Structural Barriers and the Erosion of Access to Justice in the South African Labour Court and Labour Appeal Court

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Abstract

This article critically analyses the structural challenges that hinder access to justice in the South African Labour Court and Labour Appeal Court. Eschewing scholarly debates about access to justice, this article adopts a functional approach, construing access to justice as the ability to access courts effectively. Anchored in section 34 of the *Constitution*, which guarantees the right to a fair and timely adjudication of disputes, the article investigates whether the composition of the bench, the availability of judicial personnel, the physical infrastructure and the administrative capacity of these courts enable meaningful access to justice. Drawing on legislative frameworks, judicial statistics, academic literature and field observations, the article reveals that the chronic shortage of judges, inadequate court infrastructure, limited administrative support and overreliance on acting appointments have led to systemic delays. It argues that these deficiencies amount to a constructive denial of the constitutional right to access the courts. The article concludes with policy recommendations, including legislative reform, the expansion of the Labour Court and the Labour Appeal Court, infrastructural investment and the institutional separation of the Labour Court and the Labour Appeal Court, to ensure their alignment with the constitutional imperative of accessible, fair and expeditious justice.

Keywords

Access to justice; Labour Court; Labour Appeal Court; structural challenges; judicial reform; constitutional right of access to courts.

1 Introduction

Access to justice is a concept with multifaceted theoretical understandings.[1] In its simplest form, the concept of access to justice aims to guarantee equal participation by all members of the community so that none is excluded from the public sphere.[2] This article does not intend to canvass the various theoretical meanings of the concept. The article construes access to justice to mean access to court. In other words, to mean whether litigants can easily and speedily get their matters adjudicated. It is from this perspective that this article seeks to identify the structural challenges that prevent litigants from accessing the Labour Appeal Court and the Labour Court. The article also discusses the implications of these challenges for the right to access justice in these courts. This article adopts a desktop approach and draws on case law, legislation, academic writings and observation to demonstrate factors that hinder litigants from accessing the Labour Court and the Labour Appeal Court. Even though access to court is a fundamental right that guarantees to individuals the ability to seek legal recourse through the courts by virtue of section 34 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) the author posits that the structure of the Labour Court and the Labour Appeal Court, i.e. the number of judges, the lack of infrastructure and the shortage of personnel, limit accessibility to these courts. This article further draws from observations[3] to buttress the author's suggestions for a legislative and infrastructural overhaul of both these courts that would give easy access to justice. In order to achieve that, the article is divided into three parts. The first part gives a synopsis of the Labour Court and Labour Appeal Court. Building on the first part, the second part addresses the challenges which hinder access to court. The last part makes some policy recommendations which would increase access to these courts.

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1 For an overview of the theoretical understanding of access to justice, see Crawford 2020 *Ind J Global Legal Studies* 59. Also see Muller and Swanepoel 2023 *Speculum Juris* 58.

2 Crawford and Maldonado 2020 *Ind J Global Legal Studies* 2.

3 The paper emphasises that any frequent user of these courts would probably make the same observation. During a visit to the Labour Court in Johannesburg on 16 July 2025, the author observed piles of files visibly stacked in the corridors, reflecting systemic administrative challenges.

2 The Labour Appeal Court

The Labour Court (LC) and the Labour Appeal Court (LAC) were officially opened in 1996 at their head office in Johannesburg, Arbour Square building. So, for the past 29 years the LAC has had its main sitting in Johannesburg with some rotational sittings in Cape Town, Durban and Gqeberha, formerly Port Elizabeth. (The essence of this rotation will be explained below.)

The LAC was established in terms of section 167 of the *Labour Relations Act* 66 of 1995 (LRA). The LAC is the final court of appeal in respect of all judgments and orders of the Labour Court. In terms of section 167(3) of the LRA, the LAC is "a superior court that has authority, inherent powers and standing in relation to matters under its jurisdiction equal to that of the Supreme Court of Appeal." The composition of the LAC is governed by section 168. In terms of this section:

> (1) The Labour Appeal Court consists of ---
>
> *(a)* the Judge President of the Labour Court, who by virtue of that office is Judge President of the Labour Appeal Court;
>
> *(b)* the Deputy Judge President, who by virtue of that office is Deputy Judge President of the Labour Appeal Court; and
>
> *(c)* such number of other judges who are judges of the Labour Court or High Court, as may be required for the effective functioning of the Labour Appeal Court.

A reading of paras *(a)* and *(b)* above states that the Judge President and the Deputy Judge President of the Labour Court are *de jure* Judge President and Deputy Judge President of the LAC by virtue of holding office in the LC.

LAC judges are judges of the High Court or the LC. Until the LRA amendment of 2014, which came into effect on 1 January 2015, LC's judges could not be appointed as LAC judges. Despite the amendment, it took almost a decade for two judges of the LC to be appointed to the LAC, i.e. Judges van Niekerk and Nkutha-Nkontwana, who assumed office on 1 January 2024 together with Judge Savage of the Western Cape High Court.

Prior to these three permanent appointments, the LAC consisted of judges of the High Courts who were all appointed in 2013, most of whom have now taken office at various courts, e.g. Judge Musi is now the Judge President of the Free State High Court, and Judge Sutherland is now the Deputy President of the Gauteng High Court. The article argues that these appointments, i.e. those of 2013 or 2024, obfuscate the reality of the LAC. In actual fact, judges of the LAC are part-timers or semi-permanent judges. Notwithstanding the appointment to the LAC, they remain judges of their respective High Courts. The question on the mind of the legal fraternity now is whether the two Labour Court judges appointed to the LAC will return to

the Labour Court when they are not sitting. This is so because the practice has been that LAC judges sit in the LAC for only two terms per year and return to their divisions in between these terms. That is why the LAC always appoints acting judges to sit during one or two terms. As stated above, some of the judges of the LAC have taken office at other courts. This means that the LAC has been functioning for the longest time with acting judges. In its current form, the LAC is made up of the three judges mentioned above and a Judge President. This means that the LAC comprises four judges serving the whole country, i.e. Johannesburg, Cape Town, Durban and Gqeberha. The functioning of the LAC is possible, as argued above, only with the appointment of acting judges to supplement its bench.

As regards the administration of the LAC, the registrar of the Labour Court is the registrar of the LAC.[4] The registrar of the LAC is located in Johannesburg. The registrar case manages the files and allocates and sets matters down for hearing. The satellite courts' registrars are *de facto* LAC registrars but with circumscribed functions in that their duties are limited to receiving files or records and couriering them to the LAC registrar in Johannesburg. Besides the registrar, there is only one intern to assist the LAC registrar in Johannesburg. Three secretaries or judge clerks are assigned to the LAC to support the judges; one is attached to the Judge President, and the other two are juggled around to support the remaining judges. Significantly, they also assist in the LC when the need arises. This means that the LAC functions with only three secretaries in Johannesburg and has four permanent judges serving the whole country. In the other satellite courts, the Labour Court's secretary is temporarily seconded to the LAC when appeals are heard.

Regarding the filing room, what is purported to serve as a filing room is shared with the Labour Court and has now reached full capacity. In fact, this article submits that there is no filing room for the LAC. Files, whether petitions, appeals or even records, are kept in the emergency exit corridor and/or are discarded immediately after the hearing to make place for new files. Although the court has introduced CaseLines, a court online management system, it will take some years before the court becomes completely paperless. This is so because, due to the backlog, there are still physical files awaiting court dates.

Concerning chambers of the LAC, there is no clear demarcation between the LAC and LC. Because LAC judges serve for only two terms and return to their respective High Courts, their chambers are utilised by other LAC judges and acting judges of the Labour Court during their absence. Thus, a permanent judge of the LAC has no entitlement to an exclusive chamber as

4 Section 171 of the *Labour Relations Act* 66 of 1996 (LRA).

his or her chamber is utilised when vacant. Similarly, judges of both the LAC and LC share the same tearoom. As a consequence of this arrangement, LC judges read LAC notices placed on the notice-board in the tearoom.

As stated above, the LAC sits in Durban, Cape Town and Gqeberha, with its head office in Johannesburg. The courtroom situation in Johannesburg is problematic – in the other divisions the LC has few judges and enough courtrooms to accommodate all judges. For instance, Cape Town and Durban have two judges and four courtrooms, whereas in Johannesburg, there are only six courtrooms, with court six reserved for the LAC. However, the same court is used for LC urgent matters. This arrangement is unacceptable because when the LAC is sitting all urgent matters on the LC roll have to stand down, or the urgent judge has to use the first available court or any court of his or her choosing depending on the seniority of the judge. This means that a junior judge has to wait until the urgent court is adjourned or for the first available court.

The above depicts quite a disturbing view of the LAC, far from the picturesque legislative enactment embodied in the LRA. Below the article considers whether the LC presents a different picture from that of the LAC.

3 The Labour Court

The LC is a superior court established in terms of section 151 of the LRA. Since its inauguration in 1996 the LC's main office has been housed in the Arbour Square building in Braamfontein, Johannesburg. By virtue of section 157 of the LRA, the LC has exclusive jurisdiction in respect of all matters that the LRA provides to be determined by the LC.[5] Furthermore, the LC

> has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right … and arising from --- *(a)* employment and from labour relations; *(b)* any dispute over the constitutionality 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.[6]

This means that any labour-related matters fall within the exclusive jurisdiction of the LC subject to the concurrent jurisdiction of the High Court

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5 These matters are provided for in s 191(5)*(b)* of the *Labour Relations Act* 66 of 1996 (LRA): "*(b)* the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is ---
(i) automatically unfair;
(ii) based on the employer's operational requirements;
(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

6 Section 157(2) of the LRA.

when there is a violation of a fundamental right deriving from employment or the constitutionality of conduct by an agent of the state as an employer.

There are eleven judges who serve the LC countrywide, with seven in Johannesburg, two in Durban and Cape Town respectively, and one in Gqeberha. The LC in Johannesburg is by far the busiest court as it covers six provinces, i.e. Gauteng, North-West, Limpopo, Mpumalanga, Free State and Northern Cape. Although the High Court in Polokwane and the Magistrates' Court in Pretoria have come to the rescue by allocating a courtroom to the LC, the LC in Johannesburg must detach a judge and personnel to attend to matters set down at those courts. This is compounded by the fact that Judge Moshoana is yet to be replaced since his permanent appointment to the High Court. Once more, in order to palliate his absence recourse is had to acting judges.

Operational mechanisms requires that each judge from a satellite court is required to sit in motion and trial courts in Johannesburg twice per term, with Johannesburg judges going in the opposite direction. This serves as a contingency measure to alleviate the burden on the Johannesburg judges. (The relevance of this is the subject of the next part of this article.)

Concerning staff, it is common cause that the LC, in general, is understaffed. The LC in the Gqeberha satellite office is run by the registrar, who serves both the LC and LAC although, as indicated above, the LAC duties are limited to receiving documents. An office manager runs the LC in Cape Town and Durban. Secretaries, as noted above, serve both the LC and the LAC.

In Johannesburg the front desk personnel, human resources and finance serve both the LAC and the LC. All these staff members work in a building that was initially meant to contain no more than 30 people. With a staff complement of close to 100, the lack of space is a major concern. In fact, the two floors of the seven-storey building are inadequate to house the LC. Five courtrooms are available to serve six judges. The lack of space also affects the filing room, which has reached its full capacity, resulting in files being stacked in corridors and in front of the fire escape exit of the building. As stated above, it will take some years to get rid of the files despite the introduction of CaseLines.

It is evident from the above that both the LAC and the LC are significantly affected by the shortage of staff, courtrooms, judges and office space. In the next section the article establishes how the impediments facing these courts impede the right to access to the courts.

4 Challenges hindering access to the Labour and Labour Appeal Courts

This article argues that, because of the smaller sizes of the satellite LCs in the other provinces, those courts face comparatively less severe challenges than those experienced at the main court in Johannesburg. Consequently the LC in Johannesburg may be viewed as representative of the broader systemic plight confronting the entire Labour Court structure as an institution. However, reference would be made where appropriate to the specific impediments faced by an individual court. Henceforth, reference to the LC should be construed to mean the Labour Court in Johannesburg unless the context dictates otherwise.

The preceding section of this article has demonstrated the extent to which the LAC and the LC are institutionally entangled in such a way that a physical walkthrough in the building is insufficient to dissociate one from the other. This expedient and unfortunate marriage has survived all these years, and the question on the mind of frequent users or staff is how long this forced marriage of convenience will be able to survive? Although the courts perform different functions, the article argues that their deficiencies render the LAC and LC inseparable and, on this basis, the article examines the challenges confronting both courts jointly because any attempt to dissociate them may lead to the inadequacy of subsequent solutions. Hence, the approach is to combine all the hindrances and make specific reference to only one court. At the outset, the study does not concern itself with the delay caused by parties.

The Labour Court is a superior court established in terms of section 151 of the LRA. It is a specialist court which is charged with the settlement of disputes emanating from the application and interpretation of the LRA. Furthermore, the statutory imperatives of the LRA dictate that disputes before the LC must be disposed of speedily and that delays in the finalisation of labour disputes undermine the primary objectives of the Act. An undue delay in the finalisation of disputes before the LC is detrimental to the interest of employees who must endure long periods without an income while their disputes are pending and is equally detrimental to employers who might be required to reinstate employees or retain a vacancy for an extended period, thereby interfering with their operational requirements.[7]

This article argues that the structural inadequacies of the LC have the effect of severely infringing upon the individuals' right of access to courts within the contemplation of section 34 of the *Constitution*. These structural

7 *Toyota SA Motors (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* 2016 3 BCLR 374 (CC) para 1.

inadequacies, as opined above, include the chronic shortage of judges and a lack of infrastructure and resources, which result in the delay in the finalisation of disputes before the court. This article thus argues that, despite the statutory imperatives of the LRA for the speedy resolution of disputes, the LC is unable to expedite the adjudication of disputes and that in certain circumstances the delays in the resolution of disputes result in the constructive refusal to resolve disputes and thus in an infringement upon the individuals' right of access to the courts.

It shall be further demonstrated that in certain circumstances disputes before the court await adjudication for such a long time that the relief sought may be moot when it is granted. This usually results from the delay in the enrolment of matters on account of a lack of infrastructure and further through the delay in the delivery of judgments owing to the lack of support structures for the judges of the court.

To illustrate the tardiness in resolving disputes, in the 2021/2022 financial year approximately 4,307 disputes were adjudicated in the LC. However, only 60% of those disputes were finalised.[8] It was also reported that as of July 2023 the court had approximately 116 judgments reserved for less than six months and 93 reserved for more than six months.[9] In the 2022-2023 financial year, the LC heard 3,512 matters and finalised 2,034 matters. Although the LC heard 18% fewer matters, it finalised 21% fewer matter when compared to the 2021/2022 period.[10]

The slow pace in the finalisation of disputes before the LC has been attributed to the lack of resources, including the inadequacy of structural support such as the chronic shortage of judges, and the failure to employ law researchers and judges' secretaries, etc. This lack of resources is clearly a significant factor hindering judges' abilities to perform their duties effectively.[11]

The situation is dire for the LC, which has a complement of 11 judges who are charged with the finalisation of approximately 4,000 matters annually. This has resulted in the court roll being clogged to such an extent that the court is unable to enrol new matters. As it stands, any litigant who lodges a motion proceeding or action proceeding in the LC now will get a date only at the beginning of 2027. The waiting period is about two years for a matter

8 Mbekezeli 2023 https://www.derebus.org.za/the-state-of-the-labour-court-and-the-need-for-interventions-to-improve-its-performance/ 1.

9 Marecia 2023 https://www.groundup.org.za/article/over-180-judgments-have-been-outstanding-for-longer-than-six-months/.

10 Office of the Chief Justice 2023 https://www.judgesmatter.co.za/wp-content/uploads/2024/09/Judiciary-Annual-Report-2022-23.pdf 31.

11 Office of the Chief Justice 2023 https://www.judiciary.org.za/index.php/judiciary/reserved-judgment-reports.

to find its way before a judge. This lengthy waiting period demonstrates that the paucity of judges detrimentally affects the hearing of a matter, thereby denying access to the court.

Although not on the same footing, the Commission for Conciliation, Mediation and Arbitration (CCMA)[12] has 155 full-time commissioners and 527 part-time commissioners, with Gauteng alone accounting for 58 full-time commissioners. In total, the CCMA has 682 commissioners conciliating and arbitrating disputes. Comparatively, the limited number of judges appointed to the LC constitutes a serious systemic failure that undermines the right to access to court enshrined in section 34 of the *Constitution*. The provision of only eleven judges, this article argues, makes a mockery of section 1 of the LRA, which enjoins that matters be heard speedily. How is it humanly possible to expect eleven judges to effectively deliver judgments without delay? To add insult to injury, the norms and standards expected from the judiciary, as per the Chief Justice's directive, indicate that judgment should be delivered within three months from the day the matter is heard.[13] A report by *Ground Up* reveals that the Johannesburg LC had the highest number of reserved judgments, with a total of 116 in 2022 and 42 in 2023 outstanding for more than six months.[14] In 2023 the LCs in Cape Town and Gqeberha had 24 and eight late judgments respectively, a total of 74 judgments outstanding for more than six months. During the 2022-2023 financial year, the LC delivered 33% of its judgments more than three months after their hearings.[15]

Considering that a third of arbitrated matters from the CCMA and bargaining councils[16] are referred for adjudication in the LC, even without taking

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12 The Commission for Conciliation, Mediation and Arbitration (CCMA) is established in terms of s 112 of the LRA to resolve through conciliation and arbitration employment-related disputes.

13 GN 147 in GG 37390 of 28 February 2014 (Norms and Standards for the Performance of Judicial Functions) s 5.2.6.

14 Marecia 2023 https://www.groundup.org.za/article/over-180-judgments-have-been-outstanding-for-longer-than-six-months/; Marecia 2023 https://groundup.org.za/article/over-260-court-judgments-outstanding-for-more-than-six-months/.

15 Office of the Chief Justice 2023 https://www.judgesmatter.co.za/wp-content/uploads/2024/09/Judiciary-Annual-Report-2022-23.pdf 40.

16 Bargaining councils are established in terms of s 27 of the LRA to perform functions in terms of s 28, i.e. -

(a) to conclude collective agreements;
(b) to enforce those collective agreements;
(c) to prevent and resolve labour disputes;
(d) to perform the dispute resolution functions referred to in section 51;
(e) to establish and administer a fund to be used for resolving disputes;
(f) to promote and establish training and education schemes;
(g) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;

matters that fall within the exclusive jurisdiction of the LC into account, this article argues that the number of judges appointed to serve the country is woefully inadequate. The LC receives approximately 12,000 matters annually, and the ratio of judges is blatantly disproportionate to the number of matters that come before the court. A contextual illustration is the court in Gqeberha, which since its inception has had only one judge. Even the rotational measure of sending judges from other courts to alleviate the burden on that judge has been found to be inadequate to prevent long delays in the delivery of judgments in that court. It is from this perspective that one is able to understand why Acting Judge Nontuthuzelo Mabenge has had judgments that are outstanding for more than six months.[17] Another example is the court in Durban, which since the retirement of Judges Cele and Gush functioned with only one judge until the appointment of Judge Allen-Yaman at the end of 2023.

At this juncture, this article opines that there is a two-stage delay process. The first delay occurs with the set down date. The shortage of judges means that the court is limited in the number of matters for which it can allocate a hearing date. Even when a judge finally hears a matter, the second delay kicks in. This is so because the judge probably has previously reserved judgments to attend to in addition to the latest reserved matter. Applying the first-in first-out principle, the probability that the last heard matter will be delivered last is high. It is beyond the scope of this article to engage in the debate about the deliberate inaction of judges. However, the article argues that the shortage of judges is a contributing factor to the systemic delay in the hearing and delivery of judgments in the LC. To illustrate, the Office of the Chief Justice reported that as of the beginning of term 3 of 2024 the LC in Johannesburg had the highest percentage of reserved judgments outstanding for more than six months, namely 19%, i.e. 43 out of 223 matters.[18]

As a palliative measure the LC appoints acting judges during the recess and term. Although this measure is adopted in an attempt to reduce the backlog, it is nevertheless inadequate. Acting judges are practitioners who return to

(h) to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;
(i) to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lockout at the workplace;
(j) to confer on workplace forums additional matters for consultation;
(k) to provide industrial support services within the sector; and
(l) to extend the services and functions of the bargaining council to workers in the informal sector and home workers."

17 Marecia 2023 https://groundup.org.za/article/over-260-court-judgments-outstanding-for-more-than-six-months/.

18 Office of the Chief Justice 2024 https://www.judiciary.org.za/index.php/judiciary/reserved-judgment-reports 3.

their normal work after their acting stints, and have to catch up with their usual work. As a result, delays in the finalisation of judgments occur. Parties become anxious while awaiting their judgments, and even incessant reminders to acting judges to deliver their reserved judgments are disregarded or ignored to the detriment of these parties. *Ground Up's* report[19] demonstrates that the appointment of acting judges does not really solve the problem of access to justice. The latest reported list of outstanding judgments in the LC revealed that acting judges account for the bulk of the reserved judgments. According to the latest figures, all judgments over six months in Cape Town and Durban were reserved by acting judges.[20] In Johannesburg 40 out of the 43 judgments older than six months were reserved by acting judges.[21]

The LAC, as mentioned above, has only four judges. Taking into account that a matter is heard by a panel of three, this means that only one panel of three can sit at a hearing. It is clear that the LAC also has a shortage of judges, and to alleviate this problem, acting judges are appointed from the High Courts to sit on the LAC. Delays similar to those experienced in the LC occur because, when the acting judges return to their divisions, they take time to deliver judgments. For instance, in the July 2023 report two reserved LAC judgments were reported to be outstanding for more than six months, while eighteen judgments were outstanding for less than six months.[22] During the same period in 2024 eight judgments were outstanding for less than six months and four judgments were outstanding for more than six months.[23] Such delay, this article argues, could have been averted had the LAC had enough judges to form at least two panels.

The shortage of judges is compounded by the lack of physical space for the hearing of the matters. Thus the Johannesburg LC has only six courtrooms at its disposal for the hearing of matters.[24] As discussed above, out of the six courtrooms, courtroom number six is reserved for the LAC. This means that judges in the LC have to stand their matters down while waiting for either court six or the next available court. This waiting period derails access to the court. A similar delay occurs in the LAC as panels cannot sit at the

19 Marecia 2023 https://groundup.org.za/article/over-260-court-judgments-outstanding-for-more-than-six-months/.

20 Office of the Chief Justice 2024 https://www.judiciary.org.za/index.php/judiciary/reserved-judgment-reports 21-22.

21 Office of the Chief Justice 2024 https://www.judiciary.org.za/index.php/judiciary/reserved-judgment-reports 22-25.

22 Office of the Chief Justice 2023 https://www.judiciary.org.za/index.php/judiciary/reserved-judgment-reports 4.

23 Office of the Chief Justice 2024 https://www.judiciary.org.za/index.php/judiciary/reserved-judgment-reports 4.

24 Mabuza 2023 https://www.timeslive.co.za/news/south-africa/2023-05-30-myriad-reasons-including-shortage-of-courtrooms-behind-backlogs-at-labour-court/.

same time in court without delaying the hearing in the LC. I witnessed during all my years in the LC only one instance wherein two panels sat at the same time on the same day. It was a chaotic day because the LC courtroom is designed to have only one judge, and this meant that the courtroom requisitioned to house the LAC had to be logistically re-equipped to suit the set-up of the LAC. In addition, the personnel assigned to assist the LAC had to leave their normal duties temporarily.

The above illustrates that the LC and LAC are hamstrung from giving effect to the objectives of the speedy resolution of disputes and, in effect, the vindication of the right to access to courts. The provisions of section 34 of the *Constitution* afford "every person the right to have any dispute which is capable of being settled through the application of the law decided in a fair public hearing before a court or in appropriate circumstances before another independent and impartial tribunal or forum."[25] In *Bernstein v Bester*[26] the Constitutional Court, in interpreting section 22 of the *Interim Constitution*,[27] which mirrored the provisions of section 34 of the *Constitution*, held that the purpose of these provisions is to afford protection to individuals and ensure the separation of powers, in particular the separation of the judiciary from the other organs of state. This entails that the courts and any other fora seized with the settlement of disputes must be independent and impartial. Furthermore, it was held that these provisions are fundamental to the maintenance of the rule of law, which is espoused in the founding values of the *Constitution*.

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[28] the court held that the rule of law is the fundamental principle of our constitutional dispensation. In *Affordable Medicines Trust v Minister of Health*[29] it was held that "in terms of section 1*(c)* of the Constitution, the rule of law is the founding value of the South African constitutional order." Currie and De Waal[30] argue that the principle of the rule of law encompasses "the right of every person to challenge the legality of every conduct or law and that the proper exercise of this right turns on the entitlement to have any dispute adjudicated by an entity", which is separate and independent from the alleged perpetrator of the illegality. The

25 Section 34 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).
26 *Bernstein v Bester* 1996 2 SA 751 (CC) para 105.
27 *Constitution of the Republic of South Africa Act* 200 of 1993.
28 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 56.
29 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 48.
30 Currie and De Waal *Bill of Rights Handbook* 704.

right to access to courts is an indispensable feature in a constitutional democracy founded on the rule of law.[31]

The premise of the right embodied in section 34 of the *Constitution* is the creation of institutional dispute-resolution mechanisms through access to courts or other impartial and independent fora.[32] It has been held that the right to access to courts not only encompasses the right to the settlement of disputes through impartial and independent institutions, but also includes the right to have disputes resolved without undue delay. This is so since the failure to dispose of a dispute without any undue delay directly interferes with the individual's constitutional right to access to courts.[33] This is especially so with respect to labour disputes since the statutory imperatives of the LRA demand that labour disputes must be disposed of expeditiously.[34] It is indeed the aim and objective of the LRA that disputes which arise from the Act must be resolved speedily and cost-effectively.[35] Thus, it is clear that public policy dictates that labour disputes must be disposed of expeditiously.[36]

Thus, in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*[37] it was held that the whole scheme of the LRA is aimed at cheap and accessible dispute-resolution procedures and access to courts. This presupposes the expeditious resolution of disputes since labour disputes invariably have serious implications for both the employer and employee. To this end Pillay AJ in *Mpanzama v Fidelity Guards Holdings (Pty) Ltd*[38] interpreted section 1(*d*)(iv) of the LRA, which provides for the effective resolution of labour disputes, to mean that such disputes must be resolved expeditiously.

The above judicial interpretation of section 1*(d)*(iv) of the LRA is of paramount importance, particularly to employees, since a dismissal and the resultant deprivation of income is likely to affect not only their survival but also the livelihood of their families and any relatives who rely on them. It is thus indefensible to compel employees to endure the rigours, hardship and

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31 *Rikhotso v Premier, Limpopo Province* 2021 4 BCLR 436 (CC) para 17.

32 Currie and De Waal *Bill of Rights Handbook* 704.

33 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 68.

34 *Martin & East (Pty) Ltd v National Union of Mineworkers* 2014 35 ILJ 2399 (LAC) 2405J-2506E.

35 *Road Accident Fund v Commission for Conciliation, Mediation and Arbitration* (unreported) case number J548/16 of 13 April 2016 para 5.

36 *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* 2005 5 SA 433 (SCA) para 43.

37 *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 3 All SA 466 (SCA) para 34.

38 *Mpanzama v Fidelity Guards Holdings (Pty) Ltd* 2000 12 BLLR 1459 (LC) para 10. Also see *Chemical Workers Industrial Union v Darmag Industries (Pty) Ltd* 1999 8 BLLR 754 (LC) para 39.

uncertainties attributable to undue delays in the finalisation of their disputes, be it at the enrolment stage or delivery stage. It is equally untenable to subject employers to such system failures.[39] At this juncture it is worth reproducing the *dictum* of the Supreme Court of Appeal in *Shoprite Checkers*:

> The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute-resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure.[40]

This article takes the view that structural impediments account for the systemic failure to afford the speedy finalisation of labour disputes referred to in *Shoprite Checkers*. This, the article argues, constitutes an infringement of the individual's right to access courts as entrenched in the Bill of Rights of the *Constitution*. The backlog prevailing in the LC causes delay in the adjudication of cases. The inability to allocate matters timeously results in litigants being compelled to wait for a period of approximately two years before their disputes can be set down for hearing before the courts.

This denial of expeditious adjudication may be construed as constituting a constructive refusal by the Labour Court to adjudicate disputes. A constructive refusal to adjudicate occurs in circumstances where there is an undue delay in the resolution of a dispute by a court.[41] This, in turn, constitutes a direct deprivation of individuals' rights to have their dispute resolved by an independent and impartial tribunal, which not only infringes the right to access in terms of section 34 of the *Constitution* but is also at odds with the rule of law, a foundational value of the *Constitution*. This is so because, for as long as the dispute is pending before the court, it cannot be said that the individual has access to an impartial and independent institution for the purposes of the settlement of the dispute. It is clear that where the finalisation of a dispute before a court "has been egregiously delayed", such a delay inevitably prevents the settlement of a dispute, which may, in effect, constitute an infringement of the right to access the court.[42] This is so since the very basis of the right is the settlement of justiciable disputes and an undue delay inhibits such adjudication.

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39 *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 3 All SA 466 (SCA) para 34.

40 *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 3 All SA 466 (SCA) para 34.

41 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 71.

42 *Social Justice Coalition v Minister of Police* 2022 10 BCLR 1267 (CC) para 134.

In the *Social Justice Coalition* case[43] it was held that judges are bound by the provisions of section 7(2) read together with section 8(1) of Chapter II of the *Constitution*, which requires "the state to respect, protect, promote and fulfil the rights in the Bill of Rights." This entails that judges are duty-bound to ensure that disputes which are brought before them are disposed of fairly, in a public hearing and without undue delay. This duty is owed to every person who relies on the courts to attain justice and is a vindication of the right contemplated in section 34 of the *Constitution*. This means that the courts have a duty to adjudicate disputes without delay in compliance with section 72(2) read together with section 8(1) of the *Constitution* in order to vindicate an individual's rights in terms of section 34 of the *Constitution*. Thus, it is clear that the failure to adjudicate disputes without undue delay has the potential of infringing upon an individual's right to access to courts in terms of section 34 of the *Constitution*.

In the matter of *National Union of Metalworkers of South Africa obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)*[44] the employees referred a dispute of unfair dismissal to the LC on 18 August 2003. On 16 April 2007, some four years after the dispute was instituted, the LC issued an order reinstating the employees in their previous employment. However, at the time that the LC issued the order of reinstatement some of the employees had already passed away and the order became unenforceable vis-à-vis those employees.

The effect of the above was that those employees who had passed away did not have their dispute resolved prior to their demise, and thus their rights in terms of section 34 of the *Constitution* could not be realised. This case demonstrates how a delay in the finalisation of a dispute can result in the infringement of an individual's right to have a justiciable dispute resolved before an independent and impartial tribunal. In this case, as at the time that the dispute was eventually disposed of, the employees could no longer enjoy the fruits of the resolution of their dispute and thus, their right in terms of section 34 of the *Constitution* could no longer be vindicated.

The above illustrates that undue delays in the adjudication of disputes render moot the remedy of the court. The Constitutional Court's remark on the systemic delay in the resolution of disputes in the LC in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*[45] warrants being quoted in full:

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43 *Social Justice Coalition v Minister of Police* 2022 10 BCLR 1267 (CC) paras 137-138.

44 *National Union of Metalworkers of South Africa obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* 2014 2 BLLR 185 (LC).

45 *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 31 ILJ 273 (CC) para 47.

> If insufficient personnel numbers or financial resources cause delays in the conciliation, mediation and arbitration process under the CCMA, it should be addressed by the users of the system (employers and employees) in institutions such as the National Economic, Development and Labour Council (NEDLAC) and, if needs be, by Parliament.

It is these structural deficiencies which take centre stage in this article. It is unfortunate that some 15 years after Judge Van der Westhuizen's judgment in *Billiton Aluminium* we still experience the systemic delay in the finalisation of labour disputes. This article argues that the state of the Labour Courts has worsened since the *Billiton Aluminium* case because the waiting period for a court date is now almost two years.

5 Conclusion and recommendations

The right to access to courts entails the adjudication of justiciable disputes in a fair manner, in a public hearing and without undue delay. These elements of the right to access to court have proven to be unattainable in respect of disputes before the Labour Court owing to the delays in the enrolment and adjudication of disputes. These delays have been shown to be attributable to the chronic shortage of judges, courtrooms and human resources.

It is consequently imperative that more resources be dedicated to the extension of the Labour Court bench in response to the growing number of disputes which are referred to the court. This means that more judges must be appointed to the bench, which would go a long way toward alleviating the workload of the current judges of the court. It would also ensure that judges are able to deliver their judgments within a reasonable time owing to their having a manageable workload.

Associated with the shortage of judges is the lack of infrastructure which, as this article has demonstrated above, contributes to the delay in the adjudication of matters. This article proposes that the infrastructure of the court needs to be overhauled in order to adequately accommodate additional files, personnel and judges, thereby vindicating the individual's right to access the court. This requires an investment in court premises and other tools of the trade in order to assist the judiciary in the processing of disputes before the LC and LAC.

Furthermore, there is a need for investment in support structures for judges, including the employment of adequate researchers, judges' secretaries and other support staff in order to assist judges in the enrolment processes and the adjudication of disputes. This would free judges from administrative tasks, allowing them to dedicate their time and resources to judgment writing and this, in turn, would expedite the delivery of judgments.

Objectively, this study makes the following policy recommendations to address the systemic delay in the adjudication of disputes:

5.1 The Labour Appeal Court

The Labour Appeal Court, in terms of section 167 of the LRA, is a superior court that has authority, inherent powers and standing in relation to labour matters equal to those which the Supreme Court of Appeal has in relation to matters under its jurisdiction. Since the LAC is equal to the Supreme Court of Appeal, this article suggests the following:

(a) Appointment of judges:

  (i) appoint a Judge President and a Deputy Judge President;

  (ii) appoint ten permanent judges.

(b) Infrastructure: Separate the LAC from the LC. This would entail having a building with enough courtrooms (three or four), enough filing rooms and enough offices for the LAC. This building should mirror, to some extent, the building and structure of the Supreme Court of Appeal.

(c) Personnel: Increase the staff complement; i.e. align the appointment of secretaries to that of judges, and appoint more staff, clerks and law researchers, including an office manager in the Judge President's Office.

5.2 The Labour Court

(a) Appointment of judges:

  (i) appoint a Judge President and a Deputy Judge President;

  (ii) appoint fourteen judges in addition to the current number, i.e. ten more judges for Johannesburg, one for Cape Town, one for Durban and two for Gqeberha.

(b) Infrastructure: Relocate the Johannesburg LC to a building with at least seventeen courtrooms and enough filing rooms and offices to accommodate the personnel. This building should resemble the structure of a High Court.

(c) Personnel: Increase the staff complement, i.e. align the appointment of secretaries to that of judges; appoint more staff, clerks and law researchers including an office manager in the Judge President's office.

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List of Abbreviations

CCMA	Commission for Conciliation, Mediation and Arbitration
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1996