Labour Court's jurisdiction

the need for clarity

Andrew Burrow discusses the implications for the labour movement of a recent decision on overlapping jurisdiction by the Labour Appeal Court.

The Labour Appeal Court's recent decision in *Langeveldt v Vryburg Transitional Local Council & Others*[1] has certain important implications for the labour movement. This happens at the same time that amendments to the LRA are being considered.

The decision on the merits is both very brief and largely irrelevant for present purposes. However, Judge President Zondo's analysis of the possibilities for overlapping jurisdiction offers some interesting insights into the current, sometimes confusing, state of our labour law.

The overlapping concerns the Labour and High Courts, on the one hand, and the Labour Appeal Court, the Supreme Court of Appeal and even the Constitutional Court, on the other.

What the judge was really concerned with was the possibility that one set of facts could form the bases of two different cases before different courts.

The judge felt this could result in 'forum-shopping'. This happens when parties chose their court based on which one they believe will give them the most favourable outcome. Although the court's analysis explores most of the areas of potential overlap, this article will focus on those areas of most concern to unions.

Overlapping jurisdiction

The court first examined the different jurisdictions of the High Court and the Labour Court. It then discussed instances where these overlap. To demonstrate the problem of overlapping jurisdiction, the Judge President relied on several recent cases that arose from fairly common factual situations. In the first situation, a strike is in progress. The employer then approaches the High Court to interdict the striking workers from taking part in intimidation, assault and what the court called 'other strike-related acts of misconduct'.[2] This was the backdrop to *Mondi*,[3] *Sappi*,[4] and *Coin Security*.[5]

The *Mondi* case

In these cases, the courts in question all adopted a similar approach: the fact that the Labour Court had exclusive jurisdiction over these kinds of situations meant that the High Court could not hear these matters. In the

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Mondi case, the court decided that the context in which the dispute arose was that of employment. Because of this, the High Court could not decide the matter. The judge in *Langeveldt* said that the effect of this decision 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'.[6]

The *Fourways Mall* case

In *Fourways Mall*,[7] we find a slightly different context, although we once again have a party approaching the High Court to interdict striking workers from participating in the acts mentioned above. This time the party seeking relief is not the employer of the strikers but the owner of a neighbouring business. This case does not involve an employer-employee relationship. Thus, would a third party be able to approach the High Court to protect his or her property rights by limiting the rights of the striking workers?

What happened in this case was that workers at two branches of a clothing chain were about to go on a protected strike over wages. The employer obtained an order preventing them from interfering with or assaulting the store's customers or other employees or from blocking access to the stores. Once the strike began, the owners of the two shopping malls where these shops are situated complained that the striking workers were blocking access to the malls by the public, the mall owners or other workers. The strikers were also assaulting, threatening and harassing employees of the mall owners or of the mall owners' tenants.

Who has jurisdiction when striking workers revert to acts of misconduct?

They applied to the High Court for an order preventing the striking workers from engaging in these acts and from being within 500 metres of the malls while they were on strike. The High Court judge who heard the matter first had to decide whether that court had jurisdiction to deal with the substance of the case. He decided that he did not have to follow the cases mentioned earlier. He based this decision on the fact that in those cases, an employer-employee relationship existed. He decided that this element was missing in the case before him.

What makes the *Fourways Mall* case particularly important, and potentially damaging, for unions is that the judge did not decide the issue as a labour dispute at all. Instead, he relied only on property law and the law of delict in reaching his decision that the mall owners were entitled to come to the High Court to seek the relief they sought and that they did not have to go to the Labour Court.

Criticism of *Fourways Mall*

Zondo JP's criticism of this case in *Langeveldt*, is that by ignoring the LRA, the judge in *Fourways Mall* did not consider those provisions which protect certain conduct of strikers during a protected strike. In particular, sections 67(2) and 67(8) ensure that participating in a protected strike, or carrying out acts in furtherance of such a strike, cannot be a delict or a breach of contract. Furthermore, it will not leave striking workers participating in such a strike or performing those acts open to being sued.

Zondo JP accepted that these provisions would not have protected acts that were offences. Yet, certain of the acts the mall owners complained of in *Fourways Mall* might well have been protected by the LRA. In this regard, he singled out chanting, toyi-toying and the carrying of placards as protected activities. He also pointed out that the strikers are entitled to speak to members of the public to try to gather support for their strike. A general order would prohibit this by preventing the strikers from 'interfering' with members of the public.

Zondo JP's point was the LRA requires a Labour Court judge to be a person with experience, knowledge and expertise in labour law. Such a judge would therefore have known about these provisions. A High Court judge, by not considering these sections of the LRA, may well act to the detriment of workers on a protected strike. In the process, this High Court judge may undermine collective bargaining, which sometimes requires an exercise of power, such as a strike.

What a Labour Court judge would also have known is that much of the conduct complained of in the *Fourways Mall* case is usually covered by a picketing agreement. Any disputes around breaches of such agreements are required by the LRA to be referred to the CCMA for conciliation or, if that fails, to the Labour Court for adjudication. By applying only principles of property law, for instance, a court ignorant of that fact assists in making many of our hard-won labour rights meaningless.

The Judge President was not only concerned with the undermining of labour rights, however. Returning to his original point about overlapping jurisdiction, he pointed out that in the scenario set out above, the employer of the striking workers would approach the Labour Court for relief. The owner of a shopping mall where the strike was taking place, on the other hand, would approach the High Court for relief against the same people, based on the same acts. Whereas the High Court might then interdict the strikers from picketing and effectively pursuing their strike, the Labour Court could protect that very same action.

In this situation, by which order would striking workers be bound? Appeal might also not help, as the appeals would proceed to different courts: the Supreme Court of Appeal and the Labour Appeal Court respectively. With the possibility of this kind of uncertainty, how do unions go about organising their members and engaging management? It is this uncertainty and possibility for confusion that Zondo JP found unacceptable.

The court's proposals

In order to reduce the chances of confusion, and to use our strained resources more effectively, the judge proposed[8] that if disputes concerning employment and labour matters need to be dealt with by a superior court, then that court should be the Labour Court. This would of course necessitate a change to the relevant legislation to iron out the problems mentioned above. In particular,

Chanting, toyi-toying and carrying placards are protected by the LRA.

sections of the LRA and the BCEA that give the High Court jurisdiction over certain employment- and labour-related matters should be amended to take away such jurisdiction.

The Judge President also felt that Parliament, the Minister of Justice, the Minister of Labour and Nedlac should give serious consideration to transferring all employment and labour matters to the sole jurisdiction of the Labour and Labour Appeal Courts. To this end, he ordered that a copy of the judgment be delivered to these parties.

Conclusion

The current potential for confusion in our labour law is not conducive to achieving the effective resolution of labour disputes and maintaining, where possible, industrial peace. Several other areas in our labour law exist where the jurisdiction of the various courts overlap. However, currently, property owners can rely on property law and the law of delict to limit the activities of lawful strikers. This has particularly clear implications for the labour movement, especially for those unions involved in the retail sector. These unions' traditional public areas of protest action are increasingly being incorporated into the 'privatised' space of malls and complexes.

It is hoped that those currently amending the LRA carefully consider the Judge President's comments. ★

Footnotes

1. *(2001) 22 ILJ 1116 (LAC)*
2. *Langeveldt v Vryburg Transitional Local Council & others 2001 22 ILJ 1116 (LAC) at 1126 D-E.*
3. *Mondi Paper v PPWAWU & others 1997 18 ILJ 84 (D)*
4. *Sappi Fine Papers (Pty) Ltd v PPWAWU & others 1998 19 ILJ 246 (SE)*
5. *Coin Security Group v SA National Union for Security Officers & Other Workers 1998 (1) SA 685 (C)*
6. *Footnote 2 at 1126 F-G*
7. *Fourways Mall v SACCAWU 1999 (3) SA 752 (W), (1999) 20 ILJ 1008 (W)*
8. *Footnote 2 at 1139*

Andrew Burrow is a candidate attorney at Cheadle, Thompson & Haysom Inc.