Reforming the labour courts

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Introduction

The courts will not escape the effects of reconstruction and reform in labour relations. This is inevitable – the nature, structure and functioning of labour courts is very much a function of labour market policy.

The labour courts in South Africa have played a critical role in the development of labour law. The definition of “unfair labour practice” displayed from its inception in 1979 a lack of coherent legislative policy on the regulation of workplace rights and practices – the legislature consciously abdicated its role to the newly created Industrial Court to define the law.

The performance of the Court in acquitting itself of this task has been extensively debated and does not warrant repetition here. The reconsideration of existing labour market policies by the Minister of Labour and the publication of the draft Labour Relations Bill on 2 February 1995 have strongly brought into question the role of the Industrial Court and the Labour Appeal Court as mechanisms for dispute resolution. The judiciary and the organised legal profession will no doubt be seeking to contribute to the debate, particularly that surrounding the proposals contained in the draft Bill. This article seeks to review the various efforts to restructure both the Industrial Court and the Labour Appeal Court and to make some tentative suggestions as to what the social partners, and employers in particular, might require from statutory adjudicative institutions and procedures.

Wiehahn Task Group

The draft Bill aside, the most recent contribution to the debate on industrial court reform is the report of the Wiehahn Task Group, which completed its report in March 1994. The group was appointed by the Department of Manpower and requested to make recommendations concerning the functioning of the Industrial Court, its rules, the appointment of members, the administration of the Court, the relationship between the Court and the Department and the need for the restructuring and development of the Court.
The Task Group recommended that the Court be a court of the first instance in all labour related disputes, that the statutory dispute resolution mechanisms be simplified, that there be unrestricted direct access to the court after private mediation and the rules of the court be simplified but not at the expense of certainty.

A controversial issue in the evidence given to the task group was the administrative location of the Court. After a review of the findings of previous commissions and studies, one of which had recommended a relocation of the Industrial Court to the Department of Justice, the Task Group concluded that, subject to administrative reforms, the Court should remain located in the Department of Manpower. The primary reason for this recommendation was the true nature of the statutory dispute resolution procedures, of which the Industrial Court is an integral part.

The relationship between the Department of Manpower and the Industrial Court was the subject of a separate chapter which concluded that the Court should be established as a separate directorate within the Department. The rationale for this recommendation was the promotion of the financial and administrative autonomy of the Court.

One of the more contentious recommendations concerned members of the Industrial Court. The Task Group supported the independence of the Court from the executive and the notion that the appointment of the members of the Court should have the broad support of the social partners. The Task Group thought these objectives could be achieved by ensuring that members were appointed by the State President rather than the Minister of Labour and that their appointment should be the subject of a recommendation of the National Manpower Commission.

While the terms of reference of the Wiehahn Task Group were confined to the Industrial Court, the Labour Appeal Court did not escape criticism.

**Labour Appeal Court**

The Labour Appeal Court is a little over seven years old. It was established by the insertion of section 17(A) in the Labour Relations Act by section 6 of the controversial Labour Relations Amendment Act 83 of 1988.

The Court has been increasingly active. The office of the President of the Industrial Court reports that in 1994, 106 cases were received for referral to the Labour Appeal Court. Appellants have been relatively successful. A survey of the judgments of the Labour Appeal Court reported in the *Industrial Law Journal* indicates that approximately 60% of appeals heard were successful, either wholly or in part.

The Industrial Court functioned for some nine years without the existence of an appellate tribunal; the only recourse available to dissatisfied litigants was a common law right of review. The desirability of an appellate tribunal was debated by the National Manpower Commission in 1984. In its Report 3/1984, the majority conclusion of the National Manpower Commission was that a full right of appeal should be granted to parties to a legal dispute before the Industrial Court.

The National Manpower Commission further concluded that the appellate body should be a specialised body which would comprise at least three members having the same qualifications as members of the Industrial Court. It was further recommended that the decision of the appellate body would be final and binding and not subject to appeal. The procedures before the appellate body were envisaged as inexpensive and expeditious so as to avoid unnecessary delays and costs in the hearing of appeals. A minority view accepted that conclusion only if the qualifications and experience prescribed for members of the Labour Appeal Court equated to the qualifications and experience of judges of the Supreme Court or even the Appellate Division.

What is apparent from the report is that none of the parties then represented on the National Manpower Commission were in favour of the establishment of an appeal court in the form which found expression in the 1988 Amendment Act. Common to both the majority and minority views is the notion of an appellate tribunal located outside of existing judicial structures. The legislature clearly had other views. The 1988 Amendment Act located the Labour Appeal Court firmly within Supreme Court structures. The divisions of the Labour Appeal Court coincide with the provincial divisions of the Supreme Court, the chairman of the court is a Supreme Court judge and the right of appearance before the Court was restricted to advocates and attorneys.

The nature and functions of the Labour Appeal Court were extensively debated by SACCOLA, COSATU and NACTU in the negotiations which led to the conclusion of the SCN agreement in April 1990. The agreement provided for the establishment of a specialist sub-committee to make recommendations on the structure, function and rules of the Labour Appeal Court and the criteria for the appointment of presiding officers to both the Labour Appeal Court and the Industrial Court.

The annexure to the SCN agreement reflected concensus on interim changes to the Labour Relations Act. It was proposed that section 17 be amended by the introduction of a panel of assessors, to be nominated by the major national employer and union federations. Further amendments, largely of a procedural nature, were proposed which had as their intention the expedition of appeals.

The provisions of the SCN agreement in respect of the Labour Appeal Court were among the few that did not find their way into the 1991 Labour Relations Amendment Act. That notwithstanding, the jurisdiction and powers of the Labour Appeal Court continued to remain on the agenda of the employer and union federations. The issues which were the subject of debate, some of which were included in the report of the Wiehahn Task Group, include the following:

**Should there be a right of appeal?**

The National Manpower Commission unanimously concluded in its 1984 report that there should be a right of appeal against the decisions of the Industrial Court.

This would appear to remain a widely held view. Those in favour of a right of appeal note the importance of the issues decided by the Industrial Court, the impact of those decisions on employment practices and their actual or potential cost not only to business but to the economy as a whole. They also note, with some concern, the status, image and independence of the Industrial Court. These issues were the subject of extensive investigation by the National Manpower Commission in 1984 when it recommended that steps be taken to improve the prestige and credibility of the Industrial Court to enable it to function effectively and to remove the apprehension with which it was viewed in certain quarters.

The contrary view is that a determination of the Industrial Court should be final and binding. This perspective of the Industrial Court, in which the Court is viewed perhaps as an arbitrator rather than adjudicator in labour disputes, is one which is not entirely unfamiliar. Section 46 of the Labour Relations Act,
If there is a right of appeal, should that right be limited?

The most common form of limitation on a right of appeal to a labour appellate tribunal is to exclude questions of fact from the ambit of an appeal. One of the arguments against a right of appeal is that the effect of an appeal often to delay the final resolution of a dispute, particularly where a right of appeal exists not only to the Labour Appeal Court but ultimately to the Appellate Division of the Supreme Court. The expeditious resolution of labour disputes is in the interests of both the litigants and the broader society. While delays are perhaps inevitable where a right of appeal exists, this in itself need not constitute grounds for denying a right of appeal to a party dissatisfied with a decision of the Industrial Court. The Transvaal Provincial Division of the Supreme Court recently expedited an appeal in a matter concerning a national strike. The appeal, against a decision in limine, was heard days after the ruling in the court a quo. This is a commendable step on the part of the Judge-President and perhaps a desirable precedent for appeals from the Industrial Court.

Consistency

In an article written in 1985, Halton Cheadle argued that the one genius of our labour law, if there is any, is the mutual interdependence of the Industrial Court and collective bargaining practices. Employers and union officials read judgments of the labour courts and of the Labour Appeal Court in particular. Those judgments affect strategies in collective bargaining and they establish a benchmark for employment practices. The consistency of judgments, and particularly those of the Labour Appeal Court, is critical to the development of coherent guidelines on what constitutes acceptable industrial relations practice. Take for example the stage at which an employer is required to consult a representative trade union in circumstances where retrenchment becomes a possibility. Numsa v Atlantis Diesel Engines (Pty) Limited (1993) 14 ILJ 642 (LAC) confirmed an earlier decision of the Transvaal Labour Appeal Court (Mohamedys v CCAWUSA (1992) 13 ILJ 1174 (LAC)) that an employer was obliged to consult before arriving at a decision to retrench. With that weight of authority, an attorney’s professional indemnity cover might have been considered unaffected and intact should he or she have given advice to that effect. Days after the Atlantis Diesel decision, the Cape Town Industrial Court declined to follow the Cape Labour Appeal Court, stating that the finding was not an inflexible rule of law binding on the Industrial Court but rather an expression of opinion which could form a possible guideline for the exercise of the Industrial Court’s discretion. Where other judgments of the Labour Appeal Court conflicted with those of a local division of the Labour Appeal Court, the Industrial Court was free to follow those decisions it thought were most compatible with the objectives of the Labour Relations Act.

A second example is the Labour Appeal Court’s record in regard to the vexed issue of a duty to pay severance benefits. In Young & Another v Lifegro Assurance Ltd (1991) 12 ILJ 1256 the Labour Appeal Court held that considerations of equity did not give rise to an obligation to pay severance pay. This view was confirmed in Bester Homes (Pty) Ltd v Cele & Others and by Hoogenoeg Andolusite (Pty) Ltd v NUM (1) (1992) 13 ILJ 87. In Imperial Cold Storage v Field (1993) 14 ILJ 1221 (LAC), the Transvaal Labour Appeal Court held:

“...the point remains that to the extent that fairness requires payment of a retrenchment package over and above the application of the other guidelines including fair prior notice of the retrenchment, there is no reason why the industrial court should not be able to determine this and, where appropriate, the amount of such severance package under the unfair labour practice jurisdiction.”

If the purpose of an appeal tribunal was to ensure an element of consistency in the judgments emanating from the Industrial Court, the current structure of the Labour Appeal Court has dismally failed to address that purpose. The reason for that failure is an obvious one. The Labour Relations Act provides for six divisions of the Appeal Court, none of which are bound by decisions of the other. Conflicting decisions on fundamental issues have been the consequence.

The existing structure has extended free licence to the Industrial Court to disregard decisions of the division of the Labour Appeal Court in whose area of jurisdiction the seat of such a Court is located.

McCall Report

The McCall Report, a report on the labour courts prepared by McCall J prior to his appointment to the Bench, succinctly records opinions for and against the establishment of a single court of appeal to hear all appeals from the Industrial Court. The report notes that those in favour of a single court were of
the view that it would facilitate the development of a single cohesive and harmonious set of rules and principles and eliminate the uncertainty inherent in having the Industrial Court, the Labour Appeal Court, the Supreme Court and the Appellate Division deciding and establishing rules and principles relevant to labour relations. The contrary view recorded by the report was that the advantage in having provincial divisions of the Labour Appeal Court was a wider input into the development of the law and the avoidance of the possibility that a small number of judges collectively had the final say in the formulation of policies.

The conclusion reached in the McCall Report was that there was no serious disadvantage in having separate divisions of the Labour Appeal Court but that the Judges-President should be apprised of the urgency and importance of many of the appeals from the Industrial Court and they should accord such cases precedence and when necessary, hear appeals as a matter of urgency.

Arguments cited against a single Labour Appeal Court with national jurisdiction were those of practicality and the dangers of a court being branded as either pro employer or pro employee. In respect of the first argument there is a view that it would be difficult to find judges prepared to travel around the country from one division to another to hear labour appeals as a matter of career choice. In regard to the second objection, there is a view that spreading Labour Appeal Court work amongst the provinces would avoid the perception of bias which might arise where a small number of judges are allocated appeals from the Industrial Court.

The contrary argument is that there should be a single Labour Appeal Court, with national jurisdiction to hear all appeals and reviews from the Industrial Court and that the court should comprise a number of permanent judges. Generally, it was not considered that the establishment of the Labour Appeal Court had contributed in any substantial sense to the creation of guidelines which displayed any degree of consistency. The establishment of a single Labour Appeal Court with national jurisdiction was viewed as a substantial contribution to a resolution of this problem.

Standards

What is referred to here is what is perceived to be a clash of philosophies between the Labour Appeal Court and the Industrial Court. The Industrial Court is not a court of law. Yet it would appear, certainly in the Transvaal, that the standards expected of it are those of a court of law. The Labour Appeal Court has required, for example, a standard of pleadings filed before the Industrial Court at a level expected and applied in the Supreme Court. The same has been required of pre-trial conferences held in terms of the Rules of the Industrial Court.

While one can appreciate the frustration of judges and assessors who are obliged to peruse pages of often irrelevant evidence, the reality is that the Industrial Court caters for a market which is often not that in which the conventional litigant before the Supreme Court is to be found. Those who appear before the Industrial Court often have no legal training.

The solution is not to castigate the Industrial Court or to attempt to enforce the conduct of proceedings in that Court at a level expected in the Supreme Court. The Industrial Court is primarily a body within which the inevitable conflict between capital and labour is institutionalised and as such, it fulfils a vital role in contemporary labour relations.

The necessary consequence is that employers, unions and workers should have their day in court and feel, at the end of the day, that the real dispute between them was fully ventilated and that justice was done. That may often mean a tolerance on the part of the court of conduct, pleadings and arguments which do not meet the standards applied in the civil courts.

Assessors

Section 17A(3)(b) provide that assessors in the Labour Appeal Court shall be persons who, in the opinion of the chairman, have experience in the administration of justice or skill in any matter which may be considered by the Court. The qualification is broad. It is not necessary, for example, that the assessors have any knowledge of labour relations or labour law.

A perusal of the reported decisions of the Labour Appeal Court reveals that in the vast majority of cases, assessors have been drawn from the ranks of local counsel. A secondary source has been that of academics who have some experience in labour law and in exceptional cases have employer or union legal advisers been used.

The alternative to the appointment of legal practitioners or academics as assessors is the concept of "wingpersons", not necessarily lawyers, appointed specifically to represent management and labour on the appellate tribunal. Perhaps the most well-known example is the United Kingdom, where the Employment Appeal Tribunal, which has the status of a division of the High Court, comprises a judge and two members. The members are appointed on the joint recommendation of the Lord Chancellor and the Secretary of State and are required to be persons who appear to have special knowledge or experience of industrial relations, either as representatives of employers or as representatives of workers. The members each have a vote equal to that of the judge. It has been argued that involving lay members in the adjudication of labour disputes lies mainly in the value of their knowledge and expertise of labour issues and in conferring on the adjudicating body a measure of democratic appearance. Lay persons may be allocated to disputes arising in industries which are familiar to them, in some instances they are selected from a general panel.

The 1995 draft Bill

Prior to the publication of the draft Labour Relations Bill in February 1995, the debate on labour court reform was divorced from the broader debate on the labour market and labour law reform. The publication of the draft Bill has eclipsed much of the debate on reforming labour court structures within the confines of the existing Labour Relations Act. The draft Bill represents the first in a series of steps to be taken by the Ministry of Labour to modernise the legal framework and the institutions that regulate the labour market.

The draft Bill emphasises the importance of the private resolution of disputes in the employment relationship. It is suggested by the drafting team that these policies work best when integrated into a system that begins with effective organisational policies and practices that limit the occurrence of problems before they arise, provides informal processes for individual and group conflicts that do arise and includes formal appeal and dispute resolution procedures.

Pivotal to the draft Bill is the proposal that a Commission for Conciliation, Mediation and Arbitration be established, independent of government and managed by a tripartite board. The role of the Commission will be all pervasive and its impact on existing labour court
structures will be profound. The draft Bill envisages a three tier system of adjudication - an arbitral function exercised by the Commission, a Labour Court with review jurisdiction and which may in defined instances sit as a court of first instance and a Labour Appeal Court.

It is envisaged that disputes concerning dismissal for reasons related to conduct or capacity be referred to the Commission for conciliation and in the absence of any agreement between the parties, for determination of the dispute by arbitration under the auspices of the Commission. The Commissioners are granted specific powers, including the power of subpoena, which would entitle them to engage in a more robust form of conciliation than that to which South African employers and unions have become accustomed. Where unresolved disputes are required to be determined by arbitration, the Commissioners are granted specific powers to conduct arbitrations and make awards. Legal representation is permitted in the arbitration proceedings conducted before the Commission, except where the dispute concerns a dismissal for misconduct or incapacity.

The draft Bill proposes the establishment of a Labour Court which it is envisaged would be equal in status to a division of the Supreme Court. Appointments to the Court will be made from the ranks of experienced advocates, attorneys and academics and will be made by the President in consultation with the National Economic, Development and Labour Council. The Labour Court has sole and exclusive jurisdiction over defined disputes, including economic dismissals and disputes relating to equality rights. It has the power to review arbitration awards made by Commissioners. Even at the stage of reference of a dispute to the Labour Court, the emphasis in the draft Bill is on conciliation as the primary means of dispute resolution. The draft Bill specifically entitles the Court to decline to hear a matter unless it is reasonably satisfied that the dispute has been referred to conciliation and that the parties have attempted to resolve the dispute.

Finally, the Bill proposes the establishment of a Labour Appeal Court, which comprises a full bench of the Labour Court. The main function of the Labour Appeal Court will be to hear appeals from the Labour Court.

The draft Bill forms the basis of a negotiation on labour legislation to take place between government, employers and trade unions during the course of 1995.

The response to the draft Bill at the time of writing this article was one of cautious welcome. Neither employers nor unions had formulated specific responses to the proposals concerning the Labour Courts or the broader utilisation of arbitration as a means of resolving disputes. The following points are offered as standards against which the draft Bill may wish to be tested:

- Does the tribunal, be it a Labour Court or the Commission, enjoy the broad support of employers and trade unions? Statutory adjudicative structures which enjoy little or no legitimacy in the eyes of the users are bound to fail. Procedures for appointment as either a Commissioner or Judge of the Labour Court ought necessarily to involve representatives of employers and unions. Employers and unions may wish to argue for the appointment of assessors, drawn from nominated panels, to ensure that a knowledge and expertise drawn from industrial relations practice is brought into the adjudicative process.

- Are the statutory procedures expeditious? While procedural considerations other than statutory time limits are best dealt with by Rules Boards, the following considerations seem to be relevant:
  - Does the adjudicative body have a degree of discretion to set limits on the presentation of evidence and cross-examination of evidence of witnesses?
  - Is informality and a non-technical application of procedural rules encouraged?
  - Are the proceedings to be more interrogative than adversarial?

- Are the statutory procedures inexpensive and accessible?

- What mechanisms are available to ensure that good employment practice and the in-house resolution of disputes are encouraged? What provision is made to encourage the voluntary settlement of disputes?

**Conclusion**

The organised legal profession will have its own concerns regarding the proposals contained in the draft Bill and will no doubt enter into the debate on the revised statute. Those users of the Labour Courts who have lived with the social consequences and costs of an increasing caseload, minimal finance and administrative support for the Labour Courts, lengthy hearings, unacceptable delays and the high cost of litigation will be placing informality, expeditiousness and cost-effective dispute resolution by credible and legitimate statutory institutions high on their agendas.

Whatever the 1995 Labour Relations Act will ultimately provide, it will be a significant departure from existing systems of adjudication in labour disputes.

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**Footnotes**

1 A total of 71 judgments were reported, up to and including part 4 of vol 14 of the ILJ.
2 See p 315.
3 See paragraph 6.3.1 of the report.
5 Cheadle “Retrenchment - the new guidelines” (1985) 6 ILJ 127.
6 A total of 71 decisions up to and including Part 4 of Volume 14.
7 It should be recalled that the ETA is concerned only with appeals on questions of law.
8 See Jordan and Davis “The status and organization of industrial courts” 1987 8 ILJ 199.
9 In France, lay members of the conseils de prud’hommes are allocated to disputes which arise in industries with which they are familiar. Appeals in France are referred to the regular appeal courts. See Jordan and Davis supra.