on the shopfloor

The Labour Court
out for ten?

Ten years since the establishment of a specialist labour court, plans are underway to scrap it and incorporate it into the High Court. The **Labour Bulletin** reports on input made by **Anton Roskam** on this move and the problems that have hampered the effectiveness of the court in recent years.

The Labour Court was established by the 1995 Labour Relations Act. Over the years, the court has come under scrutiny because of numerous problems such as:

- The court finds it difficult to attract sufficient permanent judges of calibre in the field of labour law. For judges the Labour Court has 'come to be viewed as a career dead-end, particularly as appointments to the court are for a fixed term.' (A Termination for Operational Requirements? Some thoughts on the end of the Labour Court Paul Benjamin (2003) 24 ILJ 1869 at 1870) Judges of the Labour Court receive inferior benefits as compared with High Court judges and they are seen as having a diminished status. Besides this a competent lawyer who decides to go to the bench probably does not want to be 'stuck' in the Labour Court dealing with retrenchment cases, reviews and strike interdicts. A permanent judge of the Labour Court has little ability to circulate to the High Court and have exposure to other kinds of cases and law. (As Benjamin points out in the article quoted above a proposal to allow Labour Court judges to move to the High Court on completion of their term of office was contained in the draft Labour Relations Bill published for comment in July 2000. This proposal would have enhanced the attractiveness of the Labour Court as an entry point into life on the bench. However, it was withdrawn from subsequent versions of the Bill, at the request of the Ministry of Justice.)
- There has been an over-reliance on acting judges, some of whom have little experience in labour law.
- The judges on the Labour Appeal Court (LAC) change too frequently so that important precedent setting cases are often overturned, making it difficult to know with certainty what the law is.
- The administration of the court is problematic – there is often over-

intervention in the processing of cases, instead of leaving it up to the parties to determine through the application of rules.
- There are serious delays in the setting down of matters, with requirements now being made of parties that, for instance, they must file their heads of argument before they may set their application down. Such requirements do not find expression in the court's rules.
- The procedural practices of the court often diverge significantly from the rules of the court. The Rules Board has not met for many years to evaluate and update its rules in accordance with best practice.

It is evident from the above that some of the problems with the Labour Court are structural. These structural problems relate, in the main, to the appointment of judges and their terms and conditions of appointment. But this is not the end of the matter. The other problems relate to the administration and management of the court. They cannot be resolved by legislative amendments. Without these latter issues being addressed very little will improve. A comprehensive strategy must be worked out to tackle all of these issues.

Because of the problems referred to above there has been a growing and powerful lobby for the integration of the Labour Court into the High Court. Developments are so advanced that the Superior Courts Bill, 2003 has already been drafted that includes the integration of the Labour Court into the High Court. Without going into the merits of the Bill, there is some concern about the nature of many of its provisions, which could lead to lengthy technical legal arguments.

More fundamentally, however, is the question about whether the Labour Court should disband and be incorporated into the High Court. I must admit to initially agreeing in principle to the proposal. My view was motivated by many of the frustrations that practitioners experienced while practising in the Labour Court and the effect that those frustrations had on the users of the court, especially workers. However, after having considered this matter more dispassionately, I believe that this matter must be considered more carefully and thoroughly. Insufficient debate has taken place about this issue and such a debate is necessary in the light of the serious consequences of the proposal contained in the Superior Courts Bill.

In essence we need to ask a few probing questions:
- Is it no longer necessary to have a specialist labour court? Does this mean that the reasons that were advanced for a specialist court in 1995 no longer exist? There is an argument that to a much greater extent labour law has become a question of the application of statutory rules and that it is no longer the 'cutting edge' discipline that broke new ground during the 1980s and 1990s. This may be true, but in many instances, especially when it comes to dismissals, an adjudicator in a labour matter must still evaluate fairness, take into account human relations and understand and cherish the function and purpose of collective bargaining and the right to strike.
- Will the High Court be able to attract judges sufficiently skilled in labour law?
- Will the High Court be able to cope administratively with the increased load from the Labour Court? What guarantees are there that the administrative problems will be worked out and that the High Court's administrative structures will not de-emphasise labour cases?
- What will be the effect upon other specialist courts such as the Competition Tribunal? Will they also be dissolved?

Before rash decisions about the Labour Court are made a proper and thorough evaluation of the Labour Court and it's functioning must be made. The result should be thoroughly debated amongst social partners.

THE STATUS OF THE LAC

A related issue is the status of the LAC. There are many cases that seem to be proceeding from the LAC to the Supreme Court of Appeal (SCA). This has the effect of undermining the LAC as a final court of appeal in respect of all judgements and orders made by the Labour Court in respect of all matters within its exclusive jurisdiction. The Constitutional Court has stated that in appropriate matters a litigant can appeal against decisions of the LAC in constitutional matters. In *Nehawu v University of Cape Town (2002) 23 ILJ 306 (LAC)* the Constitutional Court held further that such matters could also be referred to the SCA. (It is for this reason, for example, that Numsa proceeded to the SCA in the *Fry's Metals* case because it believed that this case was a matter of important principle involving fundamental constitutional questions, amongst others, the application of the right to engage in collective bargaining and the right to strike entrenched in sections 23(5) and 23(2) of the Constitution respectively.)

However, in light of the *Chevron (Chevron Engineering (Pty) Ltd v Nkambule & others (2003) 24 ILJ* 1331 (SCA)) decision of the SCA it seems at this stage that the SCA has adopted the view that it may hear appeals on all matters, which means that all LAC decisions may be appealed against. The Chevron decision is based on the interpretation of section 168(3) of the Constitution, which states that the SCA may decide appeals 'in any matter'. The Chevron decision has the potential of undermining the LAC as a specialist labour court and could result in a massive increase in trade unions' legal bills as employers appeal more and more decisions of the LAC. It is important that all trade unions argue that appeals from the LAC be limited to constitutional matters that present issues of important principle. This approach would protect the integrity of the LRA and the LAC, and is in the interests of the progressive labour movement. LS

Roskam is a partner with Cheadle Thomson. This input formed part of a broader presentation made during Cosatu's tenth anniversary conference held earlier this year.