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The Dangerous Powers of South Africa's 'Super Appellate Court'

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ABSTRACT: The Seventeenth Amendment to the Constitution transformed the Constitutional Court from a specialist in constitutional matters to a generalist appellate court. Following this amendment, the Court has demonstrated ample willingness to accept its newfound role as the super appellate court in all areas of South Africa's law, and the limits supposedly imposed on the Court's jurisdiction by Section 167(3)(b) of the Constitution have developed and evolved through a jurisprudence riddled with inconsistencies. This article briefly illustrates these inconsistencies in support of its main claim, which is that it is problematic that the Court acts as a generalist court of appeal over decisions of specialised courts, especially when those decisions require engagement with complex factual assessments that fall outside the realm of the Court's expertise. To demonstrate this, the Court's jurisprudence and experience is compared in the specialised areas of labour law and competition law. This exercise indicates that in areas where the Court possesses expertise similar to what is statutorily envisaged for the relevant specialist courts, such as labour law, it has contributed positive developments that have given content to constitutional rights. On the other hand, the Court's jurisprudence in competition law is a disturbing indication of the shortcomings of the present system in terms of which the Court, without acknowledging its limited competition expertise, has overturned expert factual and economic findings of the competition courts. In the process, this has created uncertainty and undermined the legislative intent of the Competition Act 89 of 1998. This conundrum needs to be remedied through deliberate interventions to enhance the Court's competition expertise.

KEYWORDS: competition law, constitutional litigation, employment law, jurisdiction, leave to appeal, specialist courts

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I INTRODUCTION

'With great power comes great responsibility.' This may be instructive to fictional superheroes, and it is undeniably true in the case of South Africa's apex court.

The Constitutional Court is the final stop for anyone seeking redress through South Africa's courts. However, the road to the Court is not open to all 'litigants who knock on [its] door'. A matter must engage the Court's jurisdiction before that door will be opened.[1] Unfortunately, the true parameters of the Court's jurisdiction are not clearly defined, nor have they been settled by the Court through a coherent set of principles. In the absence of certainty and clarity, scholars have sought to make sense of the 'Court's jurisdictional quagmire.'[2] That is not my intention here. I accept that the Court's jurisprudence delineating its jurisdiction is riddled with inconsistencies and contradictions, and that it is near impossible to point to a category of matters over which the Court will definitely refrain from asserting its jurisdiction.

Instead, I set out to emphasise that as the definition of the Court's jurisdiction has evolved, particularly since the Seventeenth Amendment to the Constitution, the Court has journeyed from being a specialist in constitutional matters to a generalist appellate court. The purpose of this article is to highlight the fact that this has empowered the Court to adjudicate appeals from specialist courts, and that this has undesirably positioned the Court to make pronouncements on decisions of those with greater expertise on the relevant subject matter. I refer to the areas of labour law and competition law and draw comparisons between the Court's expertise in these specialities as well as its contributions to the development of these areas. This analysis reveals a stark contrast between the Court's competence as an appellate court in these different specialities and raises doubts as to whether it is desirable for the Court to determine appeals in a subject matter in which it lacks expertise.

My argument takes the following format. First, I provide an overview of the definition and theoretical limits of the Court's jurisdiction, and emphasise that in practice these limits do not prevent the Court from adjudicating appeals from specialised courts. Second, I consider and compare the Court's expertise in and jurisprudence on labour law and competition law. Finally, I consider how the Court can 'responsibly' exercise its apex powers of appeal without harming and creating confusion in specialised areas like competition law in the future.

II THE COURT'S JURISDICTION

A Overview

Jurisdiction is 'the power vested in a court to adjudicate upon, determine and dispose of a matter'.[3] In the case of the Court, this power is defined by Sections 167(3), (4) and (5) of the Constitution of the Republic of South Africa, 1996 (Constitution). The latter two

[1] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13, 2021 (6) SA 1 (CC) at para 40.

[2] E Cohen 'The Jurisdiction of the Constitutional Court' (2021) 11 *Constitutional Court Review* 433, 435.

[3] *Gallo Africa Limited v Sting Music (Pty) Limited* [2010] ZASCA 96, 2010 (6) SA 329 (SCA) at para 6.

provisions govern the Court's exclusive jurisdiction[4] and confirmation proceedings,[5] neither of which fall within the scope of this article. More relevant for my purpose is Section 167(3), which empowers the Court to decide constitutional matters and 'any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court'.

The Court's jurisdiction as defined in Section 167(3) can be described as comprising two classes of jurisdiction: constitutional jurisdiction and general jurisdiction. The latter is a relatively recent development. Prior to the Seventeenth Amendment of the Constitution, Section 167(3) limited the Court's jurisdiction to 'only constitutional matters, and issues connected with decisions on constitutional matters'. The purpose of the amendment was 'to provide that the Constitutional Court is the highest court in all matters; to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal';[6] hence, the Court's jurisdiction was extended beyond only constitutional matters and connected decisions.

Following this amendment, the Court has developed principles on the interpretation and application of Section 167(3). Theoretically, these principles are intended to provide guidance and clarity on which matters fall within the Court's jurisdiction. Practically, however, they are not consistently applied by the Court and what has emerged is a somewhat confounding jurisprudence on the Court's jurisdiction and its limits. Some of these inconsistencies are discussed below.

B Application of the Court's jurisdiction

Before the Court considers the merits of any application, it is enjoined to determine whether that application raises either a constitutional matter or an arguable point of law of general public importance that warrants the Court's consideration. These are separate enquiries, and in some instances the Court may hold that its jurisdiction is engaged on both grounds.[7] I deal with each in turn.

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[4] Section 167(4) of the Constitution delineates the Court's exclusive jurisdiction by stipulating that:
Only the Constitutional Court may—
(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
(c) decide applications envisaged in section 80 or 122;
(d) decide on the constitutionality of any amendment to the Constitution;
(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
(f) certify a provincial constitution in terms of section 144.

[5] Section 167(5) of the Constitution provides that '[t]he Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force'.

[6] Preamble to the Constitution Seventeenth Amendment Act, 2012.

[7] Some recent examples include *Mineral Sands Resources (Pty) Limited v Reddell & Others* [2022] ZACC 37, 2023 (2) SA 68 (CC) at para 35; *United Democratic Movement v Lebashe Investment Group (Pty) Limited* [2022] ZACC 34, 2023 (1) SA 353 (CC) at para 37; and *Grobler v Clara & Others* [2022] ZACC 32, 2023 (1) SA 321 (CC) at paras 21–26.

1 *Constitutional jurisdiction*

The Court has exhibited reluctance to define its constitutional jurisdiction in a limited fashion. In its earlier days, as the highest court of appeal in only constitutional matters,[8] it held that 'the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction'.[9] Writing for a unanimous Court in *Boesak*, Langa DP declined to define the limits of the Court's constitutional jurisdiction, explaining that doing so was 'neither necessary nor desirable'.[10] This was affirmed in strong terms in *Fraser*, where the Court held that—

> [t]o attempt to define the limits of the term 'constitutional matter' rigidly is neither necessary nor desirable. Philosophically and conceptually it is difficult to conceive of any legal issue that is not a constitutional matter within a system of constitutional supremacy. All law is after all subject to the Constitution and law inconsistent with the Constitution is invalid.[11]

Notwithstanding its reluctance to narrowly define its constitutional jurisdiction, the Court has provided some examples and guidance on what it considers to be a constitutional matter. These include: disputes over whether any law or conduct is inconsistent with the Constitution; issues relating to the status, powers and functions of an organ of state; the interpretation, application and upholding of the Constitution, and the question whether the interpretation of legislation or development of the common law promotes the spirit, purport and objects of the Bill of Rights.[12] In addition, more recently the Court has held that '[f]or a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter'.[13]

This jurisprudence reveals that the Court is loath to concede that there may be matters that fall beyond constitutional reach,[14] and has accordingly defined its constitutional jurisdiction broadly. Rather than limiting the definition of 'constitutional matters', the Court has identified negative rules to exclude certain types of matters from its jurisdiction, even if they involve or connect with constitutional issues in some way. These negative rules also apply to matters that may engage the Court's general jurisdiction, and will accordingly be discussed after the principles governing this latter category of jurisdiction.

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[8] Prior to the Seventeenth Amendment to the Constitution, the Supreme Court of Appeal was the highest court of appeal in all matters except in constitutional matters. This meant that the Court had to distinguish matters within its jurisdiction from those that were not constitutional matters and were accordingly for the Supreme Court of Appeal to finally adjudicate. This exercise was taken by the Court in *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC) at paras 17–57 (Court rejects narrow interpretation of 'constitutional matters' and holds that issues relating to the legality of the conduct of the President, as one of the highest organs of state, falls within its constitutional jurisdiction.)

[9] *S v Boesak* [2000] ZACC 25, 2001 (1) SA 912 (CC)('*Boesak*') at para 14.

[10] Ibid.

[11] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24, 2007 (3) SA 484 (CC)('*Fraser*') at para 36.

[12] *Boesak* (note 9 above) at para 14.

[13] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23, 2019 (8) BCLR 919 (CC)('*Jiba*') at para 38.

[14] See also *Mankayi v Anglogold Ashanti Ltd* [2011] ZACC 3, (2011) 32 ILJ 545 (CC) at para 124, where Froneman J held that '[t]here is an impossible tension between asserting the fundamental supremacy of the Constitution as the plenary source of all law, and nevertheless attempting to conceive of an area of the law that operates independently of the Constitution'.

2 *General jurisdiction*

One of the earliest matters in which the Court explored the scope of its general jurisdiction was *Paulsen*.[15] In that matter, the Court held that the significant consequence of the Seventeenth Amendment was that it confers jurisdiction on the Court to adjudicate matters that it previously considered to be non-constitutional.[16] The Court also broke down the requirements of its general jurisdiction into three separate prongs.[17]

Dealing with the first prong of its general jurisdiction, the Court in *Paulsen* held that the point raised in a matter must be a point of law, not fact, and it must be arguable.[18] Furthermore, a point will only be considered arguable in the sense required if there is some degree of merit in the argument put forward.[19] Moreover, the Court held that the point of law must bear some prospects of success and provided an open list of indicators to assist with this part of the enquiry.[20]

Turning to the second prong of the requirements for general jurisdiction, the Court clarified that a point will be of general public importance when it 'transcend[s] the narrow interests of the litigants and implicate[s] the interest of a significant part of the general public'.[21] The Court in *Paulsen* emphasised that this does not entail the implication of the interests of society as a whole, but rather 'a sufficiently large section of the public'.[22]

The final prong of the requirements to engage the Court's general jurisdiction entails an enquiry into the demands of the interests of justice. In *Paulsen*, Madlanga J explained this as follows:

> The interests of justice factor aims to ensure that the Court does not entertain any and every application for leave to appeal brought to it. Coming to this Court's non-constitutional appellate jurisdiction, the question arises: do interests of justice not come into the equation? I think they do. This is what the words 'which ought to be considered by that Court' in section 167(3)(b)(ii) of the Constitution are directed at. If – for whatever reason – it is not in the interests of justice for this Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that 'ought to be considered by [this] Court'. The interests of justice criterion is firmly entrenched in this Court's jurisprudence on applications for leave to appeal involving constitutional matters. Whatever its true provenance in respect of applications for leave to appeal on constitutional matters from the Supreme Court of Appeal, I cannot conceive of any basis why

[15] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5, 2015 (3) SA 479 (CC)('*Paulsen*').

[16] Ibid at para 15.

[17] Ibid at paras 17–18. See also *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14, 2019 (7) BCLR 850 (CC) at para 12.

[18] *Paulsen* (note 15 above) at para 20.

[19] Ibid at para 21 where the Court held that—

> a point of law which, upon scrutiny, is totally unmeritorious cannot be said to be arguable. … The notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility.

[20] Ibid at para 23. The list included the following: the Supreme Court of Appeal may have expressed itself on the matter by a narrow majority; a minority view in the Supreme Court of Appeal may be quite forceful; different divisions of the High Court may have expressed divergent views on the point, with no pronouncement on it by the Supreme Court of Appeal; there may be no authoritative pronouncement on an issue; with available, cogent academic or expert views on it being divergent; the matter may raise a new and difficult question of law; or the answer to the question in issue may not be readily discernible.

[21] Ibid at para 26.

[22] Ibid where the Court cites *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] ECWA Civ. 749, [2009] 1 All ER 978 at para 16.

> it should not be applicable here. On the non-constitutional appellate jurisdiction we must borrow from this Court's existing jurisprudence on interests of justice.[23]

The natural question that follows this explanation of the third prong, is how the Court then goes about determining what the interests of justice demand. This is not necessarily a simple question. The Court has recognised the matter's prospects of success as an 'important aspect of this enquiry',[24] but has also taken account of a variety of other factors.[25] In this article I do not seek to proffer an analysis or in-depth understanding of the Court's interests of justice enquiry.[26] However, I must observe that this enquiry conspicuously forms part of a circular and vague series of assessments that the Court must make when deciding whether its jurisdiction is engaged. With requirements so broad, it is difficult to conceive of circumstances in which the Court would be unable to justify exercising its jurisdiction over a matter that, in its view, warrants its interference. In theory, at least, the Court has sought to mitigate against this by identifying negative rules that exclude certain types of matters from the Court's jurisdiction.

3 *Negative rules*

The Court has repeatedly identified two negative rules: first, that the Court does not entertain purely factual disputes; and, second, that matters involving the application of settled principles do not engage the Court's jurisdiction.[27]

The first rule, that the Court's jurisdiction is not engaged by purely factual disputes,[28] has been emphasised and developed by the Court in matters seeking to engage both its constitutional and general jurisdiction.[29] The Court has held that its jurisdiction is only engaged in instances where a genuine constitutional issue is raised,[30] and that a factual issue cannot 'morph into a constitutional issue through the simple facility of clothing it in constitutional garb'.[31] These principles apply with equal force to matters where an arguable point of law asserted by the parties is, at its heart, no more than a factual dispute.

The second rule, that the application of settled principles does not engage the Court's jurisdiction, has also been affirmed by the Court on numerous occasions. For instance, in *Loureiro*, the Court held that—

> the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions

[23] Ibid at para 30.

[24] *Boesak* (note 9 above) at para 12.

[25] In Cohen (note 2 above) at 474–475, Cohen argues that these factors include: 'prospects of success; the importance and complexity of the issues raised; public interest in the issues raised; the position of the applicants in society; factual nature of the dispute; mootness; prematurity and interlocutory appeals; abstract challenges; ventilation of issues before the lower courts; and direct appeals.'

[26] Cohen (ibid) at 475–479 provides a useful analysis on the different factors that the Court has considered when determining the demands of the interests of justice.

[27] *Mankayi* (note 14 above) at para 12 where Khampepe J held that the Court will not 'entertain appeals that seek to challenge only factual findings or incorrect application of the law by the lower courts'.

[28] *Jiba* (note 13 above) at para 50.

[29] *Paulsen* (note 15 above) at para 20; *Minister of Safety and Security v Van Niekerk* [2007] ZACC 15, 2007 (10) BCLR 1102 (CC) at para 10; *Minister of Safety and Security v Luiters* [2006] ZACC 21, 2007 (2) SA 106 (CC) at para 28; and *Boesak* (note 9 above) at para 15.

[30] *Fraser* (note 11 above) at para 40.

[31] *Mbatha v University of Zululand* [2013] ZACC 43, (2014) 35 ILJ 349 (CC)('*Mbatha*') at para 222.

> about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts.[32]

The Court's jurisprudence indicates that the rules are somewhat connected, as matters concerning the application of settled legal tests essentially arise from an applicant's allegation that a lower court failed to correctly apply the relevant principle to the facts of the matter. In *Jiba*, the Court explained it thus:

> The wrong application of an established legal test too does not constitute an arguable point of law. All that is required to be determined in such a case is whether the court whose judgment is subject to an appeal has correctly applied the test to the facts. This issue ordinarily illustrates the presence of reasonable prospects of success. It does not generate an argument on the content or scope of the legal principle itself but indicates an incorrect application of that principle.[33]

Through this jurisprudence, the Court has affirmed that its jurisdiction empowers it to determine important legal questions, and not mere questions of fact, even if the questions and applicable legal principles bear consequences for constitutional rights or matters of general public import.

These negative rules assist the Court in determining which matters it is constitutionally mandated to decide. They also carve out limits to the Court's jurisdiction and protect finite judicial resources by ensuring that the Court devotes its energies to appropriate matters,[34] and does not wastefully decide matters that could be determined, perhaps more competently, by lower courts.[35] However, the utility of these rules is diminished when they are applied inconsistently.

C Jurisprudential inconsistencies

'Law cannot "rule" unless it is reasonably predictable.'[36] I shall now demonstrate that the Court's application of the principles that define and limit its jurisdiction has been anything but

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[32] *Loureiro v Imvula Quality Protection (Pty) Limited* [2014] ZACC 4, 2014 (3) SA 394 (CC)('*Loureiro*') at para 33. See also *Booysen v Minister of Safety and Security* [2018] ZACC 18, 2018 (6) SA 1 (CC) at para 50; *Mbatha* (ibid) at para 194; *Mankayi* (note 14 above) at para 12; and *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26, 2003 (2) SA 34 (CC) at para 9.

[33] *Jiba* (note 13 above) at para 59.

[34] Writing for the majority in *Mbatha* (note 31 above), Cameron J signalled that the Court must be alive to the necessity to limit its jurisdiction and cautioned against the Court opening its doors to all factual disputes. At para 97 he held as follows:

> No constitutional point can be located in the fact that Mr Mbatha claims he is an 'employee' of the University under legislation that protects employment. His dispute with the University raises no issue of interpretation or disputed application of the statutory definitions, or any contested claim about the courts' jurisdiction over employees and employment disputes. It is a simple factual dispute about who his employer was. *If it were otherwise, every dispute about an employee's true employer could reach this Court. That cannot be.*

[35] I say that lower courts may be more competent to determine certain disputes because they are able to decide matters by way of action proceedings, unlike the Court, which hears only motion proceedings. In the case of factual disputes, this is undoubtedly a disadvantage. In addition, the design and organisation of the Court vastly differs to that of lower courts, and it does not have the appropriate structures and procedures in place to accommodate matters in the same way as the High Court. A simple example is that the Court has no permanent structural provision for parties to file papers after hours in urgent circumstances. This is but one of many minor factors that render the Court ill-equipped to handle the caseload and work of the lower courts. It remains best-suited to operating as the apex court that adjudicates only a selection of appropriate matters.

[36] *Gcaba v Minister for Safety and Security* [2009] ZACC 26, 2010 (1) SA 238 (CC)('*Gcaba*') at para 62. The Court made this remark in the context of a discussion of the significance of the doctrine of precedent, but it highlights

predictable. It is unsurprising, then, that the true limits of the Court's jurisdiction are nothing short of baffling, and are described by some as being more imaginary than real.[37]

As discussed above, the Court has been at pains to explain that purely factual disputes do not engage its jurisdiction. In particular, it has on numerous occasions refused to entertain criminal matters where the appeal is based on a challenge to a lower court's assessment of the facts.[38] It has justified this refusal in part by noting that if disputes over the sufficiency of the evidence in establishing guilt were to, on their own, raise a constitutional issue, then 'all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of [the] Court and that of the Supreme Court of Appeal would be illusory'.[39]

This justification appears reasonable enough, until regard is had to other contexts in which the Court has had 'no issue with subsuming an entire area of law into its jurisdiction'.[40] For instance, the Court has readily accepted that all administrative law matters involving the interpretation and application of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) engage its constitutional jurisdiction, 'even where the outcome of the issue raised under PAJA depends on the determination of factual disputes'.[41] Further inconsistencies in the Court's approach to disputes of fact can be found in its jurisprudence on labour law and competition law, but these will be discussed later in this article.

Additional evidence that the Court has not absolutely resolved to decline the adjudication of factual disputes is found in *Rail Commuters Action Group*, where the Court held that—

> [w]here, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of fact will constitute 'issues connected with decisions on constitutional matters' as contemplated by section 167(3)(b) of the Constitution. On many occasions, therefore, this Court has had to determine on appeal the facts of a matter in order to determine the constitutional claim before it. Were it to be otherwise, this Court's ability to fulfil its constitutional task of determining constitutional matters would be frustrated.[42]

Of course, this does not necessarily detract from the principle that *pure disputes of fact*, which do not raise separate constitutional issues, do not engage the Court's jurisdiction. It does, however, create an interpretative foothold that the Court can use to adjudicate disputes that appear to be closely connected to a constitutional issue, even if they are, at heart, no more than disputes of fact. A recent example of such reasoning occurred in *NVM*.[43] That matter concerned a delictual claim instituted by the mother of a baby born with cerebral palsy against the hospital where the baby was born. The claim was based on the argument that the negligent conduct of the health care workers involved in the birth caused the serious brain injury sustained by the foetus that

the critical obligation on the Court to safeguard the rule of law by adjudicating matters in a principled and consistent fashion and is accordingly relevant to the point I am making.

37 Cohen (note 2 above) at 434–435 argues that the Court's application of the principles guiding and limiting its jurisdiction has been unpredictable and 'fraught with inconsistencies' and that, consequently, the Court has failed to acknowledge the full breadth of the jurisdiction bestowed on it by these principles.

38 *Conradie v S* [2018] ZACC 12, 2018 (7) BCLR 757 (CC) at para 12; *S v Molaudzi* [2014] ZACC 15, 2014 (7) BCLR 785 (CC) at para 2; and *Boesak* (note 9 above) at para 15.

39 *Boesak* (note 9 above).

40 Cohen (note 2 above) at 464.

41 *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19, 2011 (4) SA 42 (CC) at para 51.

42 *Rail Commuters Action Group v Transnet Ltd T/A Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC)('*Rail Commuters Action Group*') at para 52.

43 *NVM obo VKM v Tembisa Hospital* [2022] ZACC 11, 2022 (6) BCLR 707 (CC)('*NVM*').

manifested in the baby being born with cerebral palsy. The matter was adjudicated by the High Court and then the Full Bench of the High Court before it reached the Court on appeal. In short, the High Court and Full Bench reached different conclusions after assessing the available evidence, and while the former held that the evidence established factual causation, the latter held that it did not.

Three judgments were penned, two of which are relevant to the point I am making.[44] The first, penned by Majiedt J (with Madondo AJ, Pillay AJ, and Tlaletsi AJ concurring), was satisfied that the matter engaged the Court's jurisdiction and would have upheld the appeal.[45] Although the first judgment acknowledged that the matter required the determination of factual disputes, it considered these to be sufficiently connected with constitutional issues. Relying on *Rail Commuters Action Group* and several other decisions,[46] it held that—

> it is clear that the factual disputes in this matter are both underpinned by the right of access to healthcare, and are also ancillary to this constitutional issue. The question of delictual liability for medical negligence is squarely located amongst the tools of citizens seeking to uphold their section 27 rights. More specifically, the test that is used for factual causation in medical negligence cases will likely determine whether it is at all possible for delictual liability to follow, given the uncertainty which is all but endemic in this context. Therefore, the question of how to apply the test in medical negligence cases is an arguable point of law with constitutional implications. There are factual issues to consider, but these are ancillary to the broader constitutional issues, so that this Court is empowered to consider them.[47]

The second judgment, penned by Rogers AJ (with Madlanga J, Mhlantla J, Theron J and Tshiqi J concurring), refused leave to appeal on the basis that the matter raised purely factual questions and accordingly did not engage the Court's jurisdiction. The second judgment rejected the first judgment's characterisation of the issues, and described the dispute in the following terms:

> The issue is whether the wrongful and negligent conduct caused the injury suffered by the applicant's baby, and that is a purely factual question. Sections 7(2) and 27 of the Constitution, and considerations of accountability and responsiveness, shed no light on its answer. To a greater or lesser extent, the rights guaranteed in the Bill of Rights cover the whole field of human existence. Almost any case could be framed as touching on one or other fundamental right. This is not enough to make the case a constitutional matter.[48]

Furthermore, Rogers AJ sought to clarify the limits on the Court's jurisdiction over factual disputes as follows:

> In order for a case to be a 'constitutional matter' within the meaning of section 167(3)(b)(i), the resolution of a constitutional issue must be reasonably necessary in order to determine the case's outcome. Similarly, a case only 'raises an arguable point of law' within the meaning of section 167(3)(b)(ii) if the answer to that question is reasonably necessary to determine the case's outcome. A peripheral constitutional issue or arguable point of law is not a justification

[44] The third judgment was penned by Zondo ACJ, who wrote a separate judgment concurring in the judgment of Rogers AJ. The distinctions between his judgment and that of Rogers AJ are irrelevant to this article.

[45] *NVM* (note 43 above) at paras 49–50 and 87.

[46] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36, 2016 (3) SA 528 (CC); and *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18, 2004 (5) SA 460 (CC).

[47] *NVM* (note 43 above) at para 49.

[48] Ibid at paras 91–92.

> for embarking on a factual reappraisal of a case where the reappraisal is not rendered reasonably necessary by the answer to the constitutional issue or arguable point of law.[49]

The divergence in the reasoning of the different judgments in *NVM* indicates two noteworthy points. First, the principles and rules that define the Court's jurisdiction over factual disputes are not lucid and comprehensive, and lend themselves to different interpretations and outcomes. Secondly and consequently, the ambiguity created by these principles leaves room for outcomes-based reasoning, where the Court can decide factual disputes under the guise of 'issues connected with decisions on constitutional matters' out of sympathy for the litigants and their pleaded cases.[50]

With the above in mind, despite the Court's frequent assertion that factual issues do not usually engage its jurisdiction, it is difficult to predict with any degree of confidence when the Court will elect or decline to adjudicate disputes of fact.

Similar inconsistencies have arisen in the Court's application of the second rule. For instance, in various contexts the Court has applied this rule with a degree of flexibility, essentially upholding the idea that if the application of the settled principle 'entails invoking constitutional values, normally through the concept of public policy, then the application of that rule raises a constitutional matter'.[51] Notwithstanding the approach adopted by the Court in this jurisprudence, there have also been matters involving the application of a rule that invokes considerations of public policy where the Court has declined jurisdiction on the basis that the circumstances are insufficient to raise a constitutional matter.

An example of the latter category is *Booysen*, where the applicant was shot by her partner, a police officer, while he was on duty. The Court observed that '[t]he difference between the reasoning in the Supreme Court of Appeal majority and the minority (and the High Court) judgments ultimately comes down to the weight that was attached to the different normative considerations underpinning vicarious liability based on their assessment of the facts'.[52]

Furthermore, despite the Court's recognition of the public policy considerations that came into play when the lower courts applied the law on vicarious liability to the facts, it resisted the inference that these considerations raise constitutional matters.[53] It is difficult to make sense of the inconsistency between this approach and other matters where the Court has

[49] Ibid at para 88.

[50] The judgment of Majiedt J in *NVM* (ibid) suggests this, particularly at para 46 where he held as follows:

> Furthermore, in this case, I would add, specifically the protection of the best interests of the child is of paramount importance. This points to the important role of the courts in giving meaning to section 27, and fortifies this particular ground of jurisdiction. Questions of accountability and responsiveness in a healthcare system that is able to meet constitutional standards, must surely raise constitutional issues. As a result, questions of medical negligence in state-operated hospitals that implicate the rights of women and children to healthcare and the rights of new-born babies to have their best interests protected, certainly engage this Court's jurisdiction.

Majiedt J argued this to assert jurisdiction in a dispute that turned on whether the applicant had successfully established factual causation. The tragic and emotive facts surrounding the matter raise suspicion over the true underpinnings of Majiedt J's reasoning, and whether they were based in law or sentiment.

[51] Cohen (note 25 above) at 469, which refers to the following decisions of the Court: *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10, 2020 (6) SA 325 (CC)('*EFF*') at para 40; *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13, 2020 (5) SA 247 (CC) at para 16; *A M v H M* [2020] ZACC 9, 2020 (8) BCLR 903 (CC) at para 25; *Loureiro* (note 32 above) at para 34; and *NM v Smith* [2007] ZACC 6, 2007 (5) SA 250 (CC) at para 31, among others.

[52] *Booysen* (note 32 above) at para 58.

[53] Instead, at para 59 the Court held that the matter 'purely concerns the application of an accepted legal test, which this Court has repeatedly held is not a constitutional matter'.

accepted jurisdiction on the basis that the application of a settled principle 'attracts various constitutional issues into adjudication, including possible issues regarding separation of powers, the constitutional duties of the parties that may be frustrated by the order and any constitutional rights implicated in the matter'.[54] What is readily apparent, however, is that it would be inaccurate to say that the Court is absolutely precluded from adjudicating matters that involve the application of settled principles.[55]

I shall not dwell any longer on the many inconsistencies that can be found in the Court's jurisprudence on the definition and limits of its jurisdiction. This has been written about elsewhere[56] and is not the focus of this article. The salient point that is relevant for the arguments in this article is that, through its interpretation of Section 167(3) of the Constitution and its inconsistent application of the principles that govern its jurisdiction, the Court has effectively demonstrated that there is no area of the law beyond its reach and that it is no longer just a specialist court in constitutional law, but a truly generalist appeal court. Moreover, nothing in the existing principles the Court has espoused on its jurisdiction creates limits based on the specialised nature of the legal issues raised, nor the Court's expertise in the relevant speciality.

Indeed, the Court has expressly recognised itself as holding 'a special place in the appellate hierarchy as a super appellate court'.[57] This is a relatively uncontroversial claim and is the natural consequence of the Seventeenth Amendment. However, it means that the Court must inevitably exercise its 'super powers' in specialised legal matters. The legislature may have intended to broaden the appellate powers of the Court through the Seventeenth Amendment, but it has not taken any corollary steps to broaden the Court's competencies in specialised areas. Herein lies the problem, which I shall explore and demonstrate further with reference to two specialities: labour law and competition law.

III SPECIALISED APPEALS TO THE GENERALIST COURT

A Specialisation in South Africa's courts

South Africa's judicial system is generally premised on the notion that judges of most courts are sufficiently equipped and knowledgeable to adjudicate any matter of law. This is apparent in the wording of Section 169(1) of the Constitution, which essentially grants the High Court jurisdiction over all matters, except those expressly assigned to another court by an Act of Parliament. Similarly, Section 168(3)(a) empowers the Supreme Court of Appeal to decide any appeal arising from the High Court or a court of similar status, 'except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament'. As already demonstrated, there is presently no constitutional limit on the Court's jurisdiction over specialised areas of the law.

In other words, specialisation is only expected in certain circumstances and realms of the law, which are expressly provided for by the legislature. Absent that provision, the assumption is that all courts are up to the task of applying the relevant law in whatever matter appears on their roll. It is quite reasonable to expect this assumption to hold true particularly in the case

[54] *EFF* (note 51 above) at para 40.

[55] For a fuller analysis of the uncertainties around the Court's application of this rule, see Cohen (note 2 above) at 468–471.

[56] Cohen (note 2 above).

[57] *EFF* (note 51 above) at para 30.

of the Court. After all, the judges appointed to the apex court must surely be amongst the judiciary's most experienced and skilled or, at least, they must have the necessary capacities to acquire any additional knowledge that they may need to perform their duties diligently.[58]

As reasonable as this might be, it is also noteworthy that the Court has, in spirit, remained a court of constitutional and human rights despite its broadened jurisdiction. This is because the Judicial Service Commission has taken very little action since the Seventeenth Amendment to address the Court's limited expertise in private and commercial law.[59] The Amendment has accordingly left the Court awkwardly between two stools: it remains staffed as a court of human and constitutional rights and yet is called upon to decide matters that extend far beyond those areas of expertise. This is problematic because it is impossible to successfully integrate constitutional law with other areas of the law with insufficient knowledge of those areas.[60] In this way, the Court risks becoming the proverbial jack of all trades, yet master of none.

My argument is that a comparison between the Court's jurisprudence on labour law and competition law demonstrates this problem, manifesting particularly in the case of legal specialities that demand engaging with complex areas outside of the law. I chose to compare these specialities because there has been an increasing trend in the number of labour and competition appeals adjudicated by the Court recently which, in the case of competition law in particular, has been met with concerns about the Court's competence. My analysis leads me to share these concerns and argue that, while the Court is reasonably adept at adjudicating issues of labour law, it has exhibited considerable shortfalls in its competence to decide more complex matters of competition law.

B Labour law

1 *South Africa's system of labour law*

As with all areas of South Africa's law, the relevant starting point is the Constitution, which is 'unique in constitutionalising the right to fair labour practice'.[61] Indeed, Section 23 of the Constitution provides an express list of labour rights, including the right to engage in industrial action. In addition to this supreme recognition of labour rights, the legislature has enacted a number of statutes to give effect to these rights.

The primary statute enacted for this purpose is the Labour Relations Act 66 of 1995 (LRA)[62] which, significantly, establishes the judicial regime that regulates labour disputes. This regime

[58] Some criticism levelled against the Court may indicate otherwise. For instance, see L Boonzaier 'A decision to undo' (2018) 135 *South African Law Journal* 642 at 677. That debate, however, is for another day.

[59] Since the Seventeenth Amendment, the following justices have been appointed to the Court: Zondo CJ, Maya DCJ, Kollapen J, Madjiedt J, Madlanga J, Mathopo J, Mhlantla J, Rogers J, Theron J and Tshiqi J. Of these, only Rogers J has significant experience in private and commercial law.

[60] Prior to the Seventeenth Amendment, this problem was anticipated by scholars who warned that extending the Court's jurisdiction would require changes to the composition of the Court to ensure that its members would have wider skills and experience than was the case before the Amendment. See C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *South African Journal of Human Rights* 509, 522.

[61] *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27, 2003 (3) SA 1 (CC)('*NEHAWU*') at para 33.

[62] Other statutes that govern labour law and the relevant rights thereunder include the Basic Conditions of Employment Act 75 of 1997; the Employment Equity Act 55 of 1998; the Skills Development Act 97 of 1998; and the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

comprises the following fora: the Commission for Conciliation, Mediation and Arbitration (CCMA); the Labour Court; and the Labour Appeal Court.

It would serve little purpose to provide an in-depth analysis of the role and function of each of these fora. It will suffice to highlight certain relevant aspects. The first is that the Labour Court and Labour Appeal Court are courts of law and equity.[63] The second is that the LRA specifies that judges of the Labour Court must 'have knowledge, experience and expertise in labour law'.[64] In this regard, the LRA expects a higher degree of specialisation from judges than is ordinarily accepted. This signals a recognition from the legislature that the adjudication and resolution of labour disputes requires some degree of expertise. Further evidence of this is the LRA's provision for the Labour Court's exclusive jurisdiction over 'all matters that elsewhere in terms of [the LRA] or in terms of any other law are to be determined by the Labour Court'.[65]

What this tells us is that the legislature has carved out disputes arising in the realm of labour law and reserved them for adjudication by a group of specialists. One justification for this is that the mechanisms by which labour disputes are resolved must be accessible, simple, and geared towards expedient finalisation, and that this is most likely to be achieved in fora designed and solely mandated for that purpose. Indeed, in *NEHAWU* the Court recognised the important role played by these specialist courts where it observed that—

> [b]y their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily by experts appointed for that purpose.[66]

However, it is also noteworthy that there are certain matters of labour law over which the Labour Court has concurrent jurisdiction with the High Court, and they include:

> any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—
> (a) employment and from labour relations;
> (b) any dispute over the constitutionally of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
> (c) the application of any law for the administration of which the Minister is responsible.[67]

The legislature has, on the one hand, recognised the need for specialised and expert courts in the resolution of labour disputes, but on the other has designated a fairly broad class of labour disputes that may be adjudicated by the High Court. The Court has made sense of this by emphasising that, although it is 'the aim of the LRA to be a one-stop shop dispute resolution structure in the employment sphere',[68] the clear intention behind section 157(2) is to extend the Labour Court's jurisdiction 'to employment matters that implicate constitutional rights'.[69]

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[63] Sections 151(1) and 167(1) of the LRA.

[64] Section 153(6)(b) of the LRA.

[65] Section 157(1) of the LRA.

[66] *NEHAWU* (note 61 above) at para 31. See also *Chirwa v Transnet Ltd* [2007] ZACC 23, 2008 (4) SA 367 (CC) ('*Chirwa*') at para 41, where the Court emphasised 'that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters'.

[67] Section 157(2) of the LRA.

[68] *Chirwa* (note 66 above) at para 54.

[69] Ibid.

This, however, is not to be interpreted as 'derogating from the jurisdiction of the High Court in constitutional matters, assigned to it by Section 169 of the Constitution, unless it can be shown that a particular matter falls into the exclusive jurisdiction of the Labour Court'.[70]

Grappling with this in *Chirwa*, the Court effectively held that the underlying issue on which the applicant's claim rested was that fair disciplinary and dismissal procedures had not been followed, and that this was a dispute of the kind envisaged in section 191 of the LRA.[71] Furthermore, since section 191 provides for specific dispute resolution procedures involving the Labour Court, the Court held that the High Court did not have concurrent jurisdiction with the Labour Court over the matter.[72]

The simplest, albeit somewhat convoluted, way to understand this is that the Labour Court has jurisdiction to adjudicate all labour disputes including those that involve constitutional rights, but that there exists a class of labour disputes that the LRA does not require to be decided by the Labour Court and that these can be adjudicated by the High Court. The upshot of this is that labour disputes are generally entrusted to and reserved for resolution by labour experts, but it is equally recognised that by nature labour matters are likely to implicate constitutional rights and that, in certain circumstances, generalist High Courts are fit to adjudicate these matters.[73] I return to this observation later.

Stating the obvious, the Court will be the court of last instance in any labour dispute in which it grants leave to appeal. It is accordingly called upon, from time to time, to adjudicate and assess decisions that have been reached by labour experts in the Labour Court and Labour Appeal Court. I turn now to consider how the Court has fared in that endeavour.

2 *Labour law in the Court*

aa The Court's expertise

It is interesting to consider whether the composition of the Court, as the final appellate court in labour matters, meets the standard required by the LRA in respect of judges' 'knowledge, experience and expertise in labour law'.[74] A cursory review of the qualifications and experience of the Court's existing members reveals that the following justices appear to possess some degree of labour expertise:

- Zondo CJ, who holds a Master of Laws in Labour Law, and who was the Judge President of the Labour Court and Labour Appeal Court for a period of ten years;
- Maya, DCJ, who holds a Master of Laws in Labour Law – Alternative Dispute Resolution and Constitutional Law, and was an acting judge of the Labour Court;
- Tshiqi J, who was a senior commissioner of the CCMA and bargaining councils for a period of ten years, as well as an acting judge of the Labour Court;
- Theron J, who was the Special Assistant to the Director of the International Labour Organisation (ILO)[75] in Washington DC for a year; and

[70] Ibid.

[71] Ibid at paras 61–63.

[72] Ibid at para 63.

[73] Ibid at para 60, where the Court held that 'the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations'.

[74] Section 153(6)(b) of the LRA.

[75] While this experience was acquired outside of South Africa and did not involve the adjudication of labour disputes in South Africa, this experience still bears mentioning as the ILO aims to unite governments,

- Rogers J, who was an acting judge of the Labour Court for a term.

In addition, the following former justices who recently retired from office were also experienced in labour law prior to their appointment to the Court:

- Jafta J,[76] whose practice at the Bar was focused primarily on labour and constitutional matters and who was an acting judge of the Labour Appeal Court;
- Khampepe J,[77] who practised as an attorney mainly acting for trade unions and who was a judge of the Labour Appeal Court;
- Mogoeng CJ,[78] who was a judge of the Labour Appeal Court;
- Froneman J,[79] who was the Deputy Judge President of the Labour Court and Labour Appeal Court; and
- Cameron J,[80] whose practice at the Bar included a focus on labour law.

Furthermore, from the ranks of the Court's recent acting justices, the following have experience in labour law:

- Makgoka AJ, who was an acting judge of the Labour Appeal Court;
- Mlambo AJ, who was a judge of the Labour Court and the Judge President of the Labour Court and Labour Appeal Court;
- Tlaletsi AJ, who was the Deputy Judge President of the Labour Court and Labour Appeal Court; and
- Pillay AJ, who was a senior commissioner of the CCMA and a judge of the Labour Court.

Thus, the composition of the Court, both presently and in recent years, indicates that there is no shortage of labour expertise at the Court. Currently, five of the ten permanent members of the Court have experience in labour law. Theoretically, then, the Court should possess expertise akin to the specialised courts that adjudicate labour disputes as required by the LRA. This is surely considerably valuable to the Court when it exercises its appellate powers over these disputes.

bb The Court's jurisdiction over labour matters

As alluded to earlier, the Court has established principles in respect of its jurisdiction over labour matters. The seminal judgment on this is *NEHAWU,* in which the Court was satisfied that its jurisdiction was engaged on the basis that the matter concerned the proper interpretation of the LRA, which was enacted to give effect to Section 23 of the Constitution.[81] Thus, the Court held that 'the proper interpretation and application of the LRA will raise a constitutional issue', and that if the consequence 'is that [the] Court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy'.[82] The Court's jurisdiction over labour

employers and workers of the United Nations' member States 'to set labour standards, develop policies and devise programmes promoting decent work for all women and men'. See International Labour Organisation 'About the ILO', available at https://www.ilo.org/global/about-the-ilo/lang--en/index.htm.

76 Jafta J retired from the Court in October 2021.

77 Khampepe J retired from the Court in October 2021.

78 Mogoeng CJ retired from the Court in October 2021.

79 Froneman J retired from the Court in June 2020.

80 Cameron J retired from the Court in August 2019.

81 *NEHAWU* (note 61 above) at para 14.

82 Ibid at para 16.

matters must accordingly be described as extremely broad.[83] All that is required is to establish that the matter involves the interpretation of the LRA, which necessarily raises a constitutional issue. This has been repeatedly affirmed by the Court,[84] which has adjudicated a plethora of labour disputes recently.

cc The Court's labour jurisprudence

Since the expertise of the Court is an integral part of the argument put forward in this article, I confine my consideration of the Court's labour jurisprudence to a sample of matters that it has adjudicated in the period aligned with the composition of the Court considered in the preceding section. While this sample is by no means exhaustive of the Court's contributions to labour law, it is sufficient for my needs because my interest is in the Court's competence in specialised areas of the law, which I accept may change with the composition of the Court.

In *Solidarity*,[85] the application came before the Court pursuant to a retrenchment exercise conducted by the respondent, Barloworld Equipment Southern Africa. On behalf of its members, Solidarity argued that the retrenchment exercise was unlawful for want of compliance with section 189 of the LRA, which requires that the employer and affected parties 'engage in a meaningful joint consensus-seeking process and attempt to reach consensus' on a number of specified matters.[86] An issue that arose for consideration by the Court was that the Labour Court had rejected many of Solidarity's arguments on the basis that their application had been brought in terms of section 189A(13) of the LRA, which allows for parties to approach the Labour Court for relief if 'an employer does not comply with a fair procedure' during the retrenchment process. Confusingly, the Labour Court distinguished between 'a fair procedure' and 'procedural fairness', and emphasised that the Labour Court's jurisdiction over disputes relating to the procedural fairness of retrenchments is ousted by section 189A(18) of the LRA.[87] Furthermore, the Labour Court held that the procedural issues alleged by Solidarity were matters of procedural fairness as opposed to 'a fair procedure', and that it was accordingly precluded from adjudicating the matter in terms of section 189A(13).[88]

Thus, the Labour Court set a confusing precedent about a party's entitlement to approach the Labour Court in terms of section 189A(13), somewhat conflating that procedure with unfair dismissal proceedings provided for in section 191 of the LRA. The only authority cited by the Labour Court in support of its approach was an unreported judgment of the

[83] It has even been suggested that the consequence of *NEHAWU* and the Court's application thereof is that the Court considers itself empowered to adjudicate all labour disputes, and has become the 'Labour Appeal Appeal Court'. See Cohen (note 2 above) at 454.

[84] A recent example is *Booi v Amathole District Municipality* [2021] ZACC 36, (2022) 43 ILJ 91 (CC)('*Booi*') at para 15, where Khampepe ADCJ held that 'it is trite that a matter that concerns the interpretation and application of the LRA raises a constitutional issue that clothes this Court with jurisdiction'. See also *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* [2015] ZACC 8, 2015 (6) BCLR 660 (CC) at para 14 and *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22, 2008 (2) SA 24 (CC) at para 50.

[85] *Solidarity on behalf of Members v Barloworld Equipment Southern Africa* [2022] ZACC 15, (2022) 43 ILJ 1757 (CC)('*Solidarity*').

[86] Ibid at paras 28–30.

[87] Section 189A(18) provides that '[t]he Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)'.

[88] *Solidarity* (note 85 above) at paras 15–17.

Labour Court,[89] and part of its reasoning contradicted the Court's jurisprudence.[90] The Court accordingly asserted its appellate jurisdiction, holding that—

> [t]his matter raises material errors made by the Labour Court, which, if not corrected and clarified, may cause confusion in labour law jurisprudence. For instance, the Labour Court sought to make a general distinction between procedural fairness and compliance with a fair procedure. The manner in which the distinction is formulated may, if not clarified, lead to confusion and to a deviation from the jurisprudence of that Court, the Labour Appeal Court and this Court, concerning what falls under the umbrella of procedural unfairness in terms of the provisions of the LRA.[91]

The Court confirmed the correct interpretation of section 189A of the LRA, and held that '[i]t is uncontroversial and has been settled by this Court that if an employer fails to follow the procedures prescribed by section 189 and 189A of the LRA, a party is entitled to approach the Labour Court in terms of section 189A(13) and the Court, in turn, is entitled to grant any of the remedies contained in that provision'.[92]

The Court's intervention in this matter was both necessary and helpful. Retrenchments lead to dismissals, which have far-reaching consequences in the lives of those affected. That these must be conducted in accordance with fair procedure is unsurprising and undoubtedly consonant with Section 23 of the Constitution. Left undisturbed, it is quite possible that the Labour Court's judgment would have undermined the rights and negated the relief expressly provided for in the LRA in future cases involving employees who find themselves embroiled in retrenchment procedures that are flagrantly unfair. *Solidarity* is accordingly an example of the Court fulfilling its role as the guardian of constitutional rights.

There are other recent examples where the Court has stepped in and corrected the Labour Court's interpretation of the LRA to bring it in line with the Constitution and the intention of the legislature. One example is *Booi*. In that matter, the Labour Court upheld an arbitration award finding that Mr Booi's dismissal was substantively unfair, but in the same breath upheld the employer's review against the reinstatement ordered by the arbitrator on the basis of the intolerability of the employment relationship supposedly established by the evidence.[93] In other words, the Labour Court's view was that reinstatement was inappropriate in accordance with section 193(2)(b) of the LRA, which stipulates that '[t]he Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable'.

Stressing the primacy of reinstatement as a remedy in the LRA and the legislative intention therefor,[94] the Court considered the arbitrator's order on remedy and disagreed with the Labour Court's finding that the order of reinstatement was unreasonable in the circumstances.[95] The Court was at pains to emphasise that 'the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one'.[96] This makes ample sense and is an important

[89] To be precise, the Labour Court cited *TAWUSA obo Mothibedi v SATAWU*, unreported judgment of the Labour Court, Case No J885/20 (17 September 2020).

[90] *Solidarity* (note 85 above) at paras 36, 63 and 75.

[91] Ibid at para 35.

[92] Ibid at para 72.

[93] *Booi* (note 84 above) at para 9.

[94] Ibid at para 39.

[95] Ibid at para 46.

[96] Ibid at para 40.

point to clarify to safeguard labour rights. If an intolerable employment relationship can be established easily through overemphasis on the employer's 'subjective and possibly irrational views' of the relationship,[97] this will create ample room for abuse. It would create a loophole to the comprehensive protections afforded by the LRA, because employers who are found guilty of unfairly dismissing employees could avoid the primary remedy of reinstatement by convincingly framing their subjective views as evidence of intolerability. It might be costly and inconvenient, but it would still be an avenue to removing the unwanted employee without sufficient legal justification.

It is not difficult to see why the Court was compelled to intervene in the circumstances, and *Booi* was thus another example of the Court's constructive contributions to the specialised area of labour law. Another is *UPSCO*,[98] where the Court rectified a decision of the Labour Court, which ordered costs against a party without providing any reasons.[99] The Court intervened as this set a precedent that defied the law, including the Court's jurisprudence, on how costs are awarded in labour matters. The significant problem that required correction, was that the decision could discourage future litigants from vindicating their constitutionally protected labour rights. Although it may be argued that it is dubious whether the Court was correct to assert its constitutional jurisdiction in this matter when it plainly concerned the misapplication of settled legal principles on costs,[100] this does not detract from the utility of the judgment in the context of labour law.

A final example worthy of attention is the Court's judgment in *McGregor*, a matter involving the dismissal of an employee for sexual harassment.[101] This was held by the bargaining council to be substantively and procedurally unfair, and an award of compensation equivalent to six months' remuneration, just short of a million rand, was made in lieu of reinstatement.[102] This order was made taking into account the 'nature of the misconduct and the extent of the [employer's] departure from substantive and procedural fairness'.[103] In short, the Court intervened and reduced this hefty award to two months' compensation. It did so largely on the basis of the nature of the misconduct, holding that—

> [w]hilst it is true that compensation for unfair dismissal serves an important purpose, the appropriateness of compensation must be understood within the context of the dismissal. This means that when the reason for the dismissal is sexual harassment, this must be taken into account. This is because our Constitution not only provides for the right to fair labour practices, but maintains that our constitutional democracy is founded on the explicit values of human dignity, integrity and the achievement of equality in a non-racial and non-sexist society under the rule of law. Yet, sexual harassment strips away at the core of a person's dignity and is the antithesis of substantive equality in the workplace. It also promotes a culture of gender-based violence that dictates the lived experiences of women and men within public and private spaces and across personal and professional latitudes.[104]

[97] Ibid at para 47.

[98] *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd* [2021] ZACC 26, (2021) 42 ILJ 2371 (CC)('*UPSCO*').

[99] Ibid at para 9.

[100] The bulk of the judgment is a recapitulation of these principles. See paras 24–37.

[101] *McGregor v Public Health and Social Development Sectoral Bargaining Council* [2021] ZACC 14, (2021) 42 ILJ 1643 (CC)('*McGregor*').

[102] Ibid at para 4.

[103] Ibid.

[104] Ibid at para 42.

It cannot be gainsaid that the law's response to gender-based violence and harassment in the workplace is an important and developing area. Situating the imperative to curb sexual harassment in the workplace at the heart of the interpretation of the LRA and other labour legislation undoubtedly serves the Constitution and the constitutional rights to dignity and equality.[105] The Court's interference and judgment in this matter was not only appropriate, it was laudable.[106]

3 *Concluding remarks*

I do not refer to the aforementioned cases to suggest that the Court's labour jurisprudence is beyond question or critique. Indeed, it would be optimistic to the point of naivety to contend that there is any area of the Court's jurisprudence that is entirely free of error. The above discussion merely demonstrates that the Court has grappled with questions of fact and law in the realm of labour law in a manner that has meaningfully developed South Africa's labour laws and given content to other constitutional rights in the process.

While this may be so, one criticism of the Court's approach to labour matters is that it tends to be overly interventionist and therefore undermines the role of the Labour Appeal Court.[107] The readiness with which the Court entertains labour appeals also delays the resolution of labour disputes and subverts one of the primary objectives of the LRA. In these circumstances, it may be argued that the Court's limited resources may be better spent in the adjudication of other matters which do not have the benefit of recourse to specialised appeal courts.

These concerns suggest that the Court ought to be more discerning before asserting its jurisdiction in any labour appeal, especially those that ought to be precluded by the negative rules (for instance, purely factual disputes). Nevertheless, the Court's recent track record as the final court of appeal in specialised labour matters does not appear to be cause for alarm. On the other hand, an inspection of the Court's contributions to competition law does not yield the same result.

C Competition law

1 *South Africa's system of competition law*

aa The legislative and institutional scheme

The Competition Act 89 of 1998 governs and regulates competition law in South Africa. It was adopted during the transitionary period between apartheid and democracy, and 'was enacted as one means by which high levels of concentration and entry barriers in the South

[105] After all, as acknowledged by the Court in *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at para 62, '[s]exual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.'

[106] *McGregor* has been described by critics as instructive on the significance of the issue of sexual harassment in the workplace as well as the 'the serious harm inflicted on employees who are sexually harassed'. See P de Vos 'ConCourt ruling on sexual harassment by George doctor puts spotlight on workplace power relations' *Daily Maverick* (17 June 2021), available at https://www.dailymaverick.co.za/article/2021-06-17-concourt-ruling-on-sexual-harassment-by-george-doctor-puts-spotlight-on-workplace-power-relations/.

[107] It has been suggested that the approach followed by the Court since *NEHAWU* has made the Court the 'Labour Appeal Appeal Court'. See Cohen (note 2 above) at 454.

African economy could be addressed'.[108] The Competition Act accordingly seeks to balance the objective of an efficient, competitive economic environment against the need for increased accessibility in light of South Africa's exclusionary past.[109] The Preamble to the Competition Act acknowledges this goal by recognising that unfair and unequal patterns of ownership and economic participation exist because of discriminatory laws and practices of the past and that effective, credible competition law is necessary to support an efficient economy for the benefit of all South Africans.

Broadly speaking, the Competition Act seeks to achieve these objectives through the regulation of the conduct of competing firms, the conduct of dominant firms and transactions that constitute mergers.[110] Pivotal to this regulation is the Competition Act's establishment of the competition authorities, including the Competition Commission, the Competition Tribunal and the Competition Appeal Court. These are specialist institutions, each mandated by the Competition Act to carry out specific functions. These functions were helpfully and concisely summarised by Goodman et al as follows:

> The Commission's primary roles include the investigation and prosecution of complaints that firms have engaged in conduct prohibited by the Competition Act, and the investigation of transactions that constitute mergers. The Tribunal is an adjudicative body that hears matters referred to it by the Commission, or by private parties. The Competition Appeal Court is a specialist appellate court that hears reviews and appeals of decisions of the Tribunal.[111]

Additionally, the Competition Act stipulates that decisions of the Competition Appeal Court may be appealed to the Court.[112]

The Competition Act confers exclusive jurisdiction on the Competition Tribunal and the Competition Appeal Court to adjudicate matters involving conduct prohibited by the Competition Act.[113] This means that other non-specialist courts in South Africa are precluded from determining the merits of substantive competition law issues.[114] The Court has confirmed this principle and observed that '[i]t is apparent from the [Competition] Act that competition matters are to be dealt with by the competition authorities to the exclusion of the ordinary courts of law'.[115]

The exclusive jurisdiction reserved for the competition authorities makes sense in light of the complex nature of competition law and its close relationship with economics. It also indicates that the legislature intended to facilitate the speedy resolution of competition law matters through the avenue of appeals from the Competition Tribunal to the Competition Appeal Court, 'which had been set up for that purpose, to be staffed by judges with the requisite competition expertise'.[116]

[108] I Goodman et al *Principles of Competition Law in South Africa* (2017) at 1.3.2.2.
[109] Ibid.
[110] Ibid at 1.4.
[111] Ibid at 3.1.
[112] Section 63(2) of the Competition Act.
[113] Goodman et al (note 108 above) at 3.5. See also ss 62 and 65 of the Competition Act.
[114] Ibid. In particular, see s 65(2) of the Competition Act, which provides that '[i]f, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits'.
[115] *Competition Commission of South Africa v Hosken Consolidated Investments Limited* [2019] ZACC 2, 2019 (3) SA 1 (CC) at para 77.
[116] D Davis 'The Constitutional Court and Competition Law' (2022) *Advocate* 46 at 47.

bb The intersection of law and economics

> Competition law is underpinned by economic theory, and in the South African context, by social objectives expressed in the Competition Act. The law gives expression to these underlying economic theories and social objectives. … [I]t is impossible to divorce the interpretation and application of the Competition Act from certain fundamental principles of competition economics, which go to the heart of the goals of competition law.[117]

Indeed, the inextricable link between competition law and economics is conspicuous throughout the provisions of the Competition Act. A pertinent example is section 12A, which provides for the consideration of mergers by the Competition Commission and Tribunal. This provision entails various technical assessments that self-evidently go beyond legal knowledge and require an understanding of economic principles. For instance, section 12A(2) requires the Commission and the Tribunal to 'assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively' in order to determine whether the merger is likely to substantially prevent or lessen competition. The provision requires the relevant authority to consider any relevant factor, including a list of particular factors. These include the level of import competition in the market, vertical integration in the market, levels of concentration in the market and other technical factors.

After determining whether the proposed merger is likely to substantially prevent or lessen competition, the Tribunal or Commission is enjoined to determine 'whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented'.[118]

The fact that the Tribunal is required to make these types of assessments is accounted for in the required composition of the Tribunal. Section 31 of the Competition Act provides that each matter referred to the Tribunal must be adjudicated by a panel of three members, and that at least one member of the panel 'has legal training and experience'. Section 28 of the Competition Act requires that the members of the Tribunal 'comprise sufficient persons with legal training and experience' to ensure that the requirement imposed by section 31 will be satisfied in all matters. Moreover, section 28(2) provides that each member of the Tribunal must 'have suitable qualifications and experience in economics, law, commerce, industry or public affairs'. These provisions are geared towards ensuring that the Tribunal will possess the relevant range of expertise to competently adjudicate matters governed by the Competition Act.

Additionally, section 52 of the Competition Act empowers the Tribunal to 'adopt any form it considers proper for a particular hearing', including an inquisitorial approach.[119] This means that the Tribunal may call its own witnesses and, naturally, play an active role in questioning the parties' witnesses. These broad procedural powers ensure that the Tribunal will be able to adapt its processes to assist it in making the complex economic and legal determinations required. By way of example, in the event that the Tribunal is unconvinced by the economic

[117] Goodman et al (note 108 above) at 1.1. See also Davis (ibid) at 46, where Davis refers to 'the complex field of competition law in which economic and legal expertise are inextricably linked'.

[118] Section 12A(1)(a) of the Competition Act.

[119] *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6, 2012 (7) BCLR 667 (CC)('*Senwes*') at para 50.

expert witnesses led by the parties in merger proceedings, it would be open to it to summons its own economic expert for further evidence. These flexible processes differ vastly from ordinary proceedings in the High Court, which indicates the legislature's recognition that competition matters require a unique and specialised form of adjudication, and that ordinary proceedings in the High Court would be the inappropriate avenue.

It is therefore no surprise that the adjudication of competition disputes is acknowledged as a complex and strenuous task. After all,

> [t]he challenge for the Competition Tribunal and the courts is to apply the Competition Act in such a way as to preserve the fundamental tenets of competition economics, and not stray into the realms of industrial policy-making, but at the same time to give effect to the ambitious, and at times mutually conflicting, objectives of the legislation.[120]

Although the legislature delineated this specialised institutional scheme for competition matters, it seemingly did so without accounting for the expertise of the Court, which must act as the final court of appeal in this scheme.

2 *Competition law in the Court*

aa The Court's expertise

A consideration of the expertise possessed by the Court in respect of competition law reveals that the following justices, who are currently members of the Court, were appointed with prior knowledge of and experience in competition law:

- Madlanga J, who was a member of the Competition Tribunal for nine years, during three of which he was its Deputy Chairperson;
- Tshiqi J, who was an acting judge of the Competition Appeal Court; and
- Rogers J, who was an acting judge and then permanent judge of the Competition Appeal Court from 2017 onwards.

Of the Court's recent retired justices, none gained experience or knowledge in competition law prior to their appointment to the Court. Furthermore, the only recent acting justices of the Court who have experience in competition law are Rogers AJ,[121] Unterhalter AJ, who has made academic contributions to the area, practised competition law as an advocate and is an acting judge of the Competition Appeal Court, and Victor AJ who is a judge of the Competition Appeal Court. Given that these three judges acted at different times, and that Unterhalter AJ and Victor AJ acted before Rogers J joined the Court as a permanent member, this means that at all times since 2019 at least[122] the Court has had no more than a maximum of three members with some degree of competition law knowledge and experience. Out of a bench of 11, three is hardly a number that renders the Court a specialist in competition law. Within this context, how does the Court make sense of its appellate powers over the specialist lower courts?

[120] Goodman et al (note 108 above) at 1.3.2.3.

[121] Prior to Rogers J's appointment as a justice of the Court in 2022, he was appointed as an acting justice of the Court in 2021.

[122] This is not to say that the Court had a greater degree of competition expertise prior to 2019. I have merely confined this exercise to the Court's composition from no earlier than 2019 as a matter of convenience and pragmatism.

bb The Court's jurisdiction over competition matters

Predictably, the Court's jurisdiction over competition law matters has developed in a complicated fashion. Recently, it affirmed that competition matters that raise issues relating to the conduct and powers of the Competition Commission and Tribunal involve the exercise of power, and accordingly engage the Court's constitutional jurisdiction.[123] However, in matters that concern issues of substantive competition law, the Court's assertion of its jurisdiction has been less certain.

Media 24, a matter concerning the legal elements of predatory pricing,[124] emphasises this uncertainty. Four judgments were penned. The effect of these judgments was that three judges held the view that the matter raised a constitutional issue, six judges held that it raised an arguable point of law, and four judges held that the matter did not engage the Court's jurisdiction on either ground.[125] The majority of the Court held the view that the matter raised an arguable point of law and engaged the Court's general jurisdiction because it required a determination of what level of costing below average total cost would meet the legal requirement for predation.[126] The minority, however, disagreed and held that—

> [i]t is only in those rare instances where purely legal issues of interpretation arise in the work of the Tribunal and the Competition Appeal Court that this Court should intervene. This is not one of those rare cases, because it does not raise a purely legal issue, but a mixed one of fact and law. And that is where the problem lies and remains, because mixed questions of fact and law require evaluative assessments, and it is precisely those assessments that it is not the function of this Court to tread into.[127]

In other words, the minority expressed grave concerns over the appropriateness of the Court exercising its appellate powers when doing so would require it to assess the relative merits of expert evidence in an area of law in which it lacks expertise.[128]

Despite the tension between the various judgments in *Media 24*, the Court readily accepted that it had jurisdiction in *Mediclinic*, a matter concerning a merger in the healthcare sector.[129] The majority in that matter simply asserted its jurisdiction with the blunt suggestion that, since the impugned merger was situated in the healthcare sector, the constitutional right to access to healthcare was implicated and the Court's constitutional jurisdiction was engaged.[130] A minority judgment criticised this approach and held that the matter constituted nothing

[123] *Competition Commission of South Africa v Group Five Construction Ltd* [2022] ZACC 36 ('*Group Five*') at para 20, where Mlambo AJ cites *Senwes* (note 119 above); *Competition Commission v Yara South Africa (Pty) Limited* [2012] ZACC 14, (2012) 9 BCLR 923 (CC); and *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14, 2021 (3) SA 1 (CC). Although Mlambo AJ penned the minority judgment in *Group Five*, the majority judgment supported and endorsed his reasoning on jurisdiction. See para 102.

[124] Section 8(1)(d)(iv) of the Competition Act prohibits firms 'from selling goods or services at predatory prices', unless they can show that doing so produces technological, efficiency or other pro-competitive gains that outweigh any proven anti-competitive effects.

[125] *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26, 2019 (5) SA 598 (CC)('*Media 24*') at paras 1–4.

[126] Ibid at para 34.

[127] Ibid at paras 134–135.

[128] Ibid at paras 136–137.

[129] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* [2021] ZACC 35, 2022 (4) SA 323 (CC)('*Mediclinic*').

[130] Ibid at para 36.

more than purely factual issues or, at best, the misapplication of settled principles.[131] I have argued elsewhere[132] that the majority's approach to jurisdiction in *Mediclinic* was deeply flawed, and ultimately 'creates scope for the Court to entertain most competition matters' in the future.[133] However, incorrect or not, it stands as authority that significantly broadens the Court's jurisdiction over competition law matters. This would not be so troubling if the Court were adequately specialised to deal with substantive issues of competition law. Unfortunately, its competition jurisprudence does little to create that impression.

cc The Court's competition jurisprudence

The Court's competition jurisprudence is best understood in two categories: those that raise procedural issues arising from the Competition Act, and those that deal with substantive issues of competition law. Although the Court has not adjudicated as many competition law matters as it has labour matters, both recently and overall, I once again confine the discussion to a sample of cases from recent years which were mostly adjudicated by the Court composed of the justices listed above.

Two recent cases relating to procedural matters arising from the Competition Act are *Pickfords*[134] and *Beefcor*.[135] *Pickfords* concerned a complaint that Pickfords Removals SA (Pty) Limited (Pickfords) had contravened section 4(1)(b)(i) of the Competition Act by engaging in collusive tendering. The procedural matter that the Court had to decide, pursuant to an exception raised by Pickfords, was whether the Competition Commission was time-barred from referring the complaint to the Competition Tribunal by virtue of section 67(1) of the Competition Act.[136] This provision stipulates that 'a complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal'. The Court accordingly had to decide whether the trigger event for the complaint was the referral made by the Commission in November 2010, which did not cite Pickfords but included a non-exhaustive list of the main companies involved,[137] or a further complaint initiation statement made by the Commission in June 2011, which specifically cited Pickfords.[138]

Before the matter reached the Court, the Competition Appeal Court considered this question and emphasised the express wording of the two complaint referral statements, which revealed that the 2011 statement clearly indicated that it was a supplementation to the first referral. It accordingly held that the trigger event for the referral insofar as it related to Pickfords was the 2011 referral, on the following basis:

[131] Ibid at para 89.

[132] L Loxton 'Merging the Unmergeable: The Contortion of Competition Law Principles by Constitutional Rights in the Constitutional Court [Discussion of Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Limited 2022 (4) SA 323 (CC)]' (2022) *SSRN*, available at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=5526178.

[133] Ibid.

[134] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14, 2021 (3) SA 1 (CC)('*Pickfords*').

[135] *Competition Commission v Beefcor Proprietary Ltd* [2021] ZACC 9, 2021 (4) SA 408 (CC)('*Beefcor*').

[136] *Pickfords* (note 134 above) at para 2.

[137] Ibid at para 5.

[138] Ibid at para 6.

> The effect for the respondent is therefore that it only became a named party when the second complaint initiation occurred; before that, the alleged prohibited practice did not involve it. After all, if it had, the Commissioner was free to have mentioned the respondent by name when first it initiated the complaint, but it did not.[139]

The Court disagreed with this finding and held that this interpretation would undermine the purpose of the Competition Act by placing too great a burden on the Competition Commission to know the identities of all offending firms when initiating a complaint of collusion.[140] This would impede the Commission's ability to fulfil its duty to investigate and prevent conduct prohibited by the Act, and thus the Court held that the trigger event must be taken as the initial referral in November 2010.[141]

In addition, the Court overturned the interpretation of section 67(1) of the Competition Act adopted by the Competition Tribunal and the Competition Appeal Court. To be precise, the Competition Appeal Court understood the purpose of the provision as 'to be to bar – in the public interest – investigations into events (prohibited practices) that have ceased an appreciable time ago, and are therefore no longer endangering the public weal'.[142] The Court disagreed and held that the Constitution requires an interpretation of section 67(1) which is more flexible and which will not subvert the powers of the Commission or the right to access to courts.[143] It accordingly held that section 67(1) does not constitute an absolute time-bar, and that non-compliance therewith can be condoned by the Tribunal in terms of section 58(1)(c)(ii).[144]

A similar pattern ensued in *Beefcor*, which turned on whether section 67(2) of the Competition Act entitles the Competition Commission to reinstate a complaint withdrawn before the Competition Tribunal.[145] This enquiry arose because the Commission referred a complaint to the Tribunal alleging that the respondents had contravened section 4(1)(b)(ii) of the Competition Act by entering into an agreement dividing the markets between them.[146] The matter was set down in the Tribunal, but less than a week before the hearing date the Commission approached the respondents seeking a postponement to explore the possibility of a settlement. The Commission then withdrew the complaint to give settlement negotiations a fair chance.[147] When settlement negotiations failed, the Commission filed an application for reinstatement at the Tribunal, which was rejected on the basis that a proper case had not been made out by the Commission.[148]

When the matter reached the Competition Appeal Court, it held that the withdrawal amounted to completed proceedings and accordingly precluded the reinstatement sought

[139] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* [2019] ZACAC 5 ('*Pickfords CAC judgment*') at para 33.
[140] *Pickfords* (note 134 above) at para 30.
[141] Ibid at para 30–31.
[142] *Pickfords CAC judgment* (note 139 above) at para 39.
[143] *Pickfords* (note 134 above) at para 39.
[144] Ibid at para 55.
[145] *Beefcor* (note 135 above) at para 1.
[146] Ibid at para 4.
[147] Ibid at paras 5–6.
[148] Ibid at paras 9–11.

by the Commission.[149] It reached this conclusion by considering the meaning of 'completed proceedings' as well as the powers afforded to the Commission by the Competition Act. It rejected the Commission's submission that section 67(2) permits it to withdraw and reinstate complaint proceedings as the alternative could result in 'a failure of justice if a respondent were allowed to escape accountability on what appears to be a technicality'.[150] It held that if the scheme of the Competition Act operates as intended, there is no risk of injustice taking place as the Commission would only withdraw matters after carefully analysing the evidence and weighing up the matter's prospects of success.[151] Moreover, it took the view that the Commission's interpretation created untenable scope for abuse, holding that—

> [s]uch an interpretation allows the Commission unilaterally to 'postpone' cases which it has referred to the Tribunal at a time of its choosing and for a period of its choosing, irrespective of the prejudice which may be occasioned to the respondent. The Commission argues, however that, on its interpretation of s 67(2), a respondent would not be without a remedy in that the courts could be approached for relief under the doctrine of abuse of power. It seems to me that this would be of little comfort to a respondent who contends that he is being subjected to harassment and abuse by repeated prosecutions. After all, were it accepted that the Commission is allowed the facility of withdrawal with impunity, a respondent would be hard pressed to prevent its use by the Commission. To my mind, the broad nature of the powers which the Commission already has militates against the construction contended for by it. Such powers have now also been considerably extended by the decision in *Pickford's*.[152]

In short, the Competition Appeal Court was unwilling to interpret section 67(2) in a manner that would undermine legislative intent, simply because the Commission failed to perform its public duties with the level of diligence required by the Competition Act.[153] However, in a curt judgment, criticised for its 'lamentable lack of analysis of the fundamental findings of the Competition Appeal Court',[154] the Court overturned this interpretation and held that proceedings are only considered completed when there has been a decision on some of the issues raised.[155] It concluded that this interpretation—

> promotes access to the Tribunal by restricting the prohibition to finalised cases. It strikes the right balance between the rights of access to have genuine complaints resolved by the Tribunal on the one hand, and the abuse of making referrals of matters that have already been resolved, on the other.[156]

Regrettably, the Court made this finding without engaging with any of the concerns raised by the Competition Appeal Court about the scope for abuse of power by the Commission should it be allowed to reinstate withdrawn matters. Its reasoning was also devoid of any acknowledgement of the Competition Appeal Court's consideration of the responsibilities

[149] *Competition Commission of South Africa v Beefcor (Pty) Ltd* [2020] ZACAC 5 ('*Beefcor CAC judgment*') at para 53.
[150] Ibid at para 46.
[151] Ibid at para 47.
[152] Ibid at para 49.
[153] Ibid at para 58.
[154] Davis (note 116 above) at 49.
[155] *Beefcor* (note 135 above) at para 30.
[156] Ibid at para 33.

borne by the Commission as a 'specialist administrative body' and 'powerful state actor' and the bearing that this had on that court's decision.[157]

Pickfords and *Beefcor* were both matters that required normative evaluations of the competition authorities' powers. The Court, as the lodestar of South Africa's constitutional legal development, is undoubtedly the appropriate body to make these assessments. However, there is evidently a tension between the weight attached to different aspects of these normative evaluations by the Competition Appeal Court and the Court, and the Court has been criticised for affording 'the widest possible deference to the powers of the Commission' in its judgments in *Pickfords* and *Beefcor*.[158] This has been criticised as a problematic failure on the part of the Court to strike a proper balance 'between the important public role played by the Commission and the rights of fair procedure and certainty which should be enjoyed by those subjected to an investigation and then an initiation by the Commission'.[159]

The Court's approach in these matters also bears the unfortunate consequence of lowering the expectations of the Commission, as the underlying message of these judgments is that the Commission need not fear any consequence for failing to abide by procedure. This undermines certainty in competition law, and disincentivises diligence on the part of the Commission. The competence of the Commission, as a key participant in all competition matters, cannot be overstated. Moreover, the Court's failure to engage with aspects of the Competition Appeal Court's reasoning that dealt with the role of the Commission and the importance of certainty in competition law, particularly in *Beefcor*, leaves the reader unconvinced that the Court weighed these factors in the balance, or whether it appreciated their importance at all. Even though substantive competition expertise may have been less important in the context of these decisions, the Court's weak legal reasoning in these matters contributes to its poor track record in competition law.

Even greater are the criticisms that have been levelled against the Court's jurisprudence in matters of substantive competition law. The crux of these criticisms is that the Court simply lacks the required functional competence to determine questions of competition law. This is because access to the record of a matter will not equip the justices with the same level of expertise as the Tribunal or the Competition Appeal Court. After all, the former is constituted of members who are suitably qualified and experienced in economics, law, commerce, industry or public affairs, and the latter is 'constituted with judges possessed of sufficient competition expertise in the field to set aside a decision of the Tribunal when [the Tribunal] had clearly erred, whether in law or in the application of the law to the facts of the case'.[160]

This problem was emphatically elucidated by Cameron J, Froneman J and Khampepe J in their minority judgment in *Media 24*, where they held:

> Determining the appropriate benchmark for predatory pricing under section 8(c) of the Competition Act inevitably depends on an assessment of the relative merits of expert evidence in that regard. That does not fall within the functional competence of this Court. It is not a purely

[157] *Beefcor CAC judgment* (note 149 above) at paras 46 and 50.
[158] *Davis* (note 116 above) at 48.
[159] Ibid.
[160] Ibid at 46.

> legal interpretative exercise. Section 167(3)(b)(ii) requires that this Court 'ought to' consider the legal point. As *Paulsen* trenchantly explained—
>
> > [i]f – for whatever reason – it is not in the interests of justice for this Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that 'ought to be considered by [this] Court'.
>
> And even if one clothes it as an assessment of the reasonableness of the Competition Appeal Court's assessment, one cannot escape that, in reality, it involves second-guessing the relative merits of different expert views.[161]

The concern expressed here is valid. Even the Competition Appeal Court, as the specialist body designated by the legislature to determine substantive matters of competition law, noted that this was the first matter concerning the interpretation of predatory pricing in terms of section 8 of the Competition Act.[162] That court emphasised that '[p]redatory pricing raises complex questions of competition economics and law and hence represents a challenge for a competition authority'.[163] What followed this observation was a lengthy analysis of economic theory and the relevant prices and evidence before the court, pursuant to which the Competition Appeal Court interpreted section 8 of the Competition Act and unanimously concluded that there was insufficient evidence to establish predatory pricing in the circumstances.[164]

With this in mind, it seems eminently reasonable that Cameron J, Froneman J and Khampepe J expressed grave doubt as to whether the Court in *Media 24*[165] was equipped to assess the relevant economic evidence. That it was not, they argued, was evident in the fact that the first judgment's remedy was to remit the matter to the Competition Appeal Court to allow it to make factual findings based on a benchmark for predatory pricing that it had set itself, in specialist territory specifically entrusted to the Competition Appeal Court.[166] In any event, the effect of the four judgments in *Media 24* was that the majority of the Court held that the appeal should be dismissed. Furthermore, considering the vast discrepancies in the four judgments' reasoning[167] alongside the nature of the issues before the Court, it is no

[161] *Media 24* (note 125 above) at para 137.

[162] *Media 24 (Pty) Limited v Competition Commission of South Africa* [2018] ZACAC 1, 2018 (4) SA 278 (CAC) ('*Media 24 CAC judgment*') at para 1.

[163] Ibid, where the Competition Appeal Court cites M Motta *Competition Law: Theory and Practice* (2004) 412, which observes that—

> [t]he very nature of predatory pricing, which involves low prices for a period, makes it difficult to analyse. To distinguish low prices due to a genuine and lawful competitive response to rivals from low prices due to a predatory and unlawful behaviour is far from an easy task in practice. Furthermore, a very cautious approach by anti-trust agencies and courts is needed to avoid the risk that firms endowed with market power keep prices high to avoid being charged with predatory behaviour.

[164] Ibid at para 112.

[165] Since this matter was heard in 2018, at this juncture I should mention that coram in *Media 24* was made up of the following judges: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J. None of these judges have any prior experience or knowledge in competition law. Interestingly, Basson AJ and Dlodlo AJ were acting justices with expertise in labour law.

[166] *Media 24* (note 125 above) at para 138.

[167] In addition to the first judgment's imposition of a benchmark for predatory pricing that differed to that of the Competition Appeal Court, and the second judgment's conclusion that the Court lacked jurisdiction, in the third judgment at para 141, Theron J held as follows:

> I, however, part ways with the first judgment and find that the Competition Appeal Court was correct in holding that the adoption of a test for predatory pricing under section 8(c) of the Competition Act that is based on the average total cost standard and the intention of a dominant firm is inappropriate. In this regard, I am of the view that the interpretation

wonder that the reasoning of the first judgment has been described as containing 'obvious economic flaws'.[168]

Critics of the Court's judgment in *Media 24* can at least find some solace in the fact that it ultimately did not overturn the reasoning of the Competition Appeal Court. Unfortunately the same cannot be said for its judgment in *Mediclinic*, which was aptly described by retired Davis J[169] as 'a depressing nadir in the jurisprudence of the Constitutional Court in this complex area of the law'.[170]

As mentioned above, I have written elsewhere about the shortcomings and flagrantly incorrect reasoning of the majority judgment in *Mediclinic*,[171] and I shall not duplicate that effort here. One of the key issues with that judgment was that the Court essentially made a factual finding regarding the likely consequences of a merger on prices and competition in the market for healthcare without any substantive engagement with or even recourse to the evidence itself, which was hotly contested by the competition authorities.[172] Instead, the Court reached its decision under the guise of safeguarding and giving meaning to constitutional rights.[173] As noble as this sounds, there is simply no way to answer the question of whether a merger will result in a substantial lessening of competition through recourse to constitutional rights. Most problematically, therefore, the Court's judgment 'is an open invitation to recourse to the "vibe" of the Constitution and eschews a rigorous interpretive exercise of important legislation passed by Parliament'.[174] Additionally, the Court's reasoning in *Mediclinic* 'diminishes the possible fallibility of the Tribunal's factual findings, emasculates the appellate powers of the CAC, and broadens the Constitutional Court's powers to hear matters of competition law'.[175] Bearing in mind the damaging effects of the Court's competition jurisprudence, the latter point is possibly the most distressing to anyone concerned with the integrity of South Africa's competition laws and institutions.

3 *Concluding remarks*

The Court has exhibited a willingness to decide a broad range of competition matters, including those that require factual analysis which, in turn, necessitates an understanding of economics. It may be debatable whether the Court's jurisprudential contributions to procedural matters of competition law have been positive. However, the Court's substantive competition law jurisprudence undoubtedly raises questions about whether the Court should hear appeals from the specialised competition courts. Indeed it is curious that the Court has displayed such little reluctance to do so, despite its obvious lack of the expertise that the legislature delineated in respect of the competition courts. While this jurisprudence paints a somewhat disappointing picture of the Court, it is interesting to compare the Court's track record in this specialised area of the law with its contributions to labour law discussed above.

adopted by the first judgment of section 8(c) of the Competition Act is contrary to the objectives of the Competition Act and may serve to severely undermine price competition and in so doing harm consumer welfare.

[168] Davis (note 116 above) at 49.

[169] Davis J is a retired judge and the former Judge President of the Competition Appeal Court.

[170] Davis (note 116 above) at 51.

[171] Loxton (note 132 above).

[172] Ibid.

[173] *Mediclinic* (note 129 above) at para 74.

[174] Davis (note 116 above) at 51.

[175] Loxton (note 132 above) at 12.

D Comparing the Court's competencies

All in all, the above discussion illustrates that there is plainly a divergence between the Court's competence as a generalist appellate court in the specialised areas of labour and competition law. While the Court has made constructive and meaningful developments in labour law, it has undermined legislative intent and created uncertainty in competition law. A synopsis of the above discussion reveals that this is not altogether surprising.

Firstly, the Court's recent composition has included a majority of justices and acting justices who are trained and experienced in labour law. By comparison, few members of the Court have experience in competition law. It is also noteworthy that the specialised labour courts are courts of equity and law. The Court, whose primary business is to interpret and apply the Constitution, is well placed to make judgments of equity. After all, 'human dignity, the achievement of equality and the advancement of human rights and freedoms' are founding values of the Constitution.[176] On the other hand, it would be more accurate to describe the competition courts as courts of law and economics, and nothing in the business of interpreting the Constitution translates into experience in and familiarity with the field of economics. Thus, without additional training or experience, it is difficult to imagine how the members of the Court would be equipped to decide issues of competition law.

It is also noteworthy that the labour courts and labour legislation are primarily in place to give effect to the constitutional rights enshrined in Section 23 of the Constitution. The same cannot be said of the Competition Act and the competition courts, which were adopted by the legislature for the imperatives discussed above, but are not intended to give effect to a specific constitutional right.[177] Thus, since there is an inherently closer connection between labour matters and constitutional rights than competition matters and constitutional rights, it seems logical to assume that the adjudication of the former would befit the Court more naturally than the latter.

Another manifestation of the closeness of these specialities to constitutional rights is visible in the fact that the Labour Courts share concurrent jurisdiction with the High Courts in certain substantive areas of labour law, provided that the LRA does not require the Labour Court to adjudicate the matter. By comparison, the Competition Act only confers concurrent jurisdiction on the High Courts in respect of matters that are not substantive competition law issues.[178] Two points arise from this which bear emphasis. First, this indicates legislative recognition that the High Courts possess the expertise required to adjudicate certain substantive labour issues, but not substantive competition issues. Second, it means that judges of the High Court are likely to encounter labour law at some stage, but will never determine substantive questions of competition law. This, in turn, means that the Court is more likely to be composed of members with the necessary experience to adjudicate labour appeals than competition appeals.

With the above in mind, it is unsurprising that the Court has set damaging competition precedents, particularly in the recent matter of *Mediclinic*. There are undoubtedly other specialised areas of South Africa's law where similar concerns could be expressed, but a consideration of those is beyond the breadth of this article. The purpose I set out to achieve was to demonstrate that the Court's wide jurisdictional powers to act as an appellate court in

[176] Section 1(a) of the Constitution.

[177] For a further explanation, see *Mediclinic* (note 129 above) at paras 127–128. Cameron J, Froneman J and Khampepe J held that '[t]he Competition Act is just legislation. It has no elite constitutional allure.'

[178] *Group Five* (note 123 above) at para 147.

specialised law may be viable in some contexts and cause for alarm in others. It may work in the case of labour law which is 'constitutionalised' through Section 23 and is fundamentally geared towards protecting vulnerable individuals. However, in areas like competition law, where no core constitutional right is at stake and business and consumer interests hang in the balance instead, the Court has yet to demonstrate an adequate proficiency.

Thus, a key tension in South Africa's constitutional dispensation arises from the need to 'constitutionalise' all areas of the law, including competition law, in a constructive as opposed to destructive manner. My present concern is accordingly what can be done to ensure that the integrity of the Court and South Africa's competition law are kept afloat in the wake of the proverbial floodgates being opened through the Court's adjudication of substantive issues of competition law.

IV SOLUTIONS

A Beyond our borders

The comparative merits of specialist as opposed to generalist courts have been the subject of debate for years. There is no universal preference of one over the other: certain jurisdictions eschew specialisation while others incorporate it at all levels.[179]

The advantages of specialisation include 'enhancing efficiency in decision making, assuring knowledgeable adjudicators, and (perhaps) increasing uniformity of result across the country'.[180] On the other hand, proponents of generalist courts argue that generalist judges are less likely to become technocrats or hide behind specialised vocabulary and 'insider concerns'.[181] The worry is that specialised judges are likely to lose sight of the big picture as they become so immersed in one area that they fail to see the wood for the trees.[182] This has been argued in respect of specialised competition courts because 'specialisation in antitrust risks losing the broad perspective attributed to the generalist judge, who approaches his occasional antitrust case informed by knowledge of other areas of the law, which knowledge can be useful, whether by analogy or by contrast, to improve the resolution of an antitrust issue'.[183]

Indeed, the issue of specialisation in competition courts arises frequently in academic discourse. A comparative study on different countries' approaches concludes that there is no 'ideal model' for competition courts,[184] but that specialisation can take different forms and be effective. For instance, the Competition Appeal Tribunal in the United Kingdom is staffed by lawyers as well as experts on fields related to competition and economics. Whereas, in Germany, specialisation has occurred through practice as certain regional courts are designated to deal

[179] D Wood 'Judges of All Trades: Further Thoughts on Specialized Courts' (2015) 99 *Judicature* 11, 11. See also S Breyer 'The Donahue Lecture Series: Administering Justice in the First Circuit' (1990) 24 *Suffolk University Law Review* 29, 41.

[180] Ibid at 12.

[181] Ibid.

[182] Ibid at 12 and 16.

[183] D Ginsburg & J Wright 'Antitrust Courts: Specialists versus Generalists' (2013) 36 *Fordham International Law Journal* 788, 807. See also D Wood 'Generalist Judges in a Specialized World' (1997) 50 *SMU Law Review* 1755, 1767.

[184] D Wolski 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 *Yearbook of Antitrust and Regulatory Studies* 115, 147.

with matters of competition law. These courts have become experts through experience.[185] Conversely, despite having a well-developed system of antitrust law, there are no specialised competition courts in the United States of America (USA). Thus, expert witnesses and federal agencies responsible for the enforcement of antitrust laws, particularly the Federal Trade Commission (FTC),[186] play a key role in legal developments.[187] Their expertise supposedly closes any gaps created by courts' lack of specialisation. Additionally, a study conducted on the impact of judges' economic training on the quality of competition decisions in the USA revealed that increased expertise does not always translate to lower appeal rates, and that a combination of advanced economic training and reliance on experts is needed to improve the quality of decisions.[188]

A related issue with which all legal systems grapple is the challenge of appointing judges in a manner that ensures that the judiciary bears the necessary skills and expertise to perform its function optimally. This is recognised as particularly challenging in light of specialisation within the legal profession and because 'the knowledge required of a trial judge can be very different to that required of a judge of the highest appellate court'.[189] In general, several jurisdictions seek to overcome these challenges through the inclusion of professional competence[190] and a certain degree of experience in the criteria for the appointment of judges.[191] The focus of this article, however, is not the criteria that ought to be adopted in the appointment of judges. I refer to this issue only to demonstrate that the expertise of judges in generalist and apex courts is a conundrum faced across the board. A generalist apex court with appellate powers that permit it to interfere with decisions of specialised courts is not a phenomenon unique to South Africa, and nor are the difficulties that this creates.

For instance, patent law is another highly complex specialisation, and many believe that it is undesirable for generalist judges, including the US Supreme Court, to make factual findings on this area of the law where they are woefully deficient of the necessary technical expertise.[192] On this basis, it is argued that the bulk of patent law matters ought to be decided by specialist patent adjudicatory bodies. This has been proposed as a solution to the Supreme Court's 'bungling' of matters in this specialised area of the law and would require the Supreme Court, as well as other generalist courts, to defer to the factual findings of these specialised bodies.[193] There are interesting parallels between this proposal and the problems relating to the Court

[185] Ibid at 125, 127 and 145.

[186] The FTC is the regulatory authority in the USA responsible for enforcing antitrust law. For more information on this body, see 'About the FTC' *Federal Trade Commission*, available at http://www.ftc.gov/about-ftc.

[187] Wolski (note 184 above) at 122 and 145.

[188] Ibid at 146.

[189] R Davis & G Williams 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819, 838, citing T Blackshield 'The Appointment and Removal of Federal Judges' in Brian Opeskin & Fiona Wheeler (eds) *The Australian Federal Judicial System* (2000) 400, 432–433.

[190] This varies between jurisdictions and is demonstrated through excellence and achievement in the legal profession, scholarly qualities, evidence of expertise, writing capabilities and advanced levels of understanding of the law. See Davis & Williams (ibid).

[191] Davis & Williams (ibid) provide a fuller discussion of the criteria used for the appointment of judges in the United Kingdom, New Zealand, Canada and the United States of America (USA).

[192] M Goodman 'What's So Special about Patent Law' (2016) 26 *Fordham Intellectual Property, Media & Entertainment Law Journal* 797.

[193] Ibid at 850–851.

and its competition law jurisprudence. It emphasises that other apex courts with generalist jurisdiction struggle to exercise their appellate powers effectively when dealing with specialised law that requires expertise beyond legal knowledge. It also supports the view held by Cameron J, Froneman J and Khampepe J in *Media 24*, that an apex court ought to exercise extreme caution before interfering with the factual findings of a specialised lower court.

B The way forward

Unfortunately, there is no panacea for solving the conundrum of the disproportionality between the Court's powers and expertise in specialised matters. A solution must, however, be found, because justice is not served when the Court exhibits questionable competence in a complex area of the law, especially when the legislature has put careful deliberation into creating specialised bodies and systems to deal with that area of the law.

It is tempting to suggest that a solution would be an increase in reticence from the Court in asserting its jurisdiction in matters involving issues of substantive competition law, especially those that require the evaluation of economic evidence. The Court has already set precedents that could provide a foothold for a more cautious approach to jurisdiction. However, in light of the absolute dearth of consistency in the Court's jurisdiction, this solution is unlikely to be particularly helpful or meaningful without drastic intervention, for instance through further legislative changes to the Court's jurisdiction. Although there is only room for improvement in the Court's approach to its jurisdiction, the purpose of this article was never to solve that problem. The solution in which I am interested is one that will enable the Court to meaningfully and responsibly engage with the specialised matters that now fall within its jurisdiction. In other words, it may be too late to keep specialised matters out of the Court, but there may still be time to find ways to bring the necessary skills and expertise to adjudicate those matters into the Court. Drawing from the approaches and experiences in other countries, the best way to achieve this is through a combination of judicial training and reliance on experts.

Judges can acquire specialist knowledge through formal training and through repeated exposure. This means that various interventions could be adopted to improve the competition expertise of the Court so that it is more closely aligned with that of the Competition Appeal Court. For instance, the members of the Court could be compelled to undergo training in competition law and economics. The expertise of the Court could also be enhanced through future permanent and acting appointments of justices who have gained experience in competition law, possibly through an acting term at the Competition Appeal Court. In fact, the dual benefit of this would arguably be that these acting judges would benefit the specialist Competition Appeal Court 'with the insights brought by a generalist judge who, while acquiring expertise in the subject matter of the specialist court, would not come under the influence of any party to the particular legal subculture of that specialty'.[194] I would accordingly argue that requiring members of the Court to have acted in the Competition Appeal Court prior to their appointment to the Court would benefit both courts, as it would increase balance in the former and expertise in the latter.

Unfortunately, this is an imperfect solution. Since there are only 11 permanent seats at the Court and many more specialities beyond competition law, it is difficult to justify the

[194] Ginsburg & Wright (note 183 above) at 808–809.

allocation of a certain number of seats to competition law over other areas. Since the Court sits en banc and every judge is expected to apply their mind to each decision, it would also be preferable to avoid situations where decisions on competition matters fall to the designated 'competition judge', who could be left to reach a decision without aid or challenge from the rest of the Bench.[195] In any event, the so-called 'expert judge' would not necessarily be in a better position to persuade or educate the other members of the Court, meaning that their expertise would not necessarily translate into improved outcomes.[196] A better solution, then, may be for appointments to be made with the intention of increasing the Court's expertise in commercial and private law more generally. A Court with greater knowledge in these areas would undoubtedly be better equipped to grapple with principles of competition law, and other areas beyond competition law. To this end, judges could also receive training in non-legal disciplines that could improve their knowledge across a range of specialities, economics being one example of such a discipline.

In addition, the importance of the role of experts cannot be understated. Sections 172 and 173 of the Constitution empower the Court with a great deal of discretion to regulate its own process and to make appropriate orders in the matters before it. Thus, it is open to the Court to find innovative ways to import expertise when it decides matters. For instance, it could appoint qualified assessors with competition expertise to assist the judges with making factual determinations. It could also appoint expert witnesses to assist the judges to understand the economic evidence. This has been done by other courts, including apex courts,[197] and has been observed as a successful way of overcoming 'the difficulty of gleaning the "truth" from competing hired-gun expert witnesses, and other flaws of the adversary system'.[198] One may object that this could result in the court of last instance hearing new evidence, but this procedure would be targeted at the assessment of existing evidence on the record as opposed to the introduction of new evidence. Even if some new evidence is introduced during this process, this is surely preferable to situations where the judges do not understand the evidence and consequently avoid it altogether (as occurred in *Mediclinic*).

Finally, it is also worth giving some attention to the relevant expert bodies that participate in specialised litigation, for instance the Competition Commission. This is not to suggest that the Court should in any way compromise its impartiality in favour of these bodies, but since the Competition Commission is the common denominator in all competition disputes, it is undeniable that it is positioned to influence the development of competition jurisprudence. Thus, the importance of the competence, diligence and expertise of bodies like the Competition Commission must be recognised and prioritised.

[195] It is worth noting that the current composition of the Court could produce this result, should the rest of the Bench defer to the views of Rogers J, who is widely acknowledged for his competition expertise.

[196] S Breyer 'Economic Reasoning and Judicial Review' 2009 *The Economic Journal* 119, 124–125.

[197] The Constitutional Court of Colombia followed a similar procedure in *Alejandro Baquero Nariño v Congreso de la República de Colombia* CCC, Sentencia, C-955, 26 July 2000, where it interfered with the decision of the central bank regarding mortgage loan rates. In addition, see Breyer (ibid) at 131–132 for a discussion on courts' reliance on independent experts in England and France.

[198] Wood (note 183 above) at 1761.

V CONCLUSION

I do not profess to have solved the problems that have arisen as the Court's generalist appellate jurisdiction has developed and evolved. However, I hope that this article serves as a word of caution about what might go wrong as the Court's appellate powers are extended into areas that fall beyond its functional competence. The system may work when the Court possesses the requisite expertise in an area such as labour law, but the same is not true when the Court's extended jurisdictional powers lead it into the realm of competition law, where it is clearly out of its depth. Unless this is remedied through interventions that enhance the Court's competition expertise and enable it to exercise its 'super appellate' powers responsibly, it is likely that tensions between the Court and the Competition Appeal Court will heighten in the future. It is also unlikely that the purpose of the Constitution and the Competition Act, or indeed any legislation, will be best served through the jurisprudence of an apex Court which is a jack of all trades but a master of none.