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Labour Dispute Resolution in Botswana: Mapping a Boundary between Labour Courts and Collective Judicial Responsibility

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Introduction- It is a fact that the introduction of labour courts in some developing African countries was a case of need. Others subjectively concentrate on issues of jurisdiction and status which is why they define the labour court as an ad hoc tribunal or an administrative agency and so should be restricted to that status, as an outgrowth of the Executive. The major culprit is the senior courts of law and record. Historically, this may be because at establishment, the labour courts were not provided for as senior courts of record in the constitutions. A simple explanation is that at independence, the post-colonial governments retained much of the constitution around which independence was negotiated. During those early days, there was no industrialisation and mass formal employment and therefore no serious labour disputes that might have threatened the stability of the state.

The proponents of exclusion of Labour Courts (LC) or Industrial Courts (IC) contend that “By “courts” is meant the courts of civil judicature and by “tribunal” is meant those bodies of men who are appointed to resolve controversies arising from certain special laws----Certain special matters go before tribunals and the residue goes to the ordinary courts of civil judicature.

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I. INTRODUCTION

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“By “courts” is meant the courts of civil judicature and by “tribunal” is meant those bodies of men who are appointed to resolve controversies arising from certain special laws---Certain special matters go before tribunals and the residue goes to the ordinary courts of civil judicature. Though tribunals may have the trappings of a court, they are not courts in the strict sense of the word.” They go further by stating that “the tribunal is also not a court just because it gives decisions affecting the rights of subjects. Further, the fact that its decisions can be appealed at the High Court or the Court of Appeal or because the civil courts can remit cases to it do not also confer the status of a “court”

It is not quite clear whether the concern is with the source, the title or the functions as arrogated. Immediately, one wonders why the judiciary would want to flog the issue of jurisdiction. The judiciary, in pursuance of whatever its objectives may be, overtly appears to conclude that a tribunal cannot metamorphose into a court of law. This is because whether a tribunal or specialised agency gives a final

decision or hears evidence on oath should not make it a court. They contend further that, such a tribunal also cannot be a court of law because two or more contending parties appear before it between whom it has to decide.

The paper suggests that the notion of status is central to the arguments of the civil judicature. This is, because status means the legal authority, standing or capacity as an institution, its freedom, origin and credibility. It would also be an index to legal rights, duties, powers and disabilities relative to the ability to deliver justice equitably, firmly and timely with credibility. In this context, status cannot be the exclusive right of the civil courts as the labour courts can also lay claim to the same status.

Therefore, the motive behind the crusade by the Judiciary is self-seeking because their status and authority are also conferred and so can be withdrawn. The paper undertakes a brief survey of the recent history of the relationship between the civil courts and the labour courts in parts of Africa. This should prepare the foundation for examining the Botswana situation in some detail.

II. JUDICIARY ENGINEERED CONFLICT: AN OVERVIEW

This section deals with the realities of what the paper terms a family feud engineered by the Civil Courts against the Labour Courts. From a lay perspective, it is unclear what there is to lose in terms of national interest in establishing specialised courts instead of those manned by the learned generalists. In fact, at the commencement of the practice of judicial case management, the key reason provided to alleviate the pressure on the civil courts in terms of timely dispensation of justice. Much as the labour courts were to ease the pressure by taking on labour civil cases, one would have expected some improvement. The facts below tell a different story.

For example, the figures below and dates show the volume of cases registered by the Industrial Court (IC) of Botswana. First it must be noted that resolving or settling these cases is not an issue of general familiarity with the common law. It requires mastery of the municipal labour law framework which includes the

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Employment Act [Cap 47:01], the Trade Unions and Employers Organizations Act [Cap 48:01], the Trade Disputes Act [Cap48:02], the Workers Compensation Act [Cap 47:03] and the Public Service Act {Cap 26:01} among others.

In 2008, 10,137 dispute cases were reported. In 2009, there were 10,137, 13,500 in 2010 and 129,11 in 2011.

Perhaps in wishing the Labour Courts away, the civil courts were asserting their capacity to handle these workloads together with their civil and criminal cases. The paper asserts that, the late arrival of Labour Courts as statutory creatures and not directly provided for by most constitutions does not render them inferior, subordinate and therefore appendages in addition to their historical disadvantage.

In Namibia for example, the Labour Court was consciously created by the Labour Act outside the constitution. The 2004 preamble talked about the intention to “consolidate and amend the labour law to establish a comprehensive Labour Law for all employers and employees, to entrench fundamental labour rights and protection -----to establish the Labour Advisory Council, the Labour Court -----.” There is no mention of any constitutional provisions. In Tanzania, the Labour Court is considered a Division of the High Court. In this case, there seems a reflection of a subordinate or secondary role as compared to the High Court. Zimbabwe appears to have prevented the development of such poor relationship between the courts. The Labour Act of 2002 dictates the composition of the court as follows; all appointees of the court, referred to as Presidents must satisfy the following criteria;

- a) Must either be a former judge of the Supreme Court or High Court or
- b) Qualified to be a judge of the High Court or
- c) Has been a magistrate in Zimbabwe for not less than seven years.

It is suggested that in this instance, those in the formal courts could not have any argument against the composition and its competence. Furthermore, the Labour Court is provided for in s. 92 of the Constitution which also stipulates that the Senior President shall craft the rules albeit in consultation with the responsible minister.

In South Africa, the Commission for Conciliation Mediation and Arbitration (CCMA) is not a court like the Labour Court where appeals go. It is an administrative tribunal intended to implement, interpret and apply the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA) It constitutes the first forum in the line of labour dispute resolution. Then come the Labour Courts and finally the Labour Appeal Court whose only superior is the Constitutional Court. The CCMA has never claimed to be a court of law as its structure and functions are very clear.

As Mathiba says, a key complicating factor was the existence of forum shopping, which has a negative impact on the independence and standing of the Labour Court and all other institutions created in terms of the Labour Relations Act 66 of 1995 (The LRA). In 2012, the pending Superior Courts Bill had proposed the abolition of the Labour Court and Labour Appeal Court. It is submitted that the judiciary in this case was challenging both the Labour Court system and the Legislation. According to the Bill, labour matters could continue to be decided by the High Court whilst labour appeals will be attended to by the Supreme Court of Appeal. Such a collective decision did not take into account efficiency, justice and effectiveness.

According to the Judiciary, holding a judicial office should be seen as more than the discharge of mere judicial functions. It is said to mean holding a position of responsibility which is primarily judicial. The assumption of such a position is not by ministerial appointment but subject to a Judicial Service Commission recommendation. The fact that rules of evidence are sacred to the civil courts should not invite the negative comments about the relaxed approach in the Labour Courts.

The preoccupation with seniority seems paramount to the civil courts. As said, “A Court’s jurisdiction flows from the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate jurisdiction beyond that which is conferred upon it by law. Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

In Kenya, the Industrial Court has been defined in terms of its functions. These are;

“To facilitate social dialogue. Social dialogue includes all types of negotiation, consultation, exchange of information and collective bargaining. The Industrial Court facilitates social dialogue by defining and adjudicating the rights and obligations of the tripartite players-government, employers and employees.”

If this is aimed at isolating the Industrial Court, it is indicative of a misunderstanding and a demonstration of the manipulation of the law by the Judiciary regarding any statutory jurisdiction vested in the IC so far. This is because including social dialogue creation and nurturing in addition to the IC’s defined duties and powers will make the argument of jurisdiction untenable. In essence, the perception is that the judges of the civil court wish to protect their exclusivity and privileges because of an assumption of a demonstrated competence for which the constitution bestows jurisdiction. The question is whether the descriptive name “court” of the IC dilutes that of the High Court.

Factually, both the “senior” and the “inferior” courts are manned by judges of same qualification.

Lesotho offers a more direct example of this unwillingness to accommodate others from the fraternity of the learned. There was much uncertainty towards the Labour Court when it was first established. The Court of Appeal offered its initial opinion of Labour Courts. It held that the Labour Code Order was “decreed” by the Military regime. As such, the Labour Court must not be seen as a court of law because as constituted, it lacked the essential attributes of a court of law despite the fact that its jurisdiction was final and exclusive regarding labour matters.

There had earlier on been a suggestion that the formal Appeal Court should hear appeals from the Labour Appeal Court (LAC). Given this confusion, the Labour Code was amended to effect a parallel system of adjudication where both Appeal Courts would function as the final forum for redress. Still some learned parties believed the Labour Appeal court was a nullity. The Court of Appeal in attempting to clarify the situation, confused it even more. With reference to the LAC the court said;

“(The Labour Court) is, in my view, a tribunal discharging a judicial function within the contemplation of s 118(1) (d) and s.127. It follows that Parliament did have the power to establish it” (as a tribunal). “Parliament then only had the power to create the Labour Appeal Court if it is a tribunal within the contemplation of ss 118 (IX) (d) and d 127 (A). of the Constitution” It is doubtful whether the jurisdiction of that court extended to challenging the Legislature for doing what the Constitution established it for which is the enactment of appropriate legislation.

The case of Nigeria provides its own lessons. The National Industrial Court (NIC) was established in 1976. It had vast jurisdiction. In 1992, the Trade Dispute Act (1976) was amended by Decree. The amendment elevated the NIC to a superior court of record with exclusive jurisdiction. This turn of events brought about the question of the precise place of the NIC in the judicial hierarchy.

In the case of National Union of Electricity Employees (NUEE) v Bureau of Public Enterprises (BPE). Briefly, BPE sought an order from the High Court to interdict the NUEE and its members from going on strike. The NUEE by notice of preliminary objection questioned the jurisdiction of the High Court. The matter ended at the Court of Appeal. The court held that the High Court had jurisdiction. In his ruling, the Court President had this to say;

“Again, it is trite law that the jurisdiction of the State High Court, as conferred by the Constitution can only be curtailed or abridged by or even eroded by the Constitution itself and not by an Act or law respectively of the National Assembly, meaning that where there is

conflict, in that regard, between the provisions of the Constitution and the provisions of any other Act or law of the National Assembly or House of Assembly respectively the Constitution shall prevail if I may emphasise excepting as I have observed above by clear and direct provision of the constitution”

In line with such pronouncement, the Supreme Court ruled further that Decree (No. 47 of 1992) can only create a tribunal which automatically becomes subordinated to the High Court. With due respect, the learned judge was wrong. The constitution is inanimate and is not intended to fetter socio-economic development. Not only has the Nigerian Constitution itself been amended several times by Parliament. Sometimes this was in response to such jurisdictional questions so as to elevate the status of the National Industrial Court. This was achieved in 2011 and put paid to the concerted effort of the Judiciary to either prevent the establishment of the NIC or failing that, to subordinate the NIC or as preferred, the tribunal to itself as the senior and more authoritative.

In any case, the same constitution vests power in the Legislature to enact laws as deemed necessary and valid. At another level, the learned judge demonstrated the need to examine labour jurisprudence more intricately. In this instance, the decision that concerns over job losses in view of an impending privatisation cannot be one of the grounds for a strike because it was not an issue relating to workers’ welfare was flawed.

Reference is made to the case of Swaziland Government v SFTU & SFLU in connection with the then intended purchase of a private jet for the Swazi King at a time when the economy was reeling and employment becoming scarce. The court held that the issue falls within the domain of the socio- economic welfare of workers and the citizenry at large. The next section deals with Botswana. The examination of Botswana adopts an integrated approach which blends the jurisdiction debate and the other issues that come up for discussion.

III. THE INDUSTRIAL COURT IN BOTSWANA

As indicated elsewhere, in 1966, Botswana was a fledgling republic and the Constitution was largely hybrid, structured together by the colonial government. In 1966, the burning issues were independence, sustenance and survival, not labour dispute resolution. However, by 1991, the employees of the state, majority of whom were categorised as “manual workers” having been allowed to unionise, organised a massive, unprecedented industrial action.

It became clear that labour relations were maturing albeit in a radical way. In 1992, the Trade Disputes Act was amended to allow for the establishment of the Industrial Court (IC). The



constitution provided extensively for only two courts; the High Court and the Court of Appeal. It was only in 2005 that the IC was acknowledged as a superior court together with the High Court, the Court of Appeal and Court Martial (not tribunals, administrative or otherwise).

There was no furore about this turn of affairs as was the case in both Lesotho and Nigeria. This is not to say there were no reservations and more importantly warning as to the potential effects on the IC. The Court was established as a court of law and equity under the political oversight of the responsible minister. The judges are appointed by the President from those eligible for appointment as judges of the High Court. It must be noted that the High Court is described in the Constitution as a superior court of record which shall have all the powers of such a court. It also has the jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court martial.

In other words, the High Court is vested with original jurisdiction in respect of these functions. What could not have been included at that time was the IC, which could therefore have been specifically exempted. This oversight is having its own unintended consequences on the IC. The reason could be one of association since the court martial is also supposed to be a superior court yet subject to the High Court. The problem then is the actual meaning of “seniority or superiority” since in investing the IC with seniority, it was left at the mercy of subjective interpretation. Nowhere has the Court been clothed with exclusive jurisdiction in labour matters unlike in Lesotho or Nigeria. This is apparent in section 18 (TDA) which hides behind all matters ‘properly brought’ before the court.

The situation is exacerbated by the absence of a Labour Court of Appeal. Which could have resulted in a well-defined, parallel structure which could have robustly advocated greater autonomy and recognition. It would also have defined more sharply, the appropriate fora for labour matters. In default, there appears to be a presumption that no IC can be more adept at its so-called specialised functions than a generalist High Court. If that is so, appeals should not be routed to the Court of Appeal as the most superior court. It also implies that the High Court can assume power of review and involve itself in both matters of common and labour law as is presently the case.

In terms of its jurisdiction, the duties imposed on the IC include settling of trade disputes, securing and maintaining good industrial relations. Included also are interdiction of unlawful strikes, hearing appeals from alternative dispute resolution agencies and referring matters to the Commissioner among others. Such specific restrictions create a grey area for an ambitious High Court. As an overview of the problem, what follows is an examination of the practical dimensions that best describe the uncertain status of the IC in Botswana. The dilemma confronting the IC is whether it is an

unwelcome appendage to the judicature or a specialised court that is subject to the political supervision of a minister. At one end is an undefined status and at the other the possibility of political interference.

a) *The Industrial Court in Botswana*

In a sense, the open debate in Lesotho, Nigeria and South Africa regarding the many implications of a Labour Court among others resulted in a commonly agreed modus operandi. It brought the labour court system into open debate as to the benefits, jurisdiction and related issues. In the case of Botswana, not much was debated in the public domain. As a result, according to Mpho, the lack of clarity regarding the role of the IC coupled with obtuse comments by some judges in both the High Court and Appeal Court pertaining to labour jurisprudence from the IC have led to poor public and disrespect for the Court.

Section 15 of the Trade Disputes Act (TDA) does not explicitly confer exclusive jurisdiction but stipulates that as a court of law and equity, it shall exercise all the powers and rights conferred on it by the Act and any law. The question of equity should have been a distinguishing characteristic of the IC. Taken to its logical conclusion, International Labour Conventions, treaties and international benchmarks ought to have been emphatically projected as key elements in the jurisprudence of labour law and its adjudicating organ.

Though exclusive jurisdiction is provided in section 18, it is subject to matters that are properly brought before the IC. There ought to be a simpler, clearer way of stating the same otherwise, “properly brought” by whom and for whose assessment remains inexplicable. It cannot therefore be inferred as the High Court shares concurrent jurisdiction with the IC in all civil matters including labour issues. If for no other reason, this avenue to forum shopping should have been firmly closed. As a statutory creation, the IC cannot go beyond the confines of the Act. Practically therefore, it finds its decisions being appealed against at both the High Court and the Court of Appeal.

While it may issue orders including that of appearance, it can only impose a fine as stipulated. It also does not impose costs except in special cases. Witnesses may decline to answer questions or present documentation such as may prejudice them elsewhere. The paper now examines the presumption that the turn of events in Botswana has created a simmering discontent and uncertainty. The ingredients are job security, distortion of labour law jurisprudence, In essence, the situation creates two major problems. The first is whether the IC is prepared to lead the way in creating an internationally credible labour law jurisprudence through robust teleological leadership or allow the High Court to fill in the void and marginalise the IC as it has been doing. The likely consequence of

the first is a possible confrontation with the state should the IC demonstrate the intention to relocate labour issues in the arena of public debate. Secondly, the IC could become a pliant tool for legitimizing the state's perspectives on labour policy and attendant legislation.

IV. CONTEXTUALISING THE DILEMMA

Section 86 of the Botswana Constitution empowers the Legislature to make laws for the peace, order and good government of Botswana. This being the case, laws can be made to repeal, amend or supplement any law duly enacted. Having elevated the IC to a superior court in section 127, this act should have been publicised and in the process clarify the relationship of the IC with other courts. Particularly with regard to the jurisdiction of the High Court. These missed opportunities create the latter conflicts resulting in questionable identity and status.

Pragmatically, judges appointed to the IC whose sessions involve a Judge President and two assessors cannot, comparatively, be seen as being at par with the other two civil courts provided for in the Constitution. It makes sense therefore for the IC to endure the current situation. Paradoxically, such compliance will imply acceptance of the status quo. Tactically, any clamouring for recognition by a few functionaries would not attract the envisaged attention.

The paper illustrates the dilemma with a few practical examples. The first case is *Botswana Power Corporation Workers Union v Botswana Power Corporation*. This was an appeal by the union from the decision of the IC in connection with whether the definition of "member of management" as defined by the Trade Unions and Employers Organisations Act (section 61) could be amended for the purposes of enabling more employees to join the employees union. The IC had ruled that the provision did not conflict with the provisions of the Constitution regarding Freedom of Association. The union then appealed. In making its decision, the Court of Appeal ruled that since the definition formed part of the Act, neither the employer nor workers can change or amend the provision. The Court did not question whether tactically, promoting employees into management in order to curb membership of the union was a form of discrimination. Secondly, it did not consider that ultimately, the definition in reality can literally convert every supervisor into a manager.

The Court saw nothing wrong with the provision within the context of freedom to form or join a union of one's choice. It also did not visualize the debilitating effect on the union's viability if all the better educated, informed and more vocal employees are elevated beyond the reach of the union. By implication, such statutory provisions should not be subject to criticism or any observation and such must not be seen as originating from either the IC or the Court of Appeal.

In contrast, the case of *Swaziland Hotel and Catering Workers Union v Swaziland SPA Holdings Ltd* indicates how far a court could go in redefining and humanizing municipal workplace law within the context of international labour law. The Judge had been asked to rule on the grading of workers into "management" which, as alleged by the union, simply allocated deceptive job titles transforming such functions into management responsibility. The Judge called for all the existing job titles and the functions attached to each. On the basis of this, he was able to determine which of the workers actually had management roles. The rest were then declared free to join the union.

In his ruling, Judge Hassanali (JA) quoted as follows;

"The modern claim to freedom of association presents itself as essentially a claim of the individual to be permitted to establish relations with others of his own choosing, for the purpose of obtaining for the whole group, some special strength or advantage in the pursuit of a common end"

In effect, the judge felt it his duty to examine and determine the purpose and relevance of some aspects of domestic labour law in pursuance of justice and equity.

In *Botswana Land Boards and Local Authorities Workers Union and Others v Director of Public Service Management and Another* the union had challenged the decision of the DPSM to take disciplinary action against striking public sector workers after they had been advised to desist from the unlawful strike. The DPSM had approached the IC to interdict the striking works on the grounds that they were essential service employees and being such their strike was unprotected. Subsequently, the interdiction order was executed. The Union noted an appeal to the Court of Appeal. Despite the notification, the DPSM on grounds of urgency, returned to the IC to seek to execute the judgement.

The concern of this paper hinges around the attitude of the IC in the matter. Suffice it to say that the IC declared itself as having the discretion to await the appeal or grant the execution of the order declaring the strike unlawful. Given the fact that there were several issues arising from the fundamental principles of labour law, the IC overlooked them. Among these are an examination of the groups of employees that have been covered under essential services from the public sector in the Schedule forming part of the Trade Disputes Act. Secondly, whether there had been any additions and whether the changes were lawful and procedurally valid. In addition whether the requirements for a protected strike by those legally categorised as essential services and whether the Act made adequate provisions for this.

If none of these issues have been satisfactorily addressed, then the IC failed to execute its mandate. In effect, the IC would have failed in asserting its independence and commitment to the advancement of



labour law. It shall have failed also in advancing the course of equity and justice. This fatal flaw necessitated the appeal heard by the High Court. The High Court raised this very issues and dealt with them comprehensively in relation to both domestic and international laws.

Tin the appeal, the applicants were seeking orders as follows;

That section 49 being the Schedule to the TDA be declared invalid having been amended unlawfully by Statutory Instrument (SI 57) of 2011 which widened the scope of essential services to include teachers and others. Further, as a signatory to ILO Conventions and international treaties, Botswana must be seen to uphold these, in particular the fundamental freedom to associate, organise and go on strike if need be. The High Court ordered that the TDA (No. 15 of 2004) was incompatible with the Constitution of Botswana and that the TDA (Amendment of Schedule) Order 2011 contained in SI 57 of 2011 was invalid and of no force or effect.

This judgement was well reasoned and demonstrated a thorough grasp of labour law jurisprudence. It makes sense therefore if the IC lacks recognition as it appears reluctant to take a decisive position on issues of importance to the generality of employees. In effect, either by acts of omission or commission, the IC appears to have abdicated its responsibilities as a specialised institution.

The next case is an appeal against the High Court ruling. Its significance is that it made pronouncements which subsequent events confirmed. Even before the Trade Disputes Bill prohibiting industrial action by essential services, the Judge President had declared that all categories of workers in any essential service such as public health are all essential and there shall be no freedom to strike as a bargaining tool. According to him, employees in essential services means every worker. In line with this position adopted, he then proceeded to redefine essential services.

“All employees in the health services for example were covered. Neither the PSA (Public Service Act) nor the TDA provides for exception either. In our view, all the employees in an essential service play an important role individually toward ensuring the effectiveness of the team delivering the essential service in question. Along with doctors, nurses and other specialists, the support staff, caterers, grounds men, cooks and others ensure a hygienic, safe environment conducive to the effective delivery of the service and the health and swift recovery of patients”

Granted that the Court unanimously agreed with the Judge President, it can be concluded that the Appeal court sees itself as the custodian of state labour policy and legislation. Having acknowledged the ILO in passing, the court could have looked at the constituents

of an essential service as communicated to the Government of Botswana. By the Committee of Experts. In the near future, the amended TDA will contain an increased number of professions categorised as essential services who are to be prohibited from any form of industrial action. The decision could therefore be indicative of endorsement of the state's labour policy and legislation whether these comply with international norms and best practices.

V. CONCLUSION

It is apparent from the evidence above that civil court judges in general do not wish to share the status of “court” with Labour or Industrial courts whom they generally refer to as “tribunals.” In doing so, the civil courts appear willing to sacrifice their role as engineers of justice. It cannot be said that they do not understand the apportionment of judicial responsibilities in the interest of efficiency and effectiveness. Neither can they claim to be more competent than the Judge Presidents of Labour courts. These Labour courts are currently presided over by practicing judges who are co-opted. It follows then that if the Labour courts are considered incompetent, it is because having been redeployed to preside over labour dispute adjudication, they have been unable to pick up the nuances of labour law in action. It is therefore possible to conclude that they are not the most suitable for the Labour courts. Paradoxically, this could be due to their generalist background.

If one agrees with the deductions above, the issue then is whether judges in general need specific reorientation if they wish to monopolise the justice system as a whole including labour matters. Assuming they see labour matters as part of the Judiciary's collective responsibility, they will still need occasional workshops and such other methods that can bring them closer to what labour law and jurisprudence practically requires.

As observed above, courts in all the countries mentioned are plagued with serious backlog of undecided cases, computerised case management notwithstanding. It is precisely because of this that references to the constitution and jurisdiction as grounds for demeaning the Labour Court are not out of sincerity but misguided discomfort with creatures of statute which might become autonomous.

Looking back at the Botswana situation, the only High Court appeal the paper dealt with was handled by a judge who was trained at the highest level in labour law for academic purposes. The depth of his competence manifested itself in the broad tapestry of labour law articulated prior to the ruling. Such calibre of judge is what the IC needs. On the other hand, the Appeal Court decision to set aside all the orders of the High Court and the performance of the IC in these cases suggest some degree of loyalty to the state.

It would be praiseworthy if all the judges can accept collective responsibility for labour disputes. Having done so, those with an inclination towards labour matters among them can be identified and an on - the - job programme for subsequent specialisation in the area drawn up. With regard to Botswana, the Industrial Court has been elevated to a superior court, Its presiding judge draws the same emolument as those in the civil courts. The Judiciary as a collective can then convince the state to release the Industrial Court from the supervision and political control of a Minister and bring it under the Judicature. The paper acknowledges that in practical terms this is not as easy as it might appear.

A more desirable alternative could be the creation of a parallel structure distinct from the civil courts. The first act in pursuance of this goal will be the creation of a Labour Appeal Court. Pragmatically, this will also exclude forum shopping as all labour matters will flow from the Commissioner of Labour through the Labour Court to the Labour Appeal Court as the final arbiter. This approach has been adopted in Lesotho, South Africa and other places. It will also close the debate over “courts” and “tribunals” thus focussing attention on the objectives of equity and justice.

