Jurisdiction of the SCA in labour matters –

the new s 168(3) of the Constitution

In footnote 26 to the minority judgment by Froneman J in the recent case of National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board 2014 (3) SA 544 (CC), the court held that ‘[a]s a result of the Constitution Seventeenth Amendment Act of 2012, this right of appeal to the Supreme Court of Appeal no longer exists’. In the same footnote, the court went on to say that ‘[s]ection 168(3)(a) of the Constitution now reads: “The Supreme Court of Appeal may decide appeals in any matters arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament”’. 

By Vuyo Mkwibiso
Before its amendment by the Constitution Seventeenth Amendment Act of 2012 (the Seventeenth Amendment), s 168(3) of the Constitution provided that ‘the Supreme Court of Appeal may decide appeals in any matter’. The section further provided that the Supreme Court of Appeal (the SCA) was the highest court of appeal except in constitutional matters.

Section 183 of the Labour Relations Act 66 of 1995 (the LRA) provides that, subject to the Constitution and despite any other law, no appeal shall lie against a decision, judgment or order of the Labour Appeal Court envisaged in ss 173(1) and 175 of the LRA.

Section 210 of the LRA provides that where there is a conflict between the LRA and any other law, other than the Constitution or an Act expressly amending the LRA, in respect of matters dealt with in the LRA, the provisions of the LRA will prevail.

In National Union of Metalworkers of South Africa and Others v Fry’s Metals (Pty) Ltd 2005 (5) SA 433 (SCA), the SCA had to consider whether it had any appellate jurisdiction in respect of appeals from the Labour Appeal Court, in light of s 183 of the LRA and s 168(3) of the Constitution prior to its amendment. The SCA held that the starting point was that the LRA’s provisions conferring finality on the Labour Appeal Court had to be read in conjunction with the appellate powers created by the Constitution. It was held that the Constitution in s 168(3) vested the SCA with the power to hear appeals from the Labour Appeal Court in both constitutional and non-constitutional matters, and the provisions of the LRA, which conferred final appellate power on the Labour Appeal Court, must be read subject to the appellate hierarchy created by the Constitution itself. This, the SCA held, did not entail that any provisions of the LRA were unconstitutional as the LRA had to be interpreted subject to the Constitution. As a result, the SCA held that it had jurisdiction to hear the matter. The SCA then went on to determine whether special circumstances existed to warrant the hearing of a further appeal from the Labour Appeal Court. It held that there were no special circumstances that warranted the hearing of the appeal and as a result dismissed the application for special leave to appeal.

Subsequent to the amendment of s 168(3) of the Constitution, the legislature enacted the Superior Courts Act. In its preamble, the Superior Courts Act notes that with the advent of democracy we inherited a fragmented court structure and infrastructure largely derived from our colonial history. It is also noted that it is desirable to provide for a uniform framework for judicial management of the judicial functions of all courts. The Superior Courts Act defines ‘appeal’ to exclude criminal law appeals, and defines ‘Superior Court’ to mean the Constitutional Court, SCA, the High Court and any court of a status similar to the High Court. Section 16(1)(c) of the Superior Courts Act provides that an appeal against any decision of a court of a status similar to the High Court lies with the SCA on leave to appeal having been granted by the SCA. By contrast, s 16(1)(b) of the Superior Courts Act provides that an appeal against a decision of a Division of the High Court lies with the SCA on special leave having been granted by the SCA. Section 17 of the Superior Courts Act governs the manner in which an application for leave to appeal may be dealt with by the court hearing such an application. Section 19 of the Superior Courts Act deals with the powers of the SCA and the High Courts when determining appeals. The Superior Courts Act, in schedule 2, amended ss 151, 154 and 170 of the LRA.

The issue is whether, in light of the amendment of s 168(3) of the Constitution and the enactment of the Superior Courts Act, the SCA still has jurisdiction to hear appeals in respect of labour matters. The following questions arise:

- Does the new s 168(3) of the Constitution take away the SCA’s jurisdiction in labour matters?
- If not, does s 183 of the LRA exclude the SCA’s jurisdiction to hear appeals in respect of labour matters from the Labour Appeal Court?
- If so, is there a conflict between s 183 of the LRA and the Superior Courts Act in respect of the SCA’s jurisdiction to hear appeals from the Labour Appeal Court?
- If so, is the Superior Courts Act an Act expressly amending the LRA as envisaged in s 210 of the LRA?
- If it is not, can the Superior Courts Act nevertheless be considered to have amended s 183 of the LRA?

It must be stressed that Froneman J’s judgment in the National Lotteries Board case was a minority judgment. The majority judgment of Zondo J said nothing of the Supreme Court of Appeal’s jurisdiction to hear labour matters in light of the amended s 168(3) of the Constitution. That issue was simply not properly put before the Constitutional Court for a decision. In my view, the majority judgment of Zondo J was correct and the employees were rightfully reinstated. No more need be said here of the merits of that specific case.

This article focuses on the accuracy of Froneman J’s statement, obiter though it was, in respect of the Supreme Court of Appeal’s jurisdiction in labour matters. Consideration is given to the old legislative framework, the Supreme Court of Appeal’s jurisprudence on the subject of its jurisdiction in labour matters, the new s 168(3) of the Constitution, and the provisions of the new Superior Courts Act 10 of 2013 (the Superior Courts Act).
In my view, the new s 168(3) of the Constitution does not take away the SCA's jurisdiction to hear appeals in respect of labour matters. The effect of the section is that the jurisdiction of the SCA in labour matters shall be limited to such extent as may be determined by an Act of Parliament. Thus, Parliament is given power to determine the extent of the SCA’s jurisdiction to hear appeals in labour matters. Parliament may make such a determination in any Act of Parliament and it is not restricted to making such a determination in the LRA.

As was stated in the Fry's Metals case, s 183 of the LRA must be read in conjunction with the powers created by the Constitution because the LRA itself stipulates that it is subject to the Constitution. A proper understanding of the powers and jurisdictional hierarchy established by s 168(3) of the Constitution is important. Had Parliament's hands been tied to determining the SCA’s jurisdiction only in the LRA as amended expressly by an Act of Parliament, it would be easy to conclude that despite the Superior Courts Act, the Labour Appeal Court remained the final court of appeal in respect of labour matters which it is entitled to determine. However, s 168(3) of the Constitution empowers Parliament to determine the SCA’s jurisdiction in labour matters in any Act of Parliament. The words 'despite any other law' in s 183 of the LRA must, thus, be interpreted subject to the constitutional power of Parliament to determine the SCA’s jurisdiction in labour matters in any Act of Parliament. That constitutional power, as exercised by Parliament when it enacted the Superior Courts Act, it would be easy to conclude that despite the Superior Courts Act, the Labour Appeal Court remained the final court of appeal in respect of labour matters which it is entitled to determine. However, s 168(3) of the Constitution empowers Parliament to determine the SCA’s jurisdiction in labour matters in any Act of Parliament. The words ‘despite any other law’ in s 183 of the LRA must, thus, be interpreted subject to the constitutional power of Parliament to determine the SCA’s jurisdiction in labour matters in any Act of Parliament.

Although s 210 of the LRA states that the provisions of the LRA shall prevail unless there is an Act expressly amending the LRA, the words 'any Act expressly amending this Act' too are subject to the Constitution which allows Parliament to determine the jurisdiction of the SCA in any Act of Parliament. The Superior Courts Act expressly amends certain sections of the LRA, but does not expressly amend s 183 of the LRA. In my view, it can be said that the new s 168(3) of the Constitution gives Parliament the power to amend the jurisdictional setting created by the LRA by enacting any Act of Parliament. This constitutional power overrides the provisions of s 210 of the LRA, which require the LRA to be amended only by an Act that amends it expressly. Parliament has exercised this constitutional power by enacting the Superior Courts Act which, though not expressly amending s 183 of the LRA, can be said to have amended the section by necessary implication.

Thus, in my view Parliament has amended s 183 of the LRA by necessary implication, which amendment Parliament was empowered by the Constitution to effect and which constitutional power overrides any limitation in the LRA.

Parliament could easily have exercised its constitutional power to exclude the SCA's jurisdiction in labour matters in the Superior Courts Act. It chose not to do so. Instead, Parliament chose to give the SCA the same extent of jurisdiction it had prior to the amendment of s 168(3) of the Constitution. What Parliament did do, in addition, was to remove the requirement of special leave to appeal in respect of labour matters emanating from the labour courts. This was done in s 16(1)(c) of the Superior Courts Act, which only requires appeals from courts of a status similar to that of the High Court to lie with the SCA upon leave having been granted.

It would not make sense to deprive the SCA of jurisdiction in labour matters emanating from the labour courts, whilst retaining its jurisdiction in labour matters emanating from the High Court. That would be the consequence of a finding that s 16(1)(c) of the Superior Courts Act does not amend s 183 of the LRA. The SCA would rely on s 16(1)(b) of the Superior Courts Act to hear appeals in respect of labour matters that emanate from a Division of the High Court. The result would be the probable development of divergent jurisprudence between the SCA and the Labour Appeal Court in respect of the application of legal principles to similar facts and issues. This would probably result in forum shopping, which has been said to be undesirable.

It remains to be seen how the courts will interpret the new s 168(3) of the Constitution, the new Superior Courts Act and the LRA in respect of the SCA's jurisdiction in labour matters. I would disagree with the obiter view expressed by Froneman J in this regard in the National Lotteries case. In my view, the SCA still has jurisdiction to hear appeals from the Labour Appeal Court. The new s 168(3) of the Constitution has not taken away the SCA's jurisdiction to hear labour matters emanating from the Labour Appeal Court. Although s 183 of the LRA sought to make the Labour Appeal Court the final court of appeal in respect of the enforcement of rights created in the LRA, that section must be interpreted subject to the Constitution, which has empowered Parliament to determine the SCA’s jurisdiction in any Act. Section 183 of the LRA has been amended by necessary implication by the Superior Courts Act, Section 210 of the LRA, which requires the LRA to be amended expressly, does not apply as it must give way to the constitutional power created in the new s 168(3) of the Constitution.

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