



# THE KEMPTON MAKAMURE LABOUR LAW JOURNAL

**VOLUME 1 2004**

**JURISPRUDENCE AND JURISDICTION  
OF THE LABOUR COURT UNDER  
THE NEW LABOUR ACT**

**Product of the  
Kempton Makamure  
Labour Law Lecture Series**

**FACULTY OF LAW  
University of Zimbabwe**

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# Jurisdiction of the Labour Court and Superior Courts: Chikara kununa kudya chimwe... Judicial Subversion Under the Cloak of Legality — Part 2.

by *Munyaradzi Gwisai*.<sup>1</sup>

## Introduction

It is befitting that we should inaugurate the Kempton Makamure Labour Law Lecture Series with a discussion on the jurisprudence and jurisdiction of the Labour Court and High Court in labour disputes.

The key question attendant to it, namely whether the Labour Court as a specialised dispute resolution institution has or should have exclusive jurisdiction in labour matters ousting the original inherent jurisdiction of the formal superior courts, raises fundamental questions about the nature and purpose of labour law.

One's answer to this question ultimately depends on one's philosophical or world outlook which in turn belies one's position in the fundamental struggle of our society - that is the struggle between the working class and the bourgeoisie over who should own and control the process of labour, including the means of production, and who takes the lion-share of the fruits of such labour. For whoever does, ultimately also gets the instruments of political authority over society.

Proponents of 'social justice and democracy in the workplace', among whom Kempton was a giant, argue that justice and democracy can only be achieved when the process of labour is controlled, not as the private property of employers as at present, but democratically and communally by all the producers, and its fruits, shared equitably amongst the producers, rather than appropriated privately as profit by the capitalist class.

Law, in particular common law, and its formal institutions like the courts, have not been neutral in this great struggle, but have invariably been found on the side of the economically dominant class, the employers. As Kempton aptly summarised:

*"Notwithstanding the fetish faith of bourgeois jurisprudence in the existence of socially or politically pure 'justice', and, existing eternally and independently, 'justice' in all class societies is always class justice. In capitalist society bourgeois class justice inevitably serves the interests of the ruling class of capitalist exploiters. The law courts and the public prosecutors oppress the progressive endeavours and the rights of workers chiefly through judicial frustration of these rights in the courts."*<sup>2</sup>

On the legal battlefield, one of the main manifestations of the fundamental struggle of society, which is essentially economic, has been the contest over the role and relevance of the formal superior courts and common law.

Those who uphold the dominance of capitalist private property and employer power fight for the continued supremacy of the formal superior courts and common law. Their philosophical basis being the unitarism and positivism based on idealism and the juridical world outlook.

On the other hand those on the side of the working class, ranging from the various strands of bourgeois liberal philosophy (pluralism), such as mild pluralists of the Sociological - Realist mould to the more radical Critical Legal Studies, Critical Race Theories, Feminist, Stalinist and State Corporatist theories to the Marxist theories have opposed this with varying degrees of intensity. These have sought to reduce, if not exclude, the role of the traditional formal superior courts and common law and substitute them by specialised courts applying equity doctrines situated within the social- economic context of the law and which aim by removing the formality and rigidity of the formal courts, to achieve substantive justice as opposed to formal justice. This is the philosophical basis of the emergence of various special courts such as labour courts, juvenile courts, matrimonial courts and Small Claims Courts.

But even where these have emerged, the struggle has not ended, but shifted to another level, that is over questions of content, power and jurisdiction of such new institutions. The defenders of the traditional order have sought to reduce these to the barest minimum possible and claw back as much authority as possible for their favoured institutions and laws – the superior formal courts and common law.

Justice Bhunu's judgement in **Tuso v City of Harare** HH 1 / 04 starkly raises the stakes over these questions, and indeed truly sets 'the Cat amongst the Pigeons.' But the historical battle is much longer, in this country going back to at least over the last fifteen years starting with the Labour Court's predecessor, the Labour Relations Tribunal. It can only be befitting therefore, that we remember Kempton, through a discussion of the same, for he was a central participant in such battles both as a judge of the Labour Relations Board and a scholar, denouncing amongst others, the use by an unreconstructed colonial and racist High Court, of a 'cloak of common law legality' to subvert the reforms introduced by the new independence state to benefit workers and blacks amongst others.<sup>3</sup>

## The Struggle in the Historical Context.

As Makarau J correctly notes in **Sibanda and Anor v Chinhemute NO and Anor** HH 131/04 the issue of the jurisdiction of the Labour Court must be understood in its historical context. Since the establishment of the Labour Relations Tribunal under the Labour Relations Act, 1985 (LRA) a key issue of controversy has been the extent of the jurisdiction and power of the Tribunal viz the original inherent jurisdiction of the High Court.

The LRA established a very powerful Tribunal with powers equivalent and in certain cases above those of the High Court. Thus it was composed of a chairperson and deputy chairperson appointed in similar manner to judges of the High Court whilst other members had to have 'wide experience

in labour relations;<sup>4</sup> it was granted extensive authority to hear and determine appeals under the Act, including hearing matters *de novo* or on record or remitting it or confirming, varying or setting aside the determination appealed against or substituting its own determination;<sup>5</sup> it was the final court of appeal on disputes of fact with appeals to the Supreme Court lying only on questions of law;<sup>6</sup> it was granted similar powers of review as the High Court as well as similar powers to summon witnesses or cause discovery of documents;<sup>7</sup> but unlike the High Court it was structured as a flexible and informal court not bound by the strict rules of procedure, evidence, *locus standi* and audience with broader rights of representation including for trade union officials; critically it was clothed with equity jurisdiction to determine matters as ‘may be just in the circumstances’;<sup>8</sup> it was granted very extensive powers to grant interim relief in appeals as it deemed fit,<sup>9</sup> and finally the Tribunal was established under a specialised enactment whose jurisdiction applied to ‘all employers and all employees’ except those covered under the Constitution.<sup>10</sup>

From the above scenario two main issues arose:

- a. Firstly whether the extensive jurisdiction and powers that had been granted to the Tribunal meant that in principle the original and inherent jurisdiction of the High Court to hear and review labour disputes under common law and section 14 of the High Court Act, had been ousted in labour disputes falling under the LRA; and
- b. Secondly, whether even if the High Court was held to still retain jurisdiction whether litigants had access *ad libitum* or free unfettered access or they were required to exhaust domestic remedies provided under the Act before approaching the Court.

As regards the first question, there seems to have been an uneasy consensus that in principle the High Court’s jurisdiction was not ousted, but open raging controversy over the second one. The position which the courts followed, based on common law principles, may be summarised as follows:

- a. The starting point is that “there is a presumption against the ouster of this Court’s jurisdiction.”<sup>11</sup> But in limited circumstances jurisdiction may be ousted, namely;
  - b. Firstly, if there is express ouster under an enactment, usually principal legislation,<sup>12</sup> as the jealously guarded jurisdiction will not be ousted by subordinate legislation; or
  - c. Secondly, where there is ouster by necessary implication through interpretation of the appropriate statute. This was aptly summarised in **Turner & Co. v Acturus Rural Council 1958 (1) SA 409 (SR)**: “A distinct and unequivocal enactment is required for the purpose ... of taking away jurisdiction which is not to be taken away except by express words or necessary implication.”<sup>13</sup>
- a. The most succinct treatment of what circumstances would suffice to infer ouster by necessary implication was done in **Lawson v Cape Town Municipality 1982 (4) SA (C)**, which was subsequently followed by our own courts, starting with **Tutani v Minister of Labour, Manpower Planning and Social Services & Ors 1987 (2) ZLR 88 (H)** - “*In considering the question whether, on the proper construction of the statutes, judicial review is excluded*

*or deferred, courts have had regard to a number of factors. Among these are: the subject matter of the statute; the body of persons who exercise appellate jurisdiction; the manner under which that jurisdiction is to be exercised, including the ambit of any rehearing on appeal; the powers of the appellate tribunal including its power to redress or 'cure' wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains."*

So it is clear that, even at common law, the protection of the original and inherent jurisdiction of a superior court like the High Court, whilst highly guarded, is not an absolute principle to which T. Biti has seemingly elevated it. In appropriate circumstances, it may be ousted, whether by express or implied means.

Although the underlying jurisprudential premises of this are not articulated in most of the cases, it is fairly obvious, namely the promotion of access to justice, which would be compromised where ouster is easily inferred. But where the interests of justice are equally or better well served by an alternative dispute resolution system, then it is proper to infer ouster of the jurisdiction of the formal superior court, guided by the Lawson Factors. This point was beautifully put by Justice Makarau in **Sibanda and Anor v Chinhemute NO and Anor**, supra –

*"Courts have been unfairly perceived in my view, as guarding jealously whatever jurisdiction they have and a court that rules that its jurisdiction has been ousted may be viewed as being less territorial than expected of it. It does appear to me that the issue of jurisdiction is not a power game but an exercise of allowing access to justice unless barred by irresistibly clear law. Thus courts are slow to deprive the citizenry of access to justice in general and in particular, to the ordinary remedies available to it at law not as a fight over turf, but as providing a bulwark against the erosion of the rights of the citizenry to access justice."*<sup>14</sup>

The above questions on jurisdiction and powers of the Tribunal rose concretely in a number of situations, and one by one, using a cloak of common law legality, the High Court and Supreme Court cannibalised the Labour Court, to subvert the substantive rights and benefits gained by workers under the LRA, taking away even powers expressly granted by the Act — *kakara kununa kudya kamwe*. The primary weapons used were common law maxims and presumptions of interpretation applied in the abstract without taking into account the context and purpose of the LRA. Key justifications included that the LRA did not provide for an express ouster of the formal superior courts' jurisdiction and that the Tribunal was a creature of enactment and therefore its jurisdiction was limited to the four corners of the authority granted therein.<sup>15</sup> The Courts upheld their authority of parallel or concurrent jurisdiction with the Tribunal or even that the Tribunal lacked jurisdiction completely in the following cases, holding that:

1. an applicant whose labour dispute was covered both under the LRA or its subsidiary legislation, and common law, could opt out of the LRA statutory route and make a direct application to

- the High Court under its original jurisdiction because there was no express ouster Court's jurisdiction in the LRA– **Ntini v Jongwe Printing and Publishing Co. Ltd F. 623 – 87; Hama v National Railways of Zimbabwe** 1996 (1) ZLR 664 (S);
2. where the applicant had in fact initiated proceedings under the LRA route, including under codes of conduct and retrenchment proceedings, and at some stage felt aggrieved by the conduct of a body therein, s/he could abandon the LRA route and make a review application to the High Court, without exhausting the domestic remedies of appeal under the LRA – the only obligation under s 124 of the LRA being to inform the current court of the earlier action – **Art Printers Ltd v The Regional Hearing Officer and Moyana HC – H 168 – 87; Mabuya v Tjolotjo District Council HB 52/92; Fisher & Ors v Air Zimbabwe Corporation HC – H 306 / 88; and Winterton, Holmes and Hill v Paterson** 1995 (2) ZLR 68 (S); **Minister of Labour & Ors v PEN Transport (PVT) Ltd** 1989 (1) ZLR 293;
  3. even where a party had an appeal pending before the Tribunal, s/he could abandon this and make an application for review to the High Court – **Dzikiti v United Bottlers** 1998 (1) ZLR 389;
  4. where a party was aggrieved by the decision or conduct of a disciplinary committee under a code of conduct instead of appealing to the Tribunal as provided under 101 (7) of the LRA s/he could make an application of review directly to the High Court, as long as this was on a general ground of review, as the LRA was held not to expressly confer this on the Tribunal, despite the clear wording of s 97 (2) or s 91 of the LRA and the requirement under s 93 (1) (b) that disputes be resolved in a manner that 'may be just in the circumstances.' – **Minerals Marketing Corporation of Zimbabwe v Mazvimavi** 1995 (2) ZLR 353 (S);
  5. an aggrieved party could appeal to the Supreme Court on a question of fact where there is 'either failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented' despite the clear and unambiguous wording of s 92 (2) of the LRA providing appeals to the Supreme Court only "on a question of law" – **Reserve Bank of Zimbabwe v Granger & Anor SC 34 / 00** and **Muzuva v United Bottlers (PVT) Ltd** 1994 (1) ZLR 217 (S);
  6. where the Tribunal found procedural irregularities as the main offending thing in a case, its powers were limited to remittal to a lower body, rather than issuing a substantive determination because it is undesirable to determine labour matters on technicalities – **Air Zimbabwe Corporation v Mlambo SC 16 of 1997** and **Dalny Mine v Banda SC 39 / 99**. This was in open conflict with s 97 (4) as read with s 91 (1) of the LRA granting the Tribunal unfettered discretion on whether to hear the matter or remit it, and once it had decided to hear an appeal to make any appropriate determination under s 91 (1) of the LRA, including holding that an employer's failure to comply with procedural requirements was fatal.

The courts in the above cases conveniently did not go into the enquiry as to whether whilst there was no express ouster of the jurisdiction of the High Court under the LRA, the extensive powers and jurisdiction granted the Tribunal could in fact amount to ouster by necessary implication using



the Lawson Factors as guides. Yet such extensive jurisdiction and powers of the Tribunal and the general application and subject matter of the LRA evidenced a clear and unambiguous intention of the legislature to substitute the formalistic and legalistic High Court anchored in colonial, racist and analytical positivist ethos<sup>16</sup> with a specialised labour court of equivalent status and power to the High Court but one capable of dispensing 'simple, speedy and cheap industrial justice unhampered by legal jargon and technicalities.'

Indeed the failure of the formal labour dispute settlement machinery was one of the main factors that led to the massive and unprecedented breakdown of the system of law and industrial relations immediately after independence, as evidenced by the 1980 – 81 wave of wild-cat strikes. One of the main demands of the workers was for a just, speedy, inexpensive and worker friendly labour dispute settlement machinery.<sup>17</sup> A major objective behind the LRA was to prevent the recurrence of such industrial unrest, through amongst other things, the establishment of a system of specialised labour courts headed by the Tribunal, applying principles of labour justice and equity based on a pluralist model of labour relations.<sup>18</sup> As McNally JA stated in **Art Corporation Ltd. V Moyana** 1989 (1) ZLR 304 (S) on the purpose of the LRA - "one of its fundamental objects is to improve the lot of the employee."

Yet the models of interpretation adopted by the courts, ironically based on doctrines of justice, were resulting in the fragmentation and disempowerment of the Tribunal, enabling employers to resort to the formalistic, legalistic and expensive superior courts, which favoured them and disadvantaged the ordinary workers, thus achieving precisely the opposite of the intended objective of the LRA.

However, worried by this, some judges sought to beat a retreat from the first position, relying on the doctrine of exhaustion of domestic remedies, leading to conflict with the more traditionalist judges, centred on the extent to which access to the High Court was open to litigants.

Two positions emerged. The one line followed the traditional line which saw the issue as one of a total war for turf and aimed to maintain the jurisdiction and superiority of the High Court at all costs. This approach advocated for totally free and unhindered access to the High Court without exhaustion of domestic remedies. The opening salvos of this approach had been fired in cases like **Art Printers Ltd v The Regional Hearing Officer & Anor** HC – H 168 – 87<sup>19</sup> but was distilled and elaborated into a principle of complete cannibalisation and annihilation of the Tribunal in **Dzikiti v United Bottlers** 1998 (1) ZLR 389, wherein the court observed –

*"One is therefore able to state the following clear principle. An aggrieved employee has an unfettered election whether to pursue a cause of action arising from employment according to the common law or through the domestic and statutory procedures appointed. Even when he has chosen, or been compelled, to submit to the domestic procedures, he is not obliged to exhaust those remedies before praying relief from the High Court."*

Opposed to this was a line of cases that exhibited an uneasiness with this unashamed and crude swallowing of the Tribunal against the clear and open intention of the LRA. In an attempt at giving the Tribunal some kind of recognition which was demanded by not only any honest and objective reading of the LRA but even the principles of common law outlined above, this approach argued that litigants did not have an open and unhindered choice but were compelled to exhaust the domestic remedies under the LRA, including appeals to the Tribunal before approaching the High Court. This approach was first articulated in **Tutani v Minister of Labour, Manpower Planning and Social Services & Ors** 1987 (2) ZLR 88 but was really well developed and articulated in **Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee** HH 115 / 94. In the latter case counsel for respondent had, essentially following the Lawson Factors, argued against granting of free access on the grounds that: (1) the courts should not take up cases that had been given a specific and specialised forum by the legislature; (2) the need to make clear to litigants that where a particular remedy is provided under a code and the LRA they 'should follow procedures provided for and not venture into unnecessary litigation;' (3) avoidance of expensive litigation;<sup>20</sup> (4) the heavy workload facing the High Court;<sup>21</sup> (5) the fact that the remedies available under codes and the Tribunal give employees ample opportunity to have their cases 'thoroughly investigated.'<sup>22</sup> In endorsing the above arguments Smith J ruled -

*"In my view, this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to the court rather than to proceed by way of the domestic remedies provided. The factors mentioned by MTAMBANENGWE J in the Tutani case ... should be carefully considered before a decision is made. A litigant should exhaust his domestic remedies before approaching the Court unless there are good reasons for approaching the Court earlier."*

It is to this that the defenders of the unitary – positivist order had responded to by their open declaration of war in **Dzikiti v United Bottlers**. But in **Girjac v Mudzingwa** 1999 (1) ZLR 243 (S), Gubbay CJ had firmly rejected the unitary perspective in favour of the pluralist perspective –

*"(the Appellant) appears to have been of the view that both options were open: the choice being uninhibited... the court did not deal with this issue. It ought to have done so."* (He then cited the approach to this question as developed in the Tutani case summarising it as) – "were domestic remedies are capable of providing effective redress in respect of the complaint, and secondly, were the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts, unless there are good reasons for not doing so... (the same approach was applied SMITH J in **Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee**... and was referred to with approval by Malaba J in **Moyo v Forestry Commission** 1996 (1) ZLR 173 (H)... **I respectfully endorse it.**" (emphasis mine).

Whilst the decision in **Girjac v Mudzingwa**, got closer in fulfilling the implied objectives of the LRA, it still had major weaknesses. Firstly, whilst asserting the importance and superiority of the

LRA route it did so in a way that left room for an interpretation of superior jurisdiction of the High Court in 'special circumstances.' Yet the very factors and authorities it relied on could easily and logically should have been used to provide not so much for deferment of the High Court's jurisdiction but actually its ouster. Courts in South Africa, before the promulgation of the LRA of 1995, granting exclusive jurisdiction to the Labour Court, had in fact taken that route, fashioning a jurisprudence of exclusive jurisdiction for the Industrial Court from its power to enforce fair labour standards.<sup>23</sup>

As it is, the above left immense discretion in the hands of particular High Court judges, enabling, them to accept or decline jurisdiction, not on any particularly discernable set of principles, other, than their own prejudices, primarily class. This, in most cases meant that jurisdiction was declined, where it was workers seeking to access the court and granted when it was employers. This is the basis of the "gross inconsistency that betrays and mirrors the current state of academic kwashiorkor, that perverts the legal profession," that Biti so bitterly complains of above.

The above is the context in which the Labour Relations Amendment Act, No. 17 of 2002 was promulgated, namely one of betrayal of the objectives of the Act. Although Chief Justice Gubbay had declared in favour of a pluralist interpretation that restricted the jurisdiction of the High Court in favour of the Tribunal, this had been done in a manner that did not dispose of the critical question – namely whether the Tribunal had superior jurisdiction in labour disputes, thereby still leaving workers exposed.

## **The Struggle under Act 17 of 2002**

The above is clearly the evil that the legislature sought to remedy in the Labour Relations Amendment Act No. 17 of 2002 ('Act No. 17 of 2002.'). This was done in four critical sections dealing with jurisdiction and powers of the Labour Court, namely sections 2A, 3, 89 and 97.

The above provisions have dealt decisive blows to the unitarists in several ways, namely:

1. For the first time the Act expressly provides exclusive jurisdiction to the Labour Court in matters falling under its jurisdiction in the first instance in s 89 (6). Given the above historical context the court clearly being referred to was the High Court, as correctly pointed out and accepted in **Tuso v City of Harare** HH 1 / 04 and **Sibanda & Anor v Chinemhute N.O. & Anor** HH 131 / 04.
2. The new s 89 (2) (a.iii) expressly provides that in determining appeals the Labour Court would "exercise the same powers of review as would be exercisable by the High Court in relation to the decision, order or action that is appealed against or any proceedings connected therewith." Under s 97 (1) appeals are defined broadly to include review. This essentially means the Labour Court has essentially the same powers equivalent to the general review jurisdiction of the High Court that had been dubiously denied in **Minerals Marketing Corporation of Zimbabwe v Mazvimavi**.

3. Under s 2A the new Act now expressly states and specifies its purpose and the model of interpretation to be applied in instances of lack of clarity, which take precedence over the common law maxims that had hitherto been applied by the courts. Specifically the purpose of the Act is defined as “to advance social justice and democracy in the workplace by” *inter alia*–
  - (a) Giving effect to the fundamental rights of employees provided under Part II;
  - (b) ...
  - (c) ...
  - (d) the promotion of fair labour standards;
  - (e) the promotion of the participation by employees in decisions affecting their interests in the workplace;
  - (f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.

Under s 2A(2) it is stated, “This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).” Thus the Act now expressly incorporates what has been referred to as the Purposive Rule of Interpretation, which contrary to Makarau J, is distinct from the traditional three main rules of interpretation. “The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to semantic and grammatical analysis... The interpreter must endeavour to infer the design or purpose which lies behind the legislation. In order to do this the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources... words should only be given their ordinary grammatical meaning if such a meaning is compatible with their complete context.”<sup>24</sup> Such model of interpretation is the one that best achieves the clearly stated pluralist objective of the Act, including the supremacy of the Labour Act above all other enactments unless expressly excluded under s 2A (3) as read with s 3 stating that the Act applies to all employees and employers.

However, this has not exhausted the central question we started with. The battles have only been transferred to another level, where the defenders of private property, thus forced to concede on the point of ouster of the jurisdiction of the High Court in the first instance under s 89 (6), have sought to limit the extent of this by their traditional cloak of common law legality, so far in three instances, namely:

- (a) arguing that the exclusive jurisdiction of the Labour Court is limited to only those areas specifically and narrowly defined in the Act, as T. Biti does above; and
- (b) even in such areas there are certain instances where there is no exclusive jurisdiction for a variety of reasons such as that the Labour Court has no express general authority to grant certain types of relief such as interlocutory or interim relief like declaratory orders or interdicts as in **Sibanda & Anor v Chinemhute N.O. & Anor** or in **Nongongo v Barbican Holdings**

LC/REV/H/90/03, where the court declined jurisdiction because for a matter to be reviewed by the Labour Court under s 89 (2) (a) (iii) 'it has to be pending as an appeal before it,' which was held not so in the case in casu.

- (c) **In Trust Bank Corporation Ltd v Chakombera & Ors LC/ORD/H/04** where the full bench of the Labour Court held that it had no jurisdiction to hear appeals from a determination on retrenchment packages by the Minister under s 12C because there was no express provision for appeal but could do so for less than five under the relevant regulations.

Let us address the above in greater detail. As regards the first issue of general jurisdiction of the Labour Court, this is a reaction to the decision in **Tuso v City of Harare** where Bhunu J held "section 89 appears to prescribe exclusive jurisdiction to the Labour Court on all labour matters in the first instance. ... I am satisfied that this court's review jurisdiction in the first instance in respect of labour matters has been ousted by statute." He similarly held so **Pedzisa v PSC & Anor HC – H 11031B/02** in declining to grant jurisdiction to an appeal from Public Service Commission under the Public Service Act, CAP 16:04.

Biti, invokes the common law maxim of *Ejusdem Generis* to attack the decision, which he says unjustifiably interprets the terms "this Act or any other enactment", too broadly. Makarau J evades the issue in **Sibanda & Anor v Chinemhute N.O. & Anor**, making a superficial distinguishing between a review application and one for a declaratory order, to in reality come up with an opposite position.

Whilst formalistically logical Biti's argument falls on the fact that it is premised on common law maxims of interpretation that run foul of the provisions of s 2A (1) (2) and (3) as read with s 93 (1) which he completely ignores as if there had never been an Act No. 17 of 2002.

Bhunu J summarises his justification for adopting such a broad interpretation on the ground that - "It is clear that the Labour Court can deal with both the procedural and substantive aspects of the case under one roof, whereas this court can only deal with the procedural aspects of the case which it cannot put right but refer to other for a for rectification if need be. This is obviously time – consuming, cumbersome and expensive." This, by the way, is the reason why in fact the reverse of Makarau J's beautiful imagery is true, namely that the informal, flexible, equity and appellate nature of the Labour Court makes it the building with 'all its doors and windows open to all and for all reasons (and in all seasons) ... (whilst) the sentry manning the gates of this building is less stern and less demanding...' and the High Court in reality for most workers being the building which is "generally closed up apart from a few windows ..."

Bhunu J, in the judgement and his paper, along with counsel, sadly fail to adequately articulate the jurisprudential premises of his decision, opening him to the attack by Biti of paying a 'cursory view of ... the Act without much debate' but rather being influenced by his previous history as the Senior Judge of the Tribunal where 'he had pushed for exclusive jurisdiction of the Labour Court in Labour Law matters.' True this might be, but I would add that Bhunu J must in fact wear this as

a badge of honour, for it shows that as a former liberation war fighter, he has remained consistent with the values and philosophical world outlook that sent him to the war, fighting the racist, sexist and anti-worker colonial order, despite all these years in the corrosive and corrupting influence of the legal profession that many have been unable to withstand in much shorter periods. After all American Realists long pointed out that the law is what the judges declare as determined by their own social background.

However, there are in fact very strong jurisprudential grounds to defend Bhunu J's position. Firstly, in this case Bhunu J in fact bites the bullet that his pluralist colleagues had previously been afraid to. As articulated above, the authority and extensive jurisdiction of the Labour Court, support a claim that the jurisdiction of the High Court has been ousted by necessary implication, and not just merely deferred.

Secondly and most importantly, Bhunu J's interpretation is the one most consistent with the articulated purpose of the Act, its articulated model of interpretation under s 2 A (1) (2) and its universal application in labour matters under s 3 as read with s 2 A (3).

From a contextual perspective, the objective of amending the provisions dealing with the jurisdiction of the Tribunal is captured in the Memorandum which accompanied the Bill, namely, "The proposed new section 90 provides for the functions, powers and jurisdiction of the Labour Court. In respect of any labour dispute, the Labour Court will have exclusive original jurisdiction, that is; no court other than the Labour Court may hear or determine such disputes in the first instance. This does not exclude the review jurisdiction of the High Court after any such dispute has been considered by the Labour Court."

Bhunu J's interpretation stating that the Labour Court has access to all labour disputes under whatever enactments most accords with this objective. Critically the Labour Court sits at the summit of a dispute settlement machinery with authority over all disputes covering all employers and employees falling under the Labour Act, unless otherwise excluded. Section 93 (1) gives labour officers or designated agents jurisdiction over all labour disputes and unfair labour practices under the realm of the Labour Act. Under s 3 the Act applies to all employers and employees, and under s 2 A (3) the Act takes precedence over all other enactments, unless expressly excluded. Under s 97 (1) a party aggrieved by the decision or conduct of investigations by a labour officer may appeal to the Labour Court. The clear and obvious logical conclusion from the above is that the Labour Court has jurisdiction over all disputes falling under the Labour Act and any other enactments, unless otherwise expressly excluded by the Act or such other enactment. The original jurisdiction of the High Court, provided under s 14 of the High Court Act, must therefore be held subordinate to that of the Labour Court in labour matters. This is not as open-ended as it may seem. The Labour Court has not been given a blank cheque as such - limitations do in fact exist, but not as defined by Biti's bourgeois common law legality but s 3, namely restricted to labour matters falling under the Labour Act. So for instance, disputes under the Export Processing Zones Act will not be covered, with the High Court retaining jurisdiction in the first instance.

The above are the reasons why the decision in **Trust Bank Corporation Ltd v Chakombera & Ors** LC/ORD/H/04 is wrong. The Labour Court must not be too quick to infer lack of jurisdiction where this is not expressly stated in the Act, the opposite must in fact apply. Thus in the case *in casu*, the Labour Court ruled that it had no authority to review the jurisdiction of the Minister, when the obvious trend under Act No. 17 was to place more areas previously determined by the Minister under authority of the Labour Court, as for instance in relation to review of show cause orders issued by the Minister and issuing of disposal orders under s 107 of the Labour Act. A robust and purposive interpretation of s 89 based on s 2 A (2) buttressed by maxims like that it is not presumed to be the intention of the legislature to alter existing laws so as to take away rights, to be unreasonable or cause injustices,<sup>25</sup> would have grounded jurisdiction in the above case. As it is the court's decision besides being grossly unreasonable in that jurisdiction is granted for less than five employees, where it is required the most, that is when concerning large numbers of workers, it is denied. The alternative remedy contemplated by the Labour Court of a review application to the High Court may be ineffective, given the extreme difficulties of establishing a ground of review on the basis of unreasonableness on the part of the trial court — this being held to be a “formidable onus.”<sup>26</sup> On the other hand the Labour Court enjoys full authority to look at issues of equity.

## **Interlocutory relief powers of the Labour Court**

Finally, on the issue of whether the Labour Court can issue declaratory orders and interlocutory relief including declaratory orders and injunctions, even in matters that are not directly pending before it. The weakness in the **Sibanda** case is that it fails to distinguish declaratory orders that pertain to disputes falling squarely within the jurisdiction of the Labour Court and those that don't. If the High Court is to have authority to issue declaratory order as those in that case, which in fact give substantive relief, then we are back to square one, and s 89 (6) is reduced to a sham. Where a dispute falls within the parameters of the Labour Court it is difficult to see why the Labour Court cannot issue such orders like declaratory orders under s 89 (2) (a) (ii) and (iii) by substituting its own order in the form of a declaratory order for the decision appealed against or issuing a declaratory order on review. Such orders are far from being a “*sui generis relief*”, as evidenced by the capacity of the South African Labour Court to issue the same.<sup>27</sup>

This issue, together with that of the general interlocutory relief powers of the Labour Court in turn rely on the question of interpretation of the terms “appeals” and “applications.” Besides the specific power to grant an interim determination pending the determination of an appeal before it under s 97 (4), which was incorrectly relied on by Mhuri P to decline jurisdiction in matters that are not directly pending before the Labour Court, the Labour Court in fact has general powers similar to the High Court's to grant interlocutory relief, including injunctions and declaratory orders and so forth. This is why Mhuri P's judgement in **Nongongo v Barbican Holdings** is also wrong, based as it is on a legalistic and formalistic conception of s 89 and 97.

In **Pedzisa v Public Service Commission & Another**, Bhunu J correctly pointed out that under the Labour Act, the term “Appeal includes review.” Whilst again not expressly justified, such interpretation is correct by reference to s 97 as read with s 2 A (1) and (2) of the Labour Act. A perusal of s 97 shows that the term “appeal” is used broadly and loosely to cover not only the traditional grounds of appeal, namely the substantive merits of a dispute as in s 97 (1) (a) and (b) but also the traditional grounds of an application for review, namely procedural irregularities or the ‘conduct of investigation of a dispute’ by a labour officer or in terms of an employment code as in s 97 (1) (c) and (d) as read with s 97 (2) (b) and (c) stating that “an appeal may seek a review of the determination or decision on any ground on which the High Court may review it; address the merits of the determination appealed against and seek its review on a ground referred to in paragraph (b).” In both instances an aggrieved party is entitled to “appeal against such determination or conduct to the Labour Court.” Refer also to s 89 (2) (a) (iii).

The implications of this are immense. It means a party aggrieved by the conduct may in fact “appeal” against the conduct of an investigation by a labour officer, designated agent or a body under a code of conduct, may in fact “appeal” directly to the Labour Court under s 97 (2) as read with s 89 (2) (a)(iii) seeking relief that the High Court can similarly grant, including the granting of interlocutory relief like an injunction, declaratory order or a *mandamus* order. However, just like for the High Court, one would have to show “special reasons” why the Labour Court should exercise its jurisdiction before exhaustion of the domestic remedies provided under the Act – the same grounds applicable in the High Court would apply such as fear of irreparable harm of lack of effective alternative remedies.

Examples that come to mind include a dispute before a labour officer over his/her characterisation of a dispute as one of right, where the other thinks its of interest, and thereby entitling them to go on collective job action, or refusal to designate an occupational hazard an immediate one or to recognise the existence of a threat to the existence of a workers committee or trade union, thereby allowing it to go on strike. Another example is where an employer is closing shop and preparing to skip the border without paying workers their lawful retrenchment packages. In all the above circumstances it would be futile to say the parties must go through conciliation, arbitration and finally the Labour Court, given the urgent nature of the problem. The Labour Court, as a court enjoying similar powers of review as the High Court and the final appellate court on disputes of fact, clearly enjoys implied general powers “to regulate and control its own proceedings so as to prevent injustices or abuse of process” by granting appropriate interlocutory relief.<sup>28</sup> A broad and purposive reading of s 97 (1) (c) and (d) as read with s 97 (2) and s 89 (2) (a) (iii) granting the Labour Court similar review power as the High Court and read in the context of s 2 A (1) (f) providing a just, effective and expeditious resolution of disputes and unfair labour practices provides further authority for the contention that the Labour Court has jurisdiction to entertain matters not directly pending as an appeal before it, but as appeals against the conduct of lower organs. But like the High Court, discretion on whether to hear such matters, before exhaustion of the domestic remedies lying under the Act would lie with the Labour Court, in the manner described in the historical section above.



Any other interpretation than the above would clearly result in the fundamental crippling of the dispute settlement machinery under the Act by denying the Labour Court the means to protect itself and the system over which it presides, from abuse of process, thereby leading to gross injustices. The only alternative would be to surrender such role to the High Court as happened in **Nongongo v Barbican Holdings**, and **Trust Bank Corporation Ltd v Chakombera & Ors** which leads to the same result, making the entire specialised dispute settlement machinery under the Act meaningless. Section 2 A and 3 require compel and provide the Labour Court with sufficient tools to play a creative and dynamic role in ensuring that 'social justice and democracy in the workplace' is achieved, even in the face of determined resistance from the forces of the status qua, which dominate the formal superior courts. This certainly cannot be achieved through the cowardly and unprincipled positions it took in the above cases.

Such an interpretation of the jurisdiction and powers of the Labour Court is vindicated by comparison with its South African counter-part which has played a much more creative and social justice determined role. Whilst it is true that such court in fact now enjoys powers that are more neatly laid out as in s 158 and is expressly defined as "a superior court that has authority, inherent powers..." these legislative provisions in fact are mere codification of a long-standing pro-social justice jurisprudence fashioned by the Industrial Court from materials much less than those available to our Labour Court today.

## Conclusion

The above show that the clear intention of the legislature has been to provide the Labour Court with exclusive jurisdiction in the first instance in labour matters falling under the Labour Act with the broad objective of achieving 'social justice and democracy in the workplace.' However, this process has continuously been subverted by unitarist judges under the cloak of common law legality, forcing the legislature to come up with the clear and unambiguous provisions of Act 17 of 2002 to counter this. But as the recent decisions of the Labour Court and High Court show, this on its own will not be sufficient. Despite expressing intentions to the contrary the latter court in fact takes the issue of jurisdiction as one of all out civil war which it must win at all costs in the interest of capital and employers. The Labour Court has been provided by the Legislature, with powerful and sufficient instruments, especially s 2 A; 89 and 97, to fight such war on the side of 'social democracy and justice in the workplace,' and must be ready to do battle without hiding behind the shadows of waiting for legislative amendment to clear so-called unclear areas. Granted, whilst the state must urgently consider some amendments to clearly and precisely lay out the inherent and general powers of jurisdiction of the Labour Court in all labour disputes arising from the Labour Act and exclude the High Court, this might take years as happened with Act No. 17 of 2002.

In the meanwhile, it would be inexcusable for the Labour Court to sit back and watch the carnage of the working class, unless it too, as increasingly seems more likely, like all courts under capitalism,

has already taken a firm class position on the matter, on the side of employers, vindicating Makamure's argument that -

*The law courts ... oppress the progressive endeavours and the rights of workers chiefly through judicial frustration of these rights in the courts.*"<sup>29</sup>

This ultimately shows that whilst efforts to reform the Labour Court by overhauling its composition and appointment of its judges to base this more directly on those with a pro-worker world outlook and experience in labour relations rather than formalistic legal qualifications, would assist, without the working class seizing power and abolishing private property internationally, efforts at achieving social justice and democracy would remain futile and vain.

## NOTES

1. Lecturer, Faculty of Law University of Zimbabwe and former student of Kempton Makamure who is a leading member of the International Socialist Organisation
2. K. Makamure, "A Comparative Study of Comrades' courts under Socialist Legal Systems and Zimbabwe's Village Courts" *Z L Rev*, Vol. 3 1985 (No. 1 & 2) 34 – 61.
3. K. Makamure, "Constitutional Theory and Practice for the Transition from Capitalism to Scientific Socialism" *Z L Rev*. Vol. 5 1987 p 108; SBO Ghutto and K. Makamure, "Judicial Subversion Under the Cloak of Legality" ZLR 1985.
4. s 99 LRA, 1985
5. s 91 and s 97 LRA CAP 28:01
6. s 89 and s 92(2) LRA, CAP 28:01
7. s97 (2) (b) and s 90 (6) LRA, CAP 28:01
8. s 93 (1) (a) LRA CAP 28:01 and s 4 Labour Relations (Settlement of Disputes) Regulations, S.I. 30 of 1993.
9. s 97 (5) LRA CAP 28:01
10. s 3 LRA, 1985
11. **Ntini v Jongwe Printing and Publishing Co. Ltd** HC – H 623 – 87:
12. This was the basis of the decision in **Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S)** where it was stated that it was unlikely that the jurisdiction of the court to effect the common law remedy of reinstatement could not be ousted by authority of delegated legislation like a Statutory Instrument.
13. **Reid – Daly v Hickman & Ors (1) 1980 ZLR 201** and **De wet v Deetlefs**, 1928 AD 286 cited by T. Biti, supra is to similar effect.
14. This echoed the position by Gillespie J in **Zikiti v United Bottlers 1998 (1) ZLR 389 (H)**.
15. **Minerals Marketing Corporation of Zimbabwe v Mazvimavi 1995 (2) ZLR 353 (S)**

16. For an analysis of the historical fight by the formal superior courts to try and preserve employer power and derail new reforms to benefit workers and blacks amongst others introduced by the independence government see: SBO Ghutto and K. Makamure, "Judicial Subversion Under the Cloak of Legality" ZLR 1985; S v Jovner 1982 (2) ZLR 252; S v Lancashire Steel (PVT) Ltd 1984 (1) ZLR 89 (S) and Tavengwa v Marine Centre 1984 (2) ZLR 173 (H).
17. Government of Zimbabwe, Labour & Economy: **Report of the National Trade Union Survey**, 1984, Vol. 1; A. Astrow, **Zimbabwe – A Revolution that lost its way?** Pluto Press, London 1983; I. Mandaza (ed) **Zimbabwe 1980 – 1986: The Political Economy of Transition**, CODESERIA, Dakar, 1986.
18. See speech by K.M. Kangai, Minister of Labour and Social Services Seminar on the Proposed Labour Relations Bill, 1983 (University of Zimbabwe, March 1983 – Unpublished). See also **Chiworese v Rixi Taxi Services Co – op Society** HH 13 - 93
19. Followed in other cases like **Fisher & Ors v Air Zimbabwe Corporation** HC – H 306; **Mabuya v Tjolutjo Council** HB 52 / 92; **Ntini v Jongwe Printing and Publishing Co. (PVT) Ltd** HC – H 623 – 87;
20. **Club of SA & Ors v Feldman** 1942 AD 340 at 362
21. A similar argument was subsequently and ironically relied on by one of the status quo defenders, Sandura JA, in **Rushwaya v ENBEE Stores (PVT) Ltd** SC 79 / 00 in justifying his throwing out a worker's case – "The fact that there is a large backlog of cases in the Tribunal does not justify taking labour disputes, such as the Appellant's, to the High Court. That court should not be turned into a Labour Relations Court."
22. **Shomes v South African Railways & Harbours** 1922 AD 228
23. **PPWAWU v Pienaar NO & Ors** (1992) 11 ILJ 308; **Foskor v Schoeman NO & Ors** (1989) 10 ILJ 861. See generally B. Rycroft and B. Jordaan, **A Guide to South African Labour Law**, (Juta, 1992) 257
24. G E Devenish, **Interpretation of Statutes**, (Juta, 1992) 35 – 39 and 289; See also L. Du Plessis, **Interpretation of Statutes** (Durban, Butterworths, 1986) 36; A Denning, **The Discipline of Law** (London, Butterworths, 1979) 19
25. G E Devenish, *supra* at p 290 – **Zimbabwe Teachers Association v Minister of Education** 1991 (2) ZLR 48 and **Secretary for Transport v Makwavarara** 1991 (1) ZLR 18.
26. **Cone Textiles (PVT) Ltd v Ayres & Anor** 1980 347 (AD); v **Stumbles NO & Anor** 1963 R & N 68 (SR) at 73 and **Cargo Carriers (PVT) Ltd v Zambezi & Ors** 1996 (1) ZLR 613 (S).
27. s 158 (1) (a) (iii) LRA and **SACWU v Engen Petroleum Ltd** 1998 ILJ 1568 (LC) 1570
28. Following the logic of **Zikitl v United Bottlers** 1998 (1) ZLR 389 (H).
29. K. Makamure, "A Comparative Study of Comrades' courts under Socialist Legal Systems and Zimbabwe's Village Courts" *Z L Rev*, Vol. 3 1985 (No. 1 & 2) 34 – 61.



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