. It also operated another shop at The Avenues Shopping Centre in Springs. It was a tenant in that Centre, too. Certain employees of Edgars in the two shops were members of the South African Commercial, Catering, and Allied Workers Union (**"SACCAWU"**). A wage dispute arose between Edgars and its employees. Prior to the commencement of a protected strike following upon such dispute, Edgars obtained an order from the Labour Court against **SACCAWU** and another union. In terms of the order members of the two unions employed by Edgars in the two shops were interdicted from, inter alia, intimidating and assaulting employees employed by Edgars, blocking entrances to Edgars' premises, intimidating and assaulting customers of Edgars and interfering with employees and customers entering and or leaving Edgars' premises.

[34] After a protected strike by members of the two unions employed in the two shops had commenced on the 28th

September, the owner of the Fourways Mall Shopping Centre, which was Edgars' landlord in respect of its shop situated at the Fourways Mall Shopping Centre and the owner of the other centre at Springs who was Edgars' landlord in respect of its shop in that centre, complained that the members of the two unions were engaging in acts such as obstructing vehicles coming in and out of the shopping malls either belonging to the landlords, tenants or customers or members of the public, interfering with such vehicles, assaulting, intimidating, threatening, harassing or interfering with, employees of the landlord or of the landlords' tenants or the public. They also complained about the strikers being within a radius of 500 metres from the shopping malls. They applied to the High Court, Witwatersrand Local Division, for an order interdicting the strikers from engaging in such acts and from being present within 500m from the shopping malls.

[35] The question arose whether or not the High Court had jurisdiction in respect of the matter or whether only the Labour Court had jurisdiction. Claassen J, who heard the matter, had regard to some of the cases to which reference has been made but distinguished all those that held that the Labour Court had exclusive jurisdiction in those particular cases on the basis that in those there was an employer-employee relationship whereas in the case before him such a relationship was absent (see

(1999) 20 ILJ 1008 (W) at 1013I-J). He also said that those cases concerned labour disputes and the case before him was, in his view, not a labour dispute (see 1012 E-I). Claassen J went on to say that: -

(a) the nature of the dispute between the applicants and the respondents in the case before him arose out of the law of delict as well as the law of property and that the applicants were seeking to protect their property from unlawful infringement and /or injury by the unions' members and to protect their custom and business (at 1012 I-J);

(b) the applicants had **"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 customs by labour troubles, reprisals, fear of unpleasantness, etc"** (at **1012J-1013A);** (in this regard he relied on **Deneys Reitz v SACCAWU 1991 (2) SA 685 (W) at 688 I-J and 692C and sec 22 and 25(1) of the Constitution**. (see **1013A-B.)**

(c) under the actio legis aquilae an owner is granted

a remedy in damages against another who has unlawfully interfered with the owner's free exercise of the full rights of ownership; in this regard he relied on **Hefer v Van Greuning 1979 (4) SA 952 (A)** at **958H; "Alternatively",** he said, **"the owner's right would be protected under the law of nuisance which is a branch of both delictual and property law"** (see 1013B-C).

[36] Claassen J found that the dispute before him did not require **“expertise in the field of labour relations”**. He said the question was **“simply whether or not the (unions’) members unlawfully infringed upon the applicant’s right to protect their custom and/or property rights” (see 1013D).** He expressed the view that the Act **“was never intended to deal with this kind of dispute” (see 1013 E).** He concluded that the High Court had jurisdiction to deal with the matter and dismissed the point in limine regarding the jurisdiction of the High Court.

[37] In relying on the absence of the employer-employee relationship between the property owners and the union members for the conclusion that the matter before him was one which the High Court and not the Labour Court had jurisdiction to deal with, Claassen J may have been correct. However, the very purpose of the Act was to create courts which required knowledge, experience and expertise in labour law. For example sec 67(2),(6) and (8) of the Act would appear to be applicable to the facts of the case in Fourways.

[38] Sec 67 (2) reads: **“A person does not commit a delict or a breach of contract by taking part in-**

(a) a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out."

Sec 67(8) provides: **"Civil legal proceedings may not be instituted against any person for-**

(a) participating in a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected lock-out."

Sec 67(6) reads: **"The provisions of subsection (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence."** A judge of the Labour Court would have known these provisions and would have considered what their effect was on the matter.

[39] Although the provisions of sec 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, toi-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

sec 67(2) such acts, when performed in contemplation or in furtherance of a protected strike, do not constitute delicts. In terms of sec 67(6) such acts enjoy immunity from a challenge by way of civil legal proceedings.

[40] The acts of toi-toying, chanting, demonstrating and the carrying of placards in the vicinity of the employer to whom a strike is directed are part of picketing which is contemplated by the provisions of sec 69 and yet this was not considered in Fourways. Strikers are also entitled to speak to members of the public to seek to persuade them to support their strike by not having any business dealings with the employer(s) against whom the strike is directed and yet this also was not considered in Fourways. The latter point raises the question of when such speaking to members of the public would constitute unlawful interference with members of the public coming to the shopping mall in a case like **Fourways.** An order which interdicts strikers from interfering with members of the public coming into the mall may be too vague-quite apart from the fact that it may have no legal basis when regard is had to the provisions of sec 67 (2) ,(6) and sec 69 of the Act.

[41] At least some of the conduct of which the property owners complained in Fourways is the type of conduct which could legitimately be included in a picketing agreement or picketing rules provided for in sec 69.

Such rules are enforceable as between the parties to the dispute giving rise to the strike. If there is a breach of such picketing agreement or rules, a dispute about such breach is required in terms of sec 69(9) to be referred first to the CCMA for conciliation (sec 69(1))and, if that fails to produce a settlement, to the Labour Court for adjudication (sec 69(11)). By virtue of the provisions of sec 157 (1) only the Labour Court has jurisdiction to adjudicate such disputes. However, in so far as landlords or property owners such as were involved in Fourways cannot approach the Labour Court for relief on the basis that there is no employer-employee relationship between them and the strikers, the result may well be that proceedings may have to be instituted in two separate superior courts for virtually the same acts which are committed by the same people in the same place and at the same time. This could lead to a situation where judges of two different courts of the same status become involved in the adjudication of virtually the same conduct committed by the same party at the same time with the inherent risk that the two courts may give conflicting judgements. This runs contrary to the very purpose of developing a certain and coherent system of law. It is also totally unacceptable in that it is not cost-effective.

[42] To compound the problem, if there were to be an appeal

against each of the two judgements of these two courts, such appeals would go to two different appeal courts of the same status, namely, the Labour Appeal Court and the Supreme Court of Appeal. If the two appeal courts were to give conflicting judgements, and there was no constitutional issue to be taken to the Constitutional Court, the result would be an intolerable one. There is no justification for any of this. The dispute resolution system applicable to all employment and labour disputes needs to be streamlined as far as possible.

[43] If the problem of jurisdiction is not resolved by way of legislative intervention, one result may be that, when an employer who is faced with a protected strike realises that the Labour Court will not grant certain relief, he can arrange for his landlord to approach, not the Labour Court, but a High Court in the hope that the High Court will grant such relief. In that event the High Court, not having the advantage of the specialised knowledge, experience and expertise in labour law required by the Act of judges of the Labour Court, may grant an order which completely undermines the process of collective bargaining which is one of the fundamental pillars of the Act. The way to avoid this difficulty is to have legislation which will ensure as far as possible that all such matters, if they have to go to a superior court, go to the Labour Court.

[44] In terms of the principles of the law of contract an employer is entitled in law to terminate an employee's contract of employment either on notice or summarily where the employee has committed a material breach of the contract of employment. If the employee believes that the dismissal constitutes a repudiation of the contract of employment (e.g because he has not committed a material breach of the contract of employment justifying summary dismissal), he may either accept the repudiation which would then bring the contract to an end and claim such damages as he may suffer as a result of such repudiation or he may reject the repudiation and hold the employer to the contract. In this event the employee could also institute action in the High Court for damages for wrongful dismissal. In fact he could even institute action or bring an application in the High Court for specific performance on the basis that the dismissal is unlawful or wrongful. In such a case the employee's complaint about the dismissal need not be that the dismissal was unfair. It needs to be that the dismissal was wrongful or unlawful or invalid. By virtue of sec 77(3) of the BCEA it appears that that kind of action can be instituted in the Labour Court too.

[45] Under the Act the employee could, irrespective of

whether he regards the dismissal as a repudiation or not but, provided he regards it as an unfair dismissal, refer the dismissal dispute to a council with jurisdiction or to the CCMA in terms of sec 191 for conciliation and, thereafter, to arbitration if conciliation fails to produce a settlement. If the employee sought or was awarded compensation under the Act for unfair dismissal, such compensation would be subject to the limitations of sec 194. **Jacot-Guillarmod v Provincial Government, Gauteng 1999 (3) SA 594 (T)** is a case where the employer and the employee concluded a fixed term contract of employment of five years but the employer terminated it before it could run its full term. The employee regarded this as a repudiation of the contract of employment but accepted the repudiation and sued for damages arising therefrom which consisted of the salary he would have been paid for the balance of the term.

[46] The employer filed a special plea taking the point that the High Court did not have jurisdiction to deal with such a claim and that the Labour Court had exclusive jurisdiction to deal with such a matter in the light of sec 157 (1) of the Act. An exception to the special plea was filed. The Court, per Le Roux J, held at 600G that this was not a matter in which the Labour Court had exclusive jurisdiction. Le Roux J accordingly held that

the High Court had jurisdiction. The basis of this conclusion was that the matter was one of a simple enforcement of a contract of employment. He said in effect that there was no provision in the Act that such a matter fell within the exclusive jurisdiction of the Labour Court. He also relied at 600E-F on sec 195 of the Act. Sec 195 provides thus:- **"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".** Le Roux J held at 600 D-F that this showed that **"the Legislature had no intention whatsoever of infringing the right of a High Court to hear any ordinary common-law action in connection with a contract of employment."**

[47] Le Roux J's judgement was delivered before sec 77(3) of the BCEA came into operation. The latter section does not improve the situation in any event. The availability to an employee of an action for damages or compensation in the High Courts and the Labour Court based on the common law when there has been a dismissal which he regards as a repudiation and also the availability to him of a claim for compensation under the Act either in the Labour Court or the CCMA based on unfair dismissal in circumstances where sec 194 of the

Act limits compensation creates the unacceptable situation that, depending on the forum chosen, and the cause of action relied upon, the amounts that may be awarded by the different courts may well be substantially different. In the **Jacot-Guillamod** case, the employee stood a chance of being awarded more than two million rand in compensation or damages in the High Court. If he had instituted proceedings in the CCMA or the Labour Court, based on an unfair dismissal claim, subject to what sec 195 of the Act means, his compensation may have been limited to a lesser amount in accordance with the provisions of sec 194 of the Act.

[48] This means that, if the complaint is that the dismissal is wrongful or unlawful, that matter may either go to a High Court or the Labour Court (sec 77(3) of the BCEA) and will not be competent to be dealt with in terms of the dispute resolution process applicable to unfair dismissal disputes under the Act. If the complaint is that the dismissal is unfair (even if it may be lawful), then a High Court has no jurisdiction to entertain it but it is competent to be dealt with in terms of the unfair dismissal dispute process of the Act. However, even that the complaint is that the dismissal is unfair does not necessarily mean that the Labour Court has jurisdiction. This is so because, depending on the reason alleged by the employee as the reason for dismissal, a dispute

about the fairness of a dismissal may be required to be referred to either the CCMA, or, a council with jurisdiction, for arbitration, or, to the Labour Court, for adjudication (sec 191 read with sec 157(5)).

[49] The Constitutional Court also has its share of jurisdiction as a court of first instance in dismissal and other employment and labour disputes. It would have jurisdiction as a court of first instance where the dismissal is challenged on the basis that it is inconsistent with the Constitution. This is so because sec 167(6) of the Constitution contemplates that either national legislation or the rules of the Constitutional Court must allow direct access to the Constitutional Court when it is in the interests of justice to do so and if the Constitutional Court grants leave therefor. An example of a case in which a dismissal is challenged on the basis that it is inconsistent with the Constitution would be one where it is alleged that the reason for dismissal is unfair discrimination based on religion, colour, race, gender or sexual orientation. In such a case the complaint would be that such dismissal is inconsistent with the provisions of sec 9(1), (3) and (4) of the Constitution.

[50] A dismissal the unfairness of which is based on grounds

that it is inconsistent with sec 9 (1), (3) and (4) of the Constitution can be said to constitute an automatically unfair dismissal as defined in sec 187(1)(f) of the Act. Such a dismissal dispute may be referred to the CCMA or a council with jurisdiction for conciliation. If, attempts at conciliation fail, the employee may refer it to the Labour Court for adjudication in terms of sec 191(5) (b) (i) of the Act. In fact an employee may institute proceedings in a High Court and then go to the Constitutional Court with or without first going to the Supreme Court of Appeal. Although the dispute would be an employment or labour dispute, it could proceed through the ordinary courts and reach the Constitutional Court without receiving the attention of the Labour Court and this Court. Although such an employee may, in terms of sec 167(b) of the Constitution or in terms of the rules of the Constitutional Court, approach the Constitutional Court for leave to have direct access to it, this should not present any difficulty in practice because in all probability the Constitutional Court will very rarely grant leave for a matter to be brought directly to it (without such matter having been dealt with by another court first).

[51] Another problem which arises from the fact that we have different courts having jurisdiction in respect of employment and labour disputes in general and dismissal disputes in particular is that it

is possible for a party to bring proceedings in a High Court and challenge a dismissal on the grounds that it is unlawful or unconstitutional, and, simultaneously, initiate proceedings in the CCMA but have such proceedings stayed pending the final outcome of the proceedings in the High Court. If the party is not satisfied with the outcome of the proceedings in the High Court, such a party may appeal to the Supreme Court of Appeal. If the party is still unhappy with the outcome of the proceedings in that court, he could proceed to the Constitutional Court. If the party is again unhappy with the outcome of the proceedings in the Constitutional Court, such party could then return to the CCMA to pursue processes in terms of the Act which might lead to the Labour Court, and, to this Court. As there would hopefully no longer be any constitutional issues since they may have been exhausted during the first round of litigation which culminated in the Constitutional Court, the appeal in this Court would be the last stage of very protracted proceedings. Obviously this entire process would have been very costly to all parties and to the State and would have enormously delayed finality in the dispute.

[52] Other disputes which I think present similar problems as dismissal disputes are disputes about suspensions, transfers, promotions, demotions, change of terms and

conditions of employment of employees and the eviction of employees from their employer's accommodation. I have already quoted the provisions of item 2 above. Item 2(1)(b) of schedule 7 to the Act refers to unfair labour practice disputes which take the form of "**unfair conduct on the part of the employer relating to the promotion, demotion, or training of an employee or relating to the provision of benefits to an employee.**" Item 2(1)(c) refers to an unfair labour practice dispute which concerns the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee. The unfair labour practice provision is silent about disputes relating to transfers and a failure or refusal to appoint a job applicant.

[53] It is clear from the provisions of item 2 that, if an employee's complaint is that the employer has acted unfairly in not promoting him at all or in not promoting him to a certain level or if the complaint is that the employer has acted unfairly in demoting the employee or in suspending the employee, a forum is provided for which will deal with such a dispute ultimately if conciliation is not successful. That is the CCMA or a council with jurisdiction. The method by which such a dispute will be put to an end is arbitration. The Labour Court will have no jurisdiction to entertain and

adjudicate such disputes under the Act.

[54] In terms of sec 77(3) of the BCEA the Labour Court may have jurisdiction to determine a case involving the demotion of an employee where the compliant is that the demotion is unlawful or is a repudiation of the employee's contract. A High Court would also have the same jurisdiction as the Labour Court in such a case. It is also arguable that, where the complaint is that the employer's failure to promote an employee, or, to appoint a job applicant to a higher position or to a higher post, or, where the complaint is that his conduct in suspending an employee is unlawful, a High Court would have jurisdiction to deal with such a dispute and the CCMA and a council would have no jurisdiction. This makes our law in this regard complicated and highly technical. Anyone who has to advise either an employee or an employer on the question of which court or forum has jurisdiction in regard to such matters and under what circumstances it has or does not have jurisdiction would have to be alive to the various possibilities and appreciate the various fine distinctions in the jurisdictions of the various fora.

[55] The challenge may well be based on constitutional grounds. In the latter event what I have already said above about dismissals which are challenged on

constitutional grounds applies subject to the possibility that the Labour Court will also have jurisdiction. The effect of this is that disputes about promotions, demotions and suspensions can go either to the CCMA (or councils with jurisdiction), the Labour Court, or the High Courts or the Constitutional Court. An employee would be advised that, if a dispute about promotion, demotion or suspension is taken to the CCMA or a council with jurisdiction as an unfair labour practice dispute, it will be arbitrated upon and there will be no right of appeal, but only a right of review in case the arbitrator's award goes against him whereas, if he challenges the promotion, demotion or suspension as unlawful in the High Court or the Labour Court under sec 77(3) of the BCEA, there will be a right of appeal subject, of course, to leave being granted. This is an invitation at forum shopping.

[56] With regard to a dispute concerning the transfer of an employee from one place of work to another or from one department to another it appears that the one route for it is that it can go to a High Court, and, thereafter, to the Supreme Court of Appeal if an appeal ensues after a decision of the High Court. It may end in the Supreme Court of Appeal if there is no constitutional issue that may qualify it to be taken to the Constitutional Court. If there is, the matter may end up in the Constitutional

Court. It appears that another possible route for such a dispute is that it may be brought to the Labour Court on the basis of the provisions of sec 77(3) of the BCEA. If this happened, an appeal against the decision of the Labour Court would lie to this Court. If there is no constitutional issue to qualify such matter to be taken to the Constitutional Court, the decision of this Court would be contemplated by the Act to be final. The fact that such a dispute can be taken either to a High Court and ultimately to the Supreme Court of Appeal and that it can also be taken to the Labour Court and ultimately to this Court creates the possibility that two appeal Courts of the same status may develop conflicting jurisprudence on the law relating to such disputes with no court having power to resolve such. That fact also means that these disputes too, which are clearly employment/labour disputes may go through the ordinary courts to the Constitutional Court without the Labour Court or this Court or any of the specialist institutions specially created to deal with labour disputes dealing with them.

[57] With regard to disputes about transfers, I note that sec 15 of the Public Service Act, 1994 regulates transfers and secondments in the public service. Sec 13 of the same Act deals with appointments, transfers and promotions on probation in the public service. Sec 14

deals specifically with the transfers of employees and officers within the public service. Sec 11 deals with appointments and the filling of posts in the public service. I note also that sec 6 of the Employment of Educators Act, 1998 (Act No 76 of 1998) regulates appointments, promotions and transfers of educators. Sec 7 has provisions relating to appointments and the filling of posts. Section 8 also deals with transfers. Sec 20 deals with the suspension of educators.

[58] There are also disputes relating to a change of an employee's terms and conditions of employment. Under the Act such disputes can be the subject of strikes or lock-outs because sec 64(4) and (5) of the Act would apply to such a dispute. Sec 64(4) and (5) read:

> "**(4) Any employee who or any trade union that refers a dispute about a unilateral change of terms and conditions of employment to a council or the Commission in terms of subsection 1(a) may, in the referral, and for the period referred to in subsection (1)(a)-**
>
> **(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or**
>
> **(b) if the employer has already**

implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer."

If an employer fails to comply with a union's requirement in terms of sec 64(4)(a) or (b), the Labour Court has jurisdiction to order the employer to comply with it because non-compliance therewith is non-compliance with the provisions of sec 64(5) of the Act and sec 158(1)(b) gives the Labour Court power to order compliance with any provision of the Act. A High Court has jurisdiction to determine a matter relating to a change of terms and conditions of employment of an employee where it is alleged that such change constitutes a breach or a repudiation of the employee's contract of employment or is in any way unlawful. By virtue of the provisions of sec 77(3) of the BCEA the Labour Court may have concurrent jurisdiction with High Courts in regard to such disputes.

[59] With regard to disputes relating to the eviction of an

employee from the employer's accommodation, it does not appear that the Labour Court would have jurisdiction to deal with such a matter unless it can be said that: (a) sec 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 sec 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. 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.

[60] It frequently happens in eviction cases that the eviction of an employee from the employer's accommodation follows upon a dismissal of the employee and that employee's right to such accommodation is dependent upon his continued employment. In such a case it may be that the dismissal dispute has to be dealt with by the Labour Court or the CCMA but that the employer brings eviction proceedings in a High Court either before the proceedings in the Labour Court or CCMA are completed or after they have been completed. In that case what is essentially one dispute may well get split between two courts.

[61] What is unacceptable with this state of affairs in regard to dismissal disputes in general is that different superior courts have jurisdiction to deal with dismissal disputes as courts of first instance depending on the grounds on which dismissals are challenged. In addition the CCMA and councils have their share of jurisdiction in this regard. Another reason why this state of affairs is unacceptable is that employment and labour matters can proceed and indeed do proceed to the High Courts and the Supreme Court of Appeal when, in the Labour Court, this country has a superior court of equal status to the High Courts and, in this Court, has an Appeal Court of equal status to the Supreme Court of Appeal which are courts that were specifically created to deal with employment and labour disputes that needed to go to court.

[62] There are at least four very recent examples of employment and labour cases which have been taken to High Courts and even to the Supreme Court of Appeal and were dealt with by those courts which have not been reported. The one is **Greathead Brian Courtney v SACCAWU case no 290/98** (Supreme Court of Appeal). In this case a trade union and an employer concluded an

agency shop agreement. An agency shop agreement is provided for in sec 25 of the Act. In terms of this agreement the employer was to make certain deductions from the salaries and wages of employees who were not members of the union. One of the employees instituted proceedings in the Witwatersrand Local Division to challenge the lawfulness and constitutionality of such agency shop agreement. This occurred despite the fact that in terms of sec 24(6) read with ss(3), (4) and (5) of the Act disputes about the interpretation or application of part B of the Chapter under which agency shop agreements fall are required to be referred to arbitration. This occurred despite the fact that the Labour Court is the court which has power in terms of sec 158(1)(b) to order compliance with any provisions of the Act where any party complains that provisions of the Act have not been complied with and sec 157(1) provides that the Labour Court has exclusive jurisdiction in respect of any matter which in terms of the Act is required to be referred to it for adjudication. The High Court dismissed the

application. There was an appeal to the Supreme Court of Appeal. The Supreme Court of Appeal handed down its judgement and upheld the appeal on grounds other than constitutional grounds. It does not appear from the judgement that the question whether the High Court had jurisdiction was considered.

[63] Another matter is that of **Lowe v Commission** on Gender Equality Appeal case no A5019/00 which was an appeal to a Full Bench of the Witwaterand 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 judgement of the Full Bench was handed down on the 15th December 2000. Another case is that of **Coetzee v Comitis & others case no 6239/00** where the Cape of Good Hope Provincial Division had to deal 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). The judgement in this regard was handed down on the 6th December 2000. The last of these matters is **NAPTOSA & others v Minister of Education (Western Cape)** and others, case no

4842/99 which was also a judgement of the Cape Provincial Division. It was handed down on the 20th October 2000. It related, inter alia, to the question whether or not the employer had been entitled not to afford certain employees (who were teachers) certain employment benefits.

[64] This analysis reveals the existence of a state of affairs which provides fertile ground for the unacceptable practice of forum-shopping. A further reason why this state of affairs is unacceptable is that it creates uncertainty in the law because the various courts have different jurisdictions and powers in relation to virtually the same dispute. This may also produce confusing jurisprudence in the field of employment and labour law. It is conceivable that the Labour Court and this Court may decide that a particular dispute falls outside their jurisdiction and the High Courts and the Supreme Court of Appeal may also decide that the dispute falls outside of their jurisdiction. Which court is to resolve such impasse?

[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.

[66] To my mind, to allow this state 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.

[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.

[68] Statutory provisions which confer jurisdiction on the High Court to deal with employment and labour disputes such as sec 157(2) of the Act and sec 77 (3) of the BCEA should be amended so as not to give High Courts jurisdiction in employment and labour matters. This would be irrespective of the nature of the issues involved in such matters. In that event High Courts would no longer have any jurisdiction in employment and labour disputes and they would be left to give their attention to other matters. This would enhance the capacity of the

High Courts to deal with other disputes falling outside of the employment and labour field such as commercial matters and those relating to crime which continue to cause our society grave concern.

[69] If the above is done, prospects of achieving the laudable objective of an efficient, expeditious and cost-effective dispute resolution system in employment and labour disputes will be enhanced. In that way, too, our limited resources will be properly utilised. The problems I have highlighted need urgent attention by the government and all relevant stakeholders. For this reason I will make an order at the end of this judgement directing the Registrar of this Court to send a copy of this judgement to all relevant authorities for their attention.

Merits of the Appeal

[70] One of the grounds on which the appellant seeks to challenge the validity of his dismissal is that the first respondent needed the approval of the Premier of the North-West Province, who is the fourth respondent in this matter, before it could dismiss him. He alleged in his founding affidavit that such approval had not been obtained. This submission was based on the provision of sec 67(2) of the Municipal Ordinance no 20 of 1974 of

the Province of the Cape of Good Hope which, it was common cause between the parties, applied to the appellant and the first respondent. Sec 67(2) reads thus:

> "**No council shall terminate the services of its town clerk, whether upon notice, or without notice, except with the approval of the Administrator who, before granting such approval, may and, if he is so requested in writing by the town clerk in any case where an inquiry in terms of section 69 has not been held, shall act in terms of section 200 and cause an investigation to be undertaken into the circumstances surrounding the proposed termination of the services of the town clerk.**"

[71] It was common cause between the parties during argument that the powers of the administrator in the ordinance were transferred by proclamation to the fourth respondent as Premier of the North-West Province. The fourth respondent did not oppose the review application in the court a quo. He also did not file any affidavit. Only the first respondent opposed the review application. It also opposed the appeal. In response to this ground of attack on its decision to

dismiss, the first respondent stated in its answering affidavit that it had approached, "**the duly appointed delegate of the Premier of the North West Province for approval as envisaged in provisions of section 67(2)...”** The first respondent went on to say that the "**delegate**" was a Member of the Executive Council for Local Government, Housing, Planning and Development, North West Province, Mr D. Africa. In support of these allegations the first respondent relied on the contents of a letter of the 3rd July which was addressed to Mr Africa by the **“town secretary”.** That letter was annexed as annexure G2 to the first respondent’s answering affidavit. Mr Africa responded by way of a letter dated the 28th July 1998 which was received by the first respondent on the 3rd August 1998 which was annexed as annexure G3 to the first respondent's answering affidavit.

[72] The contents of the letter of the 3rd July do not support the first respondent’s allegation that it thereby approached Mr Africa for approval to dismiss the appellant. The letter appears to simply have been a way of keeping Mr Africa informed of developments at the council on the particular matter. After informing Mr Africa of the resolution taken by the first respondent at its meeting of the 29th June 1998, the author of the letter ends by saying: "**We hope you will find this in**

order". He did not say, for example,: "**Please confirm that you approve of the above”** or anything to that effect. In fact the second sentence of Mr Africa's reply confirms that he also understood the letter as intended to keep him informed. There he wrote: "**I have noted the contents of your letter and appreciate the fact that your council has kept me informed of developments in relation to this sensitive issue.**"

[73] In the light of the above I find that not only did Mr Africa not provide approval but also that he was not approached for approval. This is apart from the fact that the approval that was required was that of the fourth respondent and not that of Mr Africa. In so far as the first respondent sought to suggest that the fourth respondent had delegated his authority to give approval to Mr Africa, this has not been shown. Indeed it has not even been shown that the fourth respondent would have been entitled to delegate such authority. The further contention that such approval was no longer required is without any basis in law and falls to be rejected.

[74] In dealing with this ground of review, the Court a quo found that it was not necessary for the first respondent to seek the fourth respondent's approval because the decision to dismiss an employee must be taken by the

employer and not by somebody else. This is not wholly accurate. Although the authority or power to dismiss an employee vests with the employer of such employee, the parties may in their contract of employment take that power away from the employer and confer it on a third party in certain circumstances. A good example of this would be where the parties provide either in their contract of employment or in their dispute procedure that, if the employer believes that the employee is guilty of misconduct justifying his dismissal, a disciplinary inquiry must be convened which would be chaired by an independent person who would decide on the guilt or otherwise of the employee as well as on whether such employee should be dismissed and both parties would abide by such third party's decision. As an employer and an employee in the private sector may reach agreement along those lines, it is also competent for Parliament to include a provision in a statute along such lines in respect of the State as an employer or in respect of a parastatal organisation and its employees. In this case the provisions of sec 67(2) of the ordinance precluded the dismissal of the appellant in the absence of the fourth respondent's approval.

[75] It was also argued on behalf of the first respondent both in the Court a quo and before us that the provisions of sec 67(2) of the ordinance were in conflict with the

provisions of the Act in that the Act gave the power to dismiss to an employer whereas the ordinance gave it to the fourth respondent. The Court a quo accepted this argument. However, with respect, this argument is without merit. There is nothing in the Act which precludes the kind of arrangement to which I have referred in the preceding paragraph. The argument ought to have been rejected. The Court a quo was also persuaded that, in so far as the approval of the fourth respondent was required, same had been provided. In this regard the Court a quo had regard to the contents of the letter from Mr Africa that has already been referred to above. As I have already said, the contents of that letter do not justify such a finding.

[76] The next question is what the effect is of the first respondent's failure to show that the appellant's dismissal was effected with the fourth respondent's approval. In my judgement the effect is that the first respondent had no authority to dismiss the appellant and that the dismissal is unlawful, invalid and of no effect in law and falls to be set aside. With regard to costs Counsel for the respondent submitted that, even if the appellant was successful in its appeal, no order should be made as to costs because the appellant could have taken this matter to arbitration where the parties could have handled it without incurring legal costs

because, generally speaking, lawyers do not have the right of audience in such arbitration in terms of the Act. I think the answer to this lies in the fact that the dispute which the appellant brought to the Court a quo was not a dispute about the fairness of a dismissal as envisaged in sec 191(1) of the Act but it was whether the dismissal was invalid and fell to be set aside on review. For that reason the matter could not be dealt with by way of arbitration. In my view the appellant is entitled to its costs.

Order

[77] In the result I make the following order:-

[1] The appeal is upheld and the first respondent is ordered to pay the costs of the appeal.

[2] The order of the Court a quo is set aside and the following one is substituted for it:-

“(a) The first respondent's dismissal of the applicant is hereby set aside.

(b) The first respondent is ordered to pay the applicant's costs of the application.”

[3] The registrar is directed to send a copy of this judgement

to:-

(a) the Minister of Justice and Constitutional Development.

(b) the Minister of Labour.

(c) the National Economic Development and Labour Council, and to specifically draw their attention to paragraphs 6 to 69 of this judgement.

RMM ZONDO
JUDGE PRESIDENT

Save for refraining from expressing a view on paragraphs 6 to 69 of the judgement which has been prepared by the Judge President, I agree with the Judge President’s judgement.

E,L Goldstein
Acting Judge of Appeal

I agree with the judgement prepared by the Judge President.

D.M. Davis
Acting Judge of Appeal

Appearances:

For the Appellant:	Mr N. Cloete
Instructed by:	Neville Cloete & Company
For the respondent:	Mr E. Van Graan
Instructed by:	Du Plessis Viviers
Date of hearing:	7th November 2000
Date of Judgement:	28 February 2001