THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

1.1 Case : 383/2006
REPORTABLE

In the appeal between:

MURRAY, GLENVILLE FREDERICK	Appellant
and	
THE MINISTER OF DEFENCE	Respondent

Before:	Mpati DP, Cameron JA, Mlambo JA, Combrinck JA and Cachalia JA
Heard:	Monday 18 February 2008
Judgment:	Monday 31 March 2008

Employment law – dismissal – constructive dismissal – member of South African National Defence Force – constitutional right to fair labour practices applicable – common law contract of employment developed to include protection against constructive dismissal – intolerable conditions, created by employer, not enough – employer must be to blame for conditions – duty of fair dealing with employee –
breach of – employer refusing to return employee to former post –must inform employee fully of alternative

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Neutral citation: Murray v Minister of Defence (383/2006) [2008] ZASCA 44 (31 March 2008)

JUDGMENT

CAMERON JA:

[1] This is an appeal against a judgment of Yekiso J in the Cape High Court dismissing an action in which the appellant (the plaintiff) claimed damages from the respondent (the defendant) arising from his alleged constructive dismissal from the South African navy (I shall refer to the navy, the South African Defence Force (SADF) (later the South African National Defence Force (SANDF)), of which it formed part, and to the responsible Minister, cited in the litigation, equally as the defendant). There was a separation of issues in the trial court, and the only matter before us is whether the plaintiff is entitled to damages for constructive dismissal: the quantum, if any, stood over for later determination.

[2] After nine years in the South African Police, the plaintiff in 1984 joined the navy as a military policeman. He rose from his appointment as a petty officer to the rank of commander. When the events in controversy began, he was the officer in charge of the Simonstown military police station – the most senior policeman, and the only commissioned military police officer, in the navy. Year after year, his superiors in Simonstown

lodged appraisals that lauded his commitment, dedication and managerial ability, with attendant performance bonuses.

[3] Then, disastrously, it all turned sour. From 1992, the plaintiff came into bitter conflict with members of his unit whose accusations against him led to a series of investigations and courts-martial. There was a political tinge: for at least one of his antagonists (who, unlike the plaintiff. was black) invoked parliamentary influence against him. Despite this, none of the allegations culminated in any serious adverse finding. The navy nevertheless removed him from his post at Simonstown and declined to reinstate him. After more than two years in a supernumerary position at naval staff college in Muizenberg, and despite the navy offering him a senior staff officer's position in Pretoria, he resigned. At the time, he summarised his grievances thus:

> 'Since September 1992 I have been subjected to a board of inquiry, a procrastinated investigation carried out arbitrarily and with ignorance of my rights, as well as two courts-martial. After all these events, I have a clean disciplinary record as an employee of the SANDF. However, I have been removed from my post and placed in a position where, since March 1995 to date, I have been literally without a desk and have not received a single responsibility, task or function commensurate with my rank, experience, skills and expertise. I have been deprived of any prospect of aspiring to higher goals, of achieving any promotion or of furthering my career in the SA navy … For this I have not received any reasonable explanation.'

[4] His resignation took effect on 31 December 1997. Six months later, he issued summons claiming R2.97 million in lost income as a result of

constructive dismissal. The matter came to trial more than six years later. Evidence and argument were heard over twenty five court days in October and November 2004. After a further delay of sixteen months, Yekiso J delivered judgment in March 2006. He found that the employment relationship had not broken down irretrievably. Weighing each individual complaint the plaintiff advanced, he held that none of them rendered the plaintiff's position intolerable, or caused him to resign. He therefore dismissed the action with costs, including the costs of two counsel. This appeal is with his leave (which he granted subject to conditions; though these contained no effective restriction on the issues or evidence before us).

The applicable legal framework

[5] In arguing the appeal, the parties agreed on the legal framework. There is no directly applicable statute. The Labour Relations Act 66 of 1995 (the LRA) expressly excludes members of the South African National Defence Force from its operation.[1] Its expansive protections therefore did not cover the plaintiff in his employment with the defendant. However, section 23 (1) of the Bill of Rights (of which the LRA is the

[1] Labour Relations Act 66 of 1995 s 2, **Exclusion from application of this Act**: 'This Act does not apply to – (a) members of the National Defence Force; (b) the National Intelligence Agency; (c) the South African Secret Service.' The Basic Conditions of Employment Act 75 of 1997 s 3(1)(a) is to the same effect.

principal legislative off-shoot) provides that 'Everyone has the right to fair labour practices'. This includes members of the defence force.[2] The parties agreed in argument that the plaintiff was entitled to rely directly on this right, as also on the right to dignity,[3] which is a close associate of the right to fair labour practices.[4] However, it is in my view best to understand the impact of these rights on this case through the constitutional development of the common law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights,[5] the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those the LRA does not cover.

[6] This case involves the particular application of that duty where the employee terminates the contract of service. For formally the plaintiff

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[2] So applied in *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) and *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC).

[3] Bill of Rights s 10, **Human Dignity**, 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[4] See *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 27 per Nugent JA ('The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity … for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful'); *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 59 per Ngcobo J ('One's work is part of one's identity and is constitutive of one's dignity', and 'there is a relationship between work and the human personality as a whole').

[5] Bill of Rights s 39(2): 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

was not dismissed: he resigned. He did so, he said in his resignation letter of 11 June 1997, because the navy's 'continual unfair and ill-treatment' of him over the preceding two and a half years left him 'with no alternative'. The form in which the termination of service was clad cannot deprive him of his cause of action. That is the position under the LRA, and for the reasons that follow the position under the common law as constitutionally developed can be no different.

[7] The LRA, which confers 'the right not to be unfairly dismissed' (s 185), defines 'dismissal' to include the situation where 'an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee' (s 186).[6] This provision made statutorily explicit what the jurisprudence of the industrial court and the labour appeal court had already achieved under the unfair labour practice dispensation, which Parliament introduced in 1979:[7] that unjustified conduct on the part of an employer that drives an employee to leave should be treated as a dismissal, even where, in form, it is the employee who resigns.[8]

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[6] Labour Relations Act 66 of 1995 s 186, **Meaning of dismissal**, '"Dismissal" means that – (a) an employer has terminated a contract of employment with or without notice; … (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'.

[7] For the history, see Brassey and others *The New Labour Law* (1986) pages 10-14.

[8] See the statement to this effect in E Cameron, H Cheadle and C Thompson *The New Labour Relations Act* (1988) p 144, endorsed in *Howell v International Bank of Johannesburg* (1990) 11 ILJ 790 (IC) 795C-D, *McMillan v ARP&P Noordhoek Development Trust* (1991) 2 (3) *SALLR* 1, *Amalgamated Beverage Industries (Pty) Ltd v Jonker* (1993) 14 *ILJ* 1249 (LAC)1248H-I, and *Jooste v Transnet Ltd* (1995) 16 *ILJ*

[8] The term used in English law, 'constructive dismissal' (where 'constructive'[9] signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion), has become well-established in our law. In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences. When the labour courts imported the concept into South African law from English law in the 1980s, they adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal.[10]

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629 (LAC) 639A-B. In *Jooste*, Myburgh J pointed out in reviewing the history of the concept that constructive dismissal is not found in the common law, the Labour Relations Act 28 of 1956, or (at that time) in any other South African statute; but that the industrial court had wide jurisdiction to determine unfair labour practice disputes concerning an 'employee'; and that the employee's resignation must therefore not have been intended to terminate the employment relationship.

[9] *Oxford Dictionary of Law* (4 ed, 1997) under 'constructive': 'Describing anything that is deemed by law to exist or to have happened, even though that is not in fact the case'.

[10] Lord Steyn recounts the history of the implied term in English law in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL) paras 58-61.

[9] In 1995 the LRA expressly codified unfair employer-instigated resignation as a dismissal. Even though that does not apply here, the constitutional guarantee of fair labour practices continues to cover a non-LRA employee who resigns because of intolerable conduct by the employer, and to offer protection through the constitutionally developed common law. If it is thus found that unfair conduct by the navy forced the plaintiff to resign, he would be entitled to damages for dismissal. This follows from the fact that all contracts are subject to constitutional scrutiny:[11] this includes employment contracts outside the LRA. Whether an employer dismisses such an employee in violation of the right to fair labour practices, or unfairly precipitates a resignation, is a matter of form, not constitutional substance.

[10] And it is no longer necessary under either the constitutionally developed common law or under the LRA to continue to invoke concepts such as repudiation (as was previously necessary)[12] to unmask the true substance of the parties' dealings.[13]

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[11] *Napier NO v Barkhuizen* 2006 (4) SA 1 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

[12] See for instance *Groenewald v Cradock Munisipaliteit* 1980 (4) SA 217 (E) 220E-G, summarising and applying nearly a century of authority (if employer unilaterally changes essential nature of employment agreement by down-grading status of employee's post, this amounts to a repudiation of the contract, entitling the employee to damages or compensation).

[13] As Trengove AJ put it in *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 47 that 'The codification under the LRA has amongst other things severed the link between constructive dismissal and wrongful repudiation of a contract at common law. It is now a statutory concept in its own right which does not need to retain its link to the common law doctrine of wrongful repudiation for its justification.'

[11] That substance, as was pointed out before the 1995 LRA, is that the law and the Constitution impose 'a continuing obligation of fairness towards the employee on … the employer when he makes decisions affecting the employee in his work'.[14] The obligation has both a formal-procedural and substantive dimension; it is now encapsulated in the constitutional right to fair treatment in the workplace.[15]

[12] In detailing this right, the parties freely invoked the carefully-considered jurisprudence the labour courts have evolved in dealing with unfair employer-instigated resignations under the labour relations legislation of the past three decades. These cases have established that the onus rests on the employee to prove that the resignation constituted a constructive dismissal: in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship.[16] Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and

[14] *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (199&) 18 *ILJ* 361 (LAC) 366A (Froneman J).
[15] See *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22 (CC).
[16] Concordantly with this, the LRA now provides in section 192, **Onus in dismissal disputes**, that in any proceedings concerning any dismissal, the employee must establish 'the existence of the dismissal', but once this is done, 'the employer must prove that the dismissal is fair'.

trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.[17]

[13] It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstances 'must have been of the employer's making'.[18] But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable.[19] More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'.[20] Culpability does not mean that the

[17]Some of the principal cases are *Amalgamated Beverage Industries (Pty) Ltd v Jonker* (1993) 14 *ILJ* 1249 (LAC) (Stafford J); *Jooste v Transnet Ltd* (1995) 16 *ILJ* 629 (LAC) (Myburgh J) (representing the culmination of the pre-1995 LRA jurisprudence of the labour courts); *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 *ILJ* 361 (LAC) (Froneman J); *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) (Nicholson JA); *Van Der Riet v Leisurenet Ltd* [1998] 5 BLLR 471 (LAC) (Kroon JA); *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2000) 21 *ILJ* 988 (Revelas J); *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) (Trengove AJ).

[18]*Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 50.

[19] As in *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (199&) 18 *ILJ* 361 (LAC) (employer proposing to change employee's conditions of service and basis of remuneration for well-justified operational reasons).

[20]*Jooste v Transnet Ltd* (1995) 16 *ILJ* 629 (LAC) 638I; *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) 985A.

employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.

[14] As will emerge (and here I differ respectfully from the trial court's findings), there can in my view be little doubt that at the time he resigned the plaintiff's position at work was intolerable,. There was equally little doubt that this was because of the navy's conduct. But behind this lies a more difficult question – did the navy have reasonable and proper cause for what it did in making the plaintiff's position intolerable? Viewed through the constitutional standard, did the navy, even though it made the plaintiff's position intolerable, act fairly in doing so? On the answer to that question this case turns.

The plaintiff's case

[15] The plaintiff was appointed commander of the military police station at Simonstown naval base in September 1989. His grief started three years later, when a petty officer under his command, Boois, alleged irregularities in the management of the station. The officer commanding (OC) the naval base, commodore De Vos, convened a two-officer board of inquiry to investigate. The board's findings vindicated the plaintiff, and castigated Boois, who, it found, 'committed misdemeanours in the

witness box': 'None of the allegations made by petty officer Boois could be substantiated', the board found, other than 'some minor incidents'. The board recommended a formal verbal reprimand to the plaintiff for swearing and other transgressions, but said that Boois should not only be transferred, but served with a formal written reprimand for the 'offence of unproven allegations'.

[16] Events intensified some months later, when the plaintiff charged another junior ranking under his command, Alben, with theft. The charge resulted in Alben's conviction in a civilian court and his discharge from the navy. But he returned to haunt the plaintiff when in September 1993 he 'confessed' to having been part of an alleged scheme, instigated by the plaintiff, to plant dagga in Boois's car the previous November, supposedly to avenge Boois's abortive complaints. Both Boois and Alben made their claims under oath. Their affidavits in hand, the navy within days convened a preliminary investigation. The plaintiff and two alleged co-planters were arrested and, while the investigation was under way, briefly barred from the naval work environment and ordered not to contact named witnesses.

[17] The investigation was held almost immediately. Its report cleared the three: their accusers, it found, had a motive to falsely incriminate them;

there were contradictions in their evidence; and the accused's questions to them revealed a reasonably possibly true defence. Given these considerations, the legal advisor at naval headquarters (HQ), commander Dunn, advised that charges be dropped because there was no prima facie case. Before the month's end, the chief of the navy, vice-admiral Simpson-Anderson, accepted this advice – and the plaintiff's commanding officer, De Vos, was formally told there would be no prosecution.

[18] But the descent into recrimination had already begun. Before even the preliminary investigation cleared him, the plaintiff had complained to lieutenant commander Curry, the senior staff officer for military policing in Pretoria (who was to become his friend and staunchest defender), that he was 'upset, humiliated and hurt' by the instruction to refrain from contacting witnesses. These complaints he repeated and elaborated in a memorandum to his OC De Vos, expressing the prescient fear that 'In spite of being cleared by both the board of inquiry and the preliminary investigation, … damage has been done to my credibility and to my reputation as a police officer and in my private life … [and] that there will always be doubt about me in the minds of my superiors in Pretoria, which is sure to affect my future career and promotion in the SA navy'.

He warned that he intended to seek legal advice (though at that stage he did not).

[19] But that was by no means the end of the dagga-planting claims: Boois retained attorneys, who challenged the decision to drop the investigation. They demanded to see the preliminary investigation record. Boois also invoked the support of an African National Congress-aligned member of Parliament, Mr Jan Van Eck. Almost certainly in response to this pressure, and notwithstanding Simpson-Anderson's already-announced decision not to prosecute, the navy sent a copy of the preliminary investigation to the adjutant-general (the defence force's most senior legal officer, who was the legal advisor to the chief of the defence force and the officer overseeing the legal sections in the various arms of the service). Contrary to the decision already taken, his office advised in December 1993 that there was indeed a prima facie case against the plaintiff and his fellow accused, and that they should be prosecuted. The three were again arrested. Navy HQ informed Boois's attorneys that while the navy refused to supply the preliminary investigation record, the plaintiff would after all be prosecuted.

[20] The court-martial took place in a blaze of media attention at the end of January 1994. Boois and Alben and two other witnesses testified. At the end of their evidence, Curry, representing the accused, applied for their discharge. When this was refused, they closed their cases without tendering evidence. This decision was vindicated when the presiding officer acquitted them all. So poorly did Alben fare in testimony that he was refused indemnity from prosecution.

[21] Despite being acquitted, the plaintiff felt deeply aggrieved. He recorded later that he experienced the media coverage as 'very psychologically damaging', because it 'portrayed me as a criminal'. The navy's written instruction to refrain from contacting witnesses treated him, he said, 'as a dangerous and criminal suspect'. Most crucially, however, in the light of later events, the plaintiff recorded that he felt aggrieved that navy HQ had failed to support him. As he explained in evidence, 'I felt that some sort of action should be taken in order to help restore my credibility'.

[22] Despite this controversy, the plaintiff in mid-1994 received a glowing performance appraisal from De Vos, and was awarded a merit bonus: he was 'an exceptionally trustworthy officer who is performing outstanding work'.[21] The appraisal reported that he had decided not to

[21] ''n Uiters betroubare offisier wat uitstekende werk lewer'.

take civil action against his accusers 'because of the further adverse publicity this will generate for the navy'.

[23] But trouble continued brewing amongst the staff under his command. The ink on the appraisal was barely dry when more controversy flared. It involved a sponsored golf day the plaintiff organised; the disposal by staff under the plaintiff of a set of lead diving weights that had been an exhibit in a theft case; and a weekend get-away that Curry booked at a resort to which he invited the plaintiff. Certain of the plaintiff's staff claimed that serious irregularities tainted all three events – and they expressed their misgivings and resentments to warrant officer McGrath. The plaintiff had had what he described as 'a particularly heavy clash' with McGrath, who was a military police warrant officer working under Curry at naval HQ, at about the time McGrath inspected the Simonstown station in November 1994 (which he gave a poor rating).

[24] McGrath returned to Simonstown in late November 1994, and collected affidavits containing complaints and allegations from disaffected members of the plaintiff's staff. In mid-December, navy HQ informed the plaintiff that a board of inquiry would be convened into the allegations against him. The officer appointed to investigate, colonel Van Den Raad, was a retired military policeman from the army, and the

navy chose him (Simpson-Anderson testified) precisely to ensure a measure of outside objectivity.

[25] Shortly before Van Den Raad started his investigation, the plaintiff was informed that he was to be promoted from lieutenant commander to full commander with effect from 1 January 1995. Although this was publicly announced, the navy moved to suspend the promotion pending Van Den Raad's investigation; but under pressure from the plaintiff's lawyers (and on counsel's advice) it relented in February 1995. Even though the plaintiff's OC, De Vos, who testified on his behalf, conceded that this step was normal and involved neither irregularity nor victimisation, the incident added significantly to the plaintiff's sense of grievance.

[26] The Van Den Raad investigation itself proved acrimonious and combative. It started with a confrontation in which the plaintiff claimed Van Den Raad expressed a determination to remove him from his post (De Vos testified that Van Den Raad said the same to him); the plaintiff himself walked out of their second meeting. In the last days of 1994, Van Den Raad filed an interim report that contained a damning assessment of procedures at the Simonstown military police station, and the plaintiff's lack of leadership and proper management, with (Van

Den Raad claimed) no crime prevention plan, no training, no standing orders and disregard of elementary procedures in relation to exhibits and the occurrence register. The plaintiff regarded Van Den Raad as not only ill-equipped to make these judgments, but biased against him.

[27] De Vos objected to navy HQ in January 1995 that as the plaintiff's OC he was not being kept informed of the investigation, and expressed concern that Van Den Raad was 'over-stepping his mandate'. Soon after, seven members of the plaintiff's unit made statements complaining about Van Den Raad's methods. The plaintiff himself handed to Van Den Raad a complaint he directed to navy HQ about Van Den Raad's manner of investigation, asserting that 'my rights as an officer and according to the Constitution have been violated' because Van Den Raad refused to give him a full description and itemisation of the proposed charges, offering instead only the provisions of the military discipline code (MDC) against which he said the plaintiff had offended. De Vos followed up these complaints in a letter to the chief of staff of navy personnel, commodore Du Toit, in March 1995, expressing his concern 'about the manner in which col Van Den Raad has conducted his investigation', and detailing the statements of complaint from the plaintiff's staff members.

[28] Du Toit had in the meantime decided that the plaintiff should be temporarily relieved of his command and placed on compulsory vacation leave pending the outcome of the investigation. (Of this step, too, the plaintiff later complained, 'I was yet again being portrayed as a dangerous criminal suspect who would interfere with the investigation'.)

[29] Stripped of his command, the plaintiff was appointed temporarily to a super-numerary position at the naval staff college at Muizenberg. Here, in a kind of living purgatory, he was to spend his time until he left the navy in December 1997. He was first appointed an assistant staff officer for research and development under commander Smith, but explained in evidence that the job lacked discernible content. (Du Toit countered that this was partly to assist the plaintiff to prepare for his second court-martial.) In March 1996, midway through the court-martial, the post was changed to logistician, with more defined and elaborated responsibilities (control over stores, budget and repairs, and responsibility for maintenance and new works by outside contractors). But the defendant conceded in written argument that the entire staff college posting was in various respects 'unsatisfactory'.[22]

[30] And undoubtedly the whole period at staff college was dismal for the plaintiff, who was assigned no office (having to squat perforce in that of

[22]'Dit was 'n tydelike en in verskeie opsigte onbevredigende pos.'

a secretary), was assigned no duties, tasks or challenges he felt he could undertake, and felt snubbed and slighted by his fellow officers. In May 1995, the college's OC, captain Kok, registered his concern that the plaintiff was then already 'becoming more and more demoralised while no meaningful tasks can be given to him to carry out'. The plaintiff testified that in April 1996 he was medically diagnosed with depression and put on anti-depressant treatment. This condition eventually led to a period in hospital in July 1997.

[31] Van Den Raad's probe led to a second preliminary investigation against the plaintiff, which commander Scheepers conducted in June 1995. Over his protests, the plaintiff was refused legal representation, as well as access to witness statements, whereupon he refused to cross-examine (although, when Van Den Raad testified, setting out a damning catalogue of maladministration and misjudgments, the plaintiff ventured to ask him whether he was sure that he was a military policeman, and whether he was acquainted with the rules of policing).[23] The plaintiff's complaints about the conduct of the preliminary investigation elicited support from both Smith (who voiced concern about 'the apparent disregard of commander Murray's rights') and Kok (who suggested that 'correct procedures' were not being followed).

[23]'Is u 100% seker u is 'n militere polisieman en ken u die reels van polisiering?'

[32] The record of Scheepers's preliminary investigation was sent to Simpson-Anderson in June 1995, but the plaintiff's objections to the process triggered an offer by the navy to re-open the proceedings, which the plaintiff through his attorneys refused. Simpson-Anderson decided in August 1995 that the evidence was sufficient to justify the plaintiff being arraigned before a court of law; but, fearing that the navy would be blamed for acting 'as a judge in a matter where its own interests were at stake', he referred the matter to the attorney-general of the Cape to consider a civilian prosecution. This proved abortive when the attorney-general replied that it would 'not be desirable' for the plaintiff to be prosecuted in a civilian court.

[33] The navy now convened a court-martial – the plaintiff's second in two years – but refused Curry permission to defend the plaintiff, on the ground that he might be implicated in certain of the charges (including the away weekend) and might be called as a witness. This became another enduring source of grievance to the plaintiff, even though he was ably defended by two other legally qualified officers. The plaintiff also complained that the navy's decision to appoint non-navy officers to preside at his trial was 'unusual and irregular', even though the navy

explained that it used them precisely to ensure fairness and impartiality in the trial of a senior officer within its ranks.

[34] At the court-martial, which took place in January and May 1996, the plaintiff faced eight charges. He was convicted on two (fraud arising from a statement he made justifying the use of false civilian number plates on a military vehicle; and failure to issue written delegations to his staff). He was fined R1 000. But he immediately appealed, and in August 1996 two independent review officers, Venter and Meyer, recommended he be acquitted (absence of proof of misrepresentation in regard to the use of the false number plates; and no lawful order, but only a 'guideline', that written delegations were required).

[35] One of the reviewers, Venter (an air force military justice officer), added a scathing assessment of what he clearly considered a fundamentally misdirected prosecution: it grasped, he said, at straws and revealed no criminal conduct – the criminal law should target criminals: it should not be used as a means to address administrative mismanagement, or to ensure that force members do their work properly.

[36] On 15 August 1996, Simpson-Anderson accepted the recommendation that the convictions and sentence be set aside. Now,

apart from the verbal reprimand of 1992, the plaintiff had been cleared of all charges. Even though the review officers had stated that he should as far as possible now be put in the position ‘as though he had never stood trial on any charges’ (and even though Kok started pressing for re-appointment instructions as soon as the court-martial concluded, and later urged that he be returned to his posting as officer commanding the Simonstown military police), the navy was chary of this. This was intimated to the plaintiff in a post-acquittal meeting with Du Toit on 13 September 1996. Riven with suspicion of the navy’s intentions, the plaintiff (who had asked for a meeting with Simpson-Anderson, and appeared to feel slighted that he had to meet with Du Toit instead) secretly recorded the conversation. Even though the hostile statements by subordinates had not secured any conviction against the plaintiff, Du Toit told him that to return him to the military police would be ‘very awkward’: ‘how can you have credibility and people’s loyalty’, he asked, ‘if those are the statements made about you?’ The awkwardness arose, Du Toit emphasised, ‘not because of what the court is saying, but [from] what your subordinates perceive to have transpired and what they have put in statements’. In a later confidential memorandum, Du Toit explained to the head of defence

force personnel that although the plaintiff was ultimately acquitted, the preliminary investigation had showed a prima facie case: in the result, the plaintiff 'was no longer suitable to act as head of naval police, since his credibility and competence to act as a police officer had been impaired, despite his acquittal'.[24]

[37] The plaintiff was guarded when Du Toit probed him about his availability for alternative postings, saying only 'I leave it up to you in the sense that I'm not prepared to commit myself at the moment'. In evidence, the plaintiff explained that he 'refused to make any input because of the way that the conversation went.'

[38] In the meanwhile, as De Vos conceded in evidence, the defence force underwent a major restructuring between 1994 and 1996, with the loss of large numbers of posts (Du Toit testified that naval personnel were cut from 10 000 in 1992 to 8 500 when he left in April 1999), while at the same time the former liberation movements' soldiers had to be integrated. The defence force budget was also being cut severely – by 14% in 1997 alone, Simpson-Anderson testified. In the period of the plaintiff's conviction, the military police were also subjected to a restructuring review (by Van Den Raad). The new structure took effect

[24] 'Die uitwerking hiervan egter is dat die lid nie meer geskik is om weer as hoof van die vlootpolisie te ageer nie, aangesien sy geloofwaardigheid en bevoegdheid om as polisiebeampte op te tree, ondanks die onskuldigbevinding, geknou is.'

on 15 July 1996, while the plaintiff was still at staff college, and shortly before his acquittal. The result was that the Simonstown post the plaintiff had held was down-graded to a lieutenant commander's post (or more accurately returned to its former rightful grading, since the navy's evidence showed that the plaintiff's promotion to the rank of full commander while in that post had been an error). This was done without consultation with the plaintiff.

[39] Ignorant of the fate of his post, the plaintiff persisted in his request for a meeting with the chief of the navy, but Du Toit was again assigned to meet with him on 1 October 1996. Dunn and Curry also attended this meeting. The plaintiff was informed that in the eyes of his superiors he had no further career as a military policeman in the navy. Instead, he was offered a senior staff officer's (SSO) position in Pretoria as head of 'protection services'. The alternative would be for him to accept a voluntary severance package. The SSO position in charge of military police was out of the question (it later went to Van Den Raad). Without inquiring further as to what the SSO protection services offer would entail, the plaintiff abruptly left the meeting. The offer was confirmed in writing just over a week later, but rejected in a letter from the plaintiff's attorneys on 1 November 1996.

[40] In evidence, the plaintiff explained that he consulted Smith, to whom he reported at staff college, but made no other inquiries about the job. Smith advised him that the navy was setting him up for failure and that accepting the post would ‘be a career suicide move’. Cross-examination established that the plaintiff took no steps to follow up, investigate, explore or consider the details of the post offered: but the evidence also showed that neither Du Toit nor any other naval management officer made any effort to explain the post to the plaintiff, or to allay any apprehension on his part and thereby persuade him to take it.

[41] The scene was now set for the plaintiff’s departure from the navy, for neither side – senior management on the one, and the plaintiff on the other – took further steps in relation to an alternative posting. The plaintiff remained at naval staff college. On 28 October 1996, the plaintiff’s attorneys wrote at length to the defendant, setting out the plaintiff’s complaints and claiming that the navy had ‘virtually destroyed his naval career and left him with no meaningful future in the navy’. The letter stated that the circumstances ‘would justify a finding that there has been a constructive dismissal’ of the plaintiff, and demanded ‘compensation’ for what it called ‘a great injustice’.

[42] In May 1997, Kok recorded that it was becoming 'increasingly more difficult to utilise' him: a decision on his re-appointment or future utilisation was 'urgently needed'. On 11 June 1997, the plaintiff tendered his resignation from the navy. After some final disputation, it took effect at the end of that year, leading to this litigation.

Assessment of the plaintiff's case

[43] The plaintiff plainly endured hardship during the investigations into his conduct and the two court-martials he faced. His last years in the navy were truly miserable. Despite all the steps taken against him, he emerged with a record formally clear of any stain, save for the 1992 verbal reprimand. From his testimony (including a taxing cross-examination) he emerged as an honourable man who became deeply burdened by his sense of grievance against the navy. Yet it seems to me that the navy established in most respects that its management of the plaintiff's employment was substantially fair. In one crucial respect, to which I shall return, it did not.

[44] The plaintiff complained that the navy's decision to prosecute him on the dagga-planting charges was politically tainted, and that he was not given a chance to make representations before it reversed its initial

decision. Given its timing, the reversal was almost certainly prompted by political considerations. That does not mean that it was 'tainted'. The navy and the defence force of which it is part are significant national institutions, which rightly face scrutiny in how they deal with discipline and complaints. The navy in my view had ample justification not to ignore Boois's and Alben's allegations, or to dismiss them summarily because of doubts about credibility and motive. The decision to air the charges in a public trial was taken in the interests of showing the public – and, more specifically, Boois – that the navy would deal fairly and fully with allegations made under oath against a senior insider.

[45] The plaintiff's own words were not far from the mark: the prosecution, he protested, was 'a political move to show them that all is fair and well in the navy'. Precisely so: but with justification. All organs of state – not least the defence force, which had been the mailed fist of apartheid – were under intense scrutiny in the transitional era of 1994, and the navy can in my view not be faulted for being responsive to that pressure in its management decisions.

[46] Nor did the proceedings rest on thin air. A prosecution must have at least 'a minimum of evidence upon which [the accused] might be convicted'.[25] That minimum has for long been understood in our law to

[25] *S v Lubaxa* 2001 (2) SACR 703 (SCA) para 19 (Nugent AJA for the court).

be 'such information as would lead a reasonable man to conclude that the [accused] had probably been guilty of the offence charged'.[26] Prosecution may be justified if there is a prima facie case, consisting in allegations, supported by statements and real and documentary evidence available to the prosecution, of such a nature that if proved in a court of law through admissible evidence, should result in a conviction.[27]

[47] That the defendant had. Two affidavits implicated the plaintiff in the dagga-planting incident; one from a witness who claimed that the plaintiff had suborned him to falsify evidence and pervert the administration of justice. Despite the questions surrounding Boois's credibility, and Alben's motive, the existence of the affidavits was a powerful pointer to the necessity for a public airing. The bizarre nature of the conflicts and allegations emanating from the plaintiff's unit from 1992 meant that it was neither unfair nor unreasonable to ignore their claims. Simpson-Anderson testified without challenge that this was 'the worst allegation that I had heard of regarding an officer in the navy'. As he put it to Dr Eileen Murray, in a sympathetic response to an angry letter of complaint (the first of three) she directed to him, as the

[26] *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) 136A-B per Schreiner JA.
[27] Du Toit et al *Commentary on the Criminal Procedure Act* Revision Service 38, 2007, I-4M to I-4O.

plaintiff's spouse, 'the cold facts had to be aired to ensure that truth and justice prevailed'. The decision to proceed, however distressful to the plaintiff, was in my view not unfair or unreasonable.

[48] The navy's failure to consult the plaintiff before reversing its decision also does not seem to me to have been unfair. The preliminary investigation gave him a full opportunity to rebut the charges – indeed, his effective use of that opportunity was what led the navy to conclude, initially, that there should be no prosecution. The decision as to whether there should thereafter be a prosecution was one for his employer, the navy, to make within the overall operational situation that confronted it. This included responding to the political pressure Boois applied. Given the affidavit evidence at its disposal, it was not obliged to consult the plaintiff before reversing its decision. It had a duty to deal fairly with the plaintiff. In the politically charged situation it faced, it did not breach that duty, despite doubt about the complainants' veracity and motives, by deciding after all that the allegations against him had to be aired in public.

[49] The plaintiff's complaints about Van Den Raad's investigation also seem to me to lack foundation. Van Den Raad was brought in from outside because the navy was determined to grant the plaintiff fairness

and objectivity. Though the plaintiff clearly felt persecuted, there is no evidence even remotely suggesting any conspiracy or malevolent intent against him – and during the trial his legal team rightly abandoned any suggestion that ‘any member of naval HQ’ conspired ‘to damage’ him. Van Den Raad came down hard on the plaintiff, who disputed his means and his conclusions; but that was an incident of a fairly initiated process for which the plaintiff’s employer cannot be blamed. And the plaintiff for his part did what an employee aggrieved in such a situation is entitled to do: he complained (indeed he did so volubly and repeatedly).

[50] That Van Den Raad’s resultant report contained a veritable catalogue of dubious practices, mismanagement and procedural oversights that required some sort of managerial response was not disputed at the trial. The report confronted naval top brass with a further operational dilemma involving the plaintiff: how to deal fairly and effectively with a senior employee accused of mismanagement and criminal misconduct. The navy’s lawyers recommended a prosecution, and though that decision was later questioned by other defence force lawyers, I do not think it was unfairly taken. At the least, the affidavits and circumstantial evidence available to naval management warranted a prosecution in the

use of false civilian number plates on cars under the plaintiff's control – even though that charge, like the others, did not ultimately stick.

[51] It is beyond question that the plaintiff's ensuing years at naval staff college were wretched. He had nothing to do, and did it in an atmosphere of marginalisation (he testified that he felt 'shunned' and 'sidelined'). For that his employer was responsible but not to blame. The decision to relieve him of his command pending the second court-martial was – as the plaintiff's own witnesses perforce conceded – neither irregular nor unusual. Suspension on full pay would have been worse, from the point of inactivity and marginalisation, yet the navy would have been justified, in my view, in taking that step. It cannot be faulted for taking the lesser step of assigning him alternative employment while the charges pended, even though it proved dispiriting.

[52] The plaintiff also attacked the navy's decision not to restore him to his post as commanding officer of the naval military police unit at Simonstown. It true that his complaint fails to appreciate the extent of the operational dilemma the disputes affecting him created for the navy. While the plaintiff was acquitted, a significant number of personnel reporting to him were willing to testify under oath that he had engaged

in improprieties of various kinds, some serious, in carrying out his command. The plaintiff and his witnesses pointed out in evidence that naval top brass failed to inquire at the base whether he would be welcomed back. But this was not for decision by ballot or opinion poll. Whatever the majority view might have been, the navy judged that the plaintiff's operating capacity as a military policeman (whether in Simonstown or in a senior staff posting in Pretoria) had been injured by the controversies surrounding him. That conclusion was in my view fairly justifiable.

[53] More dubious, however, was the navy's decision to down-grade (or re-grade) the post for the commanding officer at Simonstown from commander to lieutenant commander without consulting the plaintiff. The navy's evidence established that the plaintiff had been promoted on the erroneous supposition that the post carried the higher rank of commander. However, the fact was that the navy promoted him while he was the incumbent of the post. Without any consultation with the plaintiff (who was languishing at staff college), the restructuring of mid-1996 confirmed the lower rank. The navy therefore argued that it was operationally inappropriate for the navy to re-assign the plaintiff to Simonstown. That may ultimately have shown to be the case, but the

navy reached the conclusion unprocedurally: fairness required that it consult the plaintiff before re-grading the post he occupied. Instead he was presented with a unilaterally (and therefore unfairly) effected fait accompli.

[54] That brings the focus to the nub of the matter, which in my view concerns the navy's response to the resulting operational conundrum. The navy offered the plaintiff a job at HQ in Pretoria as SSO protection services. As previously stated, the plaintiff made no serious effort to investigate the ambit and responsibilities of the job, but declined it on advice from his reporting superior at the staff college, Smith. Thus advised, the plaintiff, suspecting that he was being set up, and convinced that what he thought the job entailed would lie quite outside his capabilities, rejected the offer.

[55] That was an error. But in my view the facts show that the navy committed a bigger error. It made no effort whatever to explain the job to the plaintiff, to illuminate its parameters and challenges, and to engage him in a process that would enable him to consider it properly. The navy's decision not to return the plaintiff to his post presented it with a classic reorganisation or rationalisation problem. Given the outcome of both court-martials, the decision not to return him to his post

involved no fault on the plaintif's part. In these circumstances the law clearly places a duty on the employer to consult fully with the employee affected and to share information to enable him to make informed decisions. The navy did not fulfil this responsibility until after the plaintiff resigned.

[56] This observation warrants elaboration. Explaining the job offer was anything but superfluous. The job the navy proposed for the plaintiff was an entirely new position, carved out from a previous post that embraced both 'protection services' and 'amphibious warfare'. Navy staff referred colloquially to the old post simply as 'SSO protection services'. The plaintiff thought his new duties would embrace amphibious warfare, for which he had neither suitable qualification nor inclination. He was wrong. But his misperception was both understandable and reasonable. And the navy never put him right. Nor did it make any effort to ensure that he knew what he was being offered, or what it would require of him.

[57] What is more, the navy was prepared to offer the plaintiff the benefit of what Du Toit called 'a bit of cross-training'[28] as well as the benefit of head office support (it was willing as Du Toit expressed it to 'hold his

[28] ''n Bietjie kruis-opleiding'.

hand' for a while).[29] None of this the plaintiff knew, and no effort was made to communicate it to him. It is true that he walked out of the meeting with Du Toit on 1 October 1996 without taking matters further. But in the circumstances that prevailed, the navy was in fairness not entitled to sit back and let matters stall there. Given the background of management decisions (albeit operationally justified) that had brought the employment relationship to that impasse, it had a duty in fairness to do more.

[58] Instead, it seems the navy expected the plaintiff to resign. That is why Du Toit's follow-up letter formally offering the SSO post also stated that 'if your decision is to leave the SA Navy it can be done in one of the following manners', setting out three severance and retirement options (none of which proved applicable to the plaintiff). This was neither malicious nor unrealistic, since the relationship had long become acrimonious, and the plaintiff's sense of grievance and anger must have been palpable to all who dealt with him, particularly Du Toit.

[59] Despite this, the navy owed the plaintiff more. While management was not to blame for the eighteen months of unhappy ennui he endured at staff college, while the charges were pending, what he suffered because of its (justified) operational decisions was a material factor that

[29]'Om die term te gebruik, sy hand vas te hou vir 'n rukkie om hom leiding te gee'.

should have directed its decisions in managing his prospects once he had been acquitted. The officer commanding staff college had warned the chief of the navy as early as May 1995 that the plaintiff was 'demoralised' and under 'severe strain'. Fifteen months later that condition was certain to have been compounded. The plaintiff's subjective condition of suspicion, demoralisation and depression, which was evident to those dealing with him, was materially relevant to how fairness required the navy to deal with him. His condition meant that an unexplained offer of a new post was likely to be rejected. The lack of explanation, follow-up and elucidation did not constitute fair dealing.

[60] Significant here is the reinstatement principle. Absent reasons justifying a different outcome, fairness required the plaintiff to be returned to his military police command. This court has held that an unfairly dismissed employee suffers a wrong that requires 'the fullest redress obtainable', which in the absence of countervailing reasons is the restoration of the previous position.[30] This principle applies also when an employee is removed from his post for operational reasons. When the operational reasons no longer exist, fairness by default

[30] *National Union of Metalworkers of SA v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) 462I-J, per Nicholas AJA for the majority.

requires reinstatement. The default position was thus that fairness required that the plaintiff be returned to his post.

[61] The navy in fact had justification for not returning the plaintiff; but what it did to convey that to the plaintiff, and to enable him to accept the alternative it offered, were woefully inadequate. In short, Du Toit's unexplained and unelaborated offer of the SSO post did not constitute the bona fide consultation the law required of the navy.

[62] Du Toit testified that he could see no reason why the plaintiff should not still have been in the navy: he blamed the breakdown entirely on the plaintiff's failure to investigate and accept the offer. On this evidence we must accept that, had the plaintiff investigated the offer properly, he would still have been employed by the navy. But to require the plaintiff to investigate and research a post that was not explained to him puts the responsibility where it does not belong. Since the navy was unwilling to return him to his previous position, fairness required that it explain the basic ambit and responsibilities of what it offered instead, together with the support it envisaged in assisting him to adjust.

[63] In my view (which Du Toit's evidence supports), had the navy adequately and fairly explained the post to the plaintiff, and the back-up it offered, his position would not have been intolerable. (He certainly

was consistent in expressing his wish and determination to stay in the navy, though on just terms.) Its failure to do so means the operating cause of the plaintiff's resignation was the navy's conduct.

[64] I am all too aware that this conclusion is based on hindsight. Fair dealing as required by the constitutional right to fair labour practices is hard to pinpoint, and involves retrospective judgments made on documentation and evidence that stretch far back – in this case over more than a decade. But one must counter the sense that the navy has been found wanting against an intangible and unpredictable standard by positing that it is hard to avoid the impression, at the end of all the evidence and memoranda and letters and pleadings, that the plaintiff was hard done by. It is not hard to perceive, with more than a decade's distance, why and how things went so painfully sour in this employment relationship. To any slight or injury, the plaintiff reacted with not muted, but insistent, loud and even strident complaint. He blamed the navy for each and every one of his ills, without seeking to shoulder any responsibility for the breakdown of trust and confidence between him and, on the one hand, many of those under his command at the military police base, and, on the other, naval top brass. And it is not hard to see

why Du Toit, in particular, might have thought in good faith that the navy would be better rid of him.

[65] But after more than two years of purgatory at staff college, the navy was not entitled to leave the plaintiff under a material misapprehension as to what it offered him instead. In overall assessment, the preponderant conclusion seems to me inevitable that the navy did not deal fairly with the plaintiff.

[66] The trial court's judgment omitted to reach this conclusion because in my respectful view it fragmented each of the plaintiff's complaints, considering them one by one in isolation, concluding in relation to each that they neither were pivotal to his resignation nor rendered his position intolerable. When one considers the case as a whole, however, the conclusion is hard to avoid that the navy breached its duty of fair dealing in the denouement of his acquittal in the second court-martial.

[67] The defendant argued, and the trial court found, that the plaintiff did not resign because his position had become intolerable, but because he wished to claim compensation for the injury he felt he had suffered at the hands of the navy, and because he was advised that to do so he would have to resign. If correct, this would mean that the causal

impetus for the resignation was not that the plaintiff's position had become intolerable, but that he desired to claim compensation even though it had not. I cannot endorse this argument. There is some basis for concluding that the plaintiff heeded legal advice that resignation was a necessary precursor to a claim for compensation. But that does not mean that his position was tolerable, or that the desire for compensation was the main operating factor in his decision. He testified that he wanted to remain in the navy, but on terms that gave him justice and fairness. The correspondence makes it clear, as does the plaintiff's lengthy 'redress of wrongs' affidavit, which he penned after his resignation, that he considered himself simultaneously entitled to compensation for injury and in an intolerable position in his employment, both because of the navy's conduct. The navy's refusal to compensate him resulted in a stalemate. He did not forfeit his claim because he was intent on being compensated, and decided that therefore he had no alternative but to resign.

[68] In the result there is an order as follows:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the trial court is set aside.
3. In its place there is substituted the following order:

(a) The plaintiff is entitled to such compensation as he may prove for constructive dismissal by the defendant.

(b) The defendant is to pay the costs, including the costs of two counsel.

E CAMERON
JUDGE OF APPEAL

CONCUR:
MPATI DP
MLAMBO JA
COMBRINCK JA
CACHALIA JA