REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

SITTING AT DURBAN

CASE NO: D1038/98

In the matter between:

PHILIPPUS LODEWICUS SCHOLTZ	Applicant
and	
THE MINISTER FOR SAFETY AND SECURITY	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	Second Respondent
THE PROVINCIAL COMMISSIONER, KWAZULU-NATAL, OF THE SOUTH AFRICAN POLICE SERVICES	Third Respondent
SUPERINTENDENT ND NTOYI	Fourth Respondent

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J U D G M E N T

(1) The Applicant is a career police officer and holds the rank of Superintendent in the South African Police Services ("the SAPS"). Since 1 June 1996 he had been the unit commander of the Natal Midlands unit of the National Intelligence Task Unit ("the NITU"). With the restructuring of this unit and it being renamed the Violence Investigation Unit ("the VIU") the Applicant was replaced by the present Fourth Respondent, Superintendent N Ntoyi, on 2 October 1998 and transferred to the office of the Midlands KwaZulu-Natal Area Commissioner. It is this transfer, as well as the alleged failure by the First to Third Respondents to give reasons and supply information relating to the

Applicants replacement by Superintendent Ntoyi, that has brought about to the present application.

(2) The Applicant seeks an order in the following terms:

"1. Declaring the actions of the Respondents' in failure to furnish information requested by the Applicant and/or relevant to the Respondents' decision to transfer the Applicant to be unlawful and unconstitutional;

2. Declaring the actions of the Respondents in failing to provide the Applicant with the reasons for the Respondents' decision to transfer the Applicant to be unlawful and unconstitutional;

3. That the decision by the Respondents to transfer the Applicant from his position as Commander be and is hereby reviewed and set aside;

4. The Respondents are ordered forthwith to provide written reasons for their decision to transfer the Applicant;

5. The Respondents are ordered forthwith to provide the Applicant all material information relevant to their decision to transfer the Applicant;

6. The Respondents are ordered forthwith to reinstate the Applicant in his former position within the South African Police Services on conditions no less favourable to him than those enjoyed by him at the time of his transfer;

7. The Respondents are ordered to pay the costs of this Application;

8. The Applicant is granted such further and/or alternative relief in its

application dated 17 December 1998 as to this Honourable Court deems meet."

(3) In dealing with the facts Mr Swain, who appeared for the Applicant, asked me to find that the papers as a whole place a big question mark over the bona fides of the Respondents and that for this reason the Applicant's version must be accepted. Because of the ultimate view that I take as will appear from this judgment I intend to, except as I will indicate below, approach the matter applying the normal test where there is a dispute of fact on affidavit. The following is what then emerges.

(4) The NITU was established to deal in the main with political violence. The Richmond area was particularly troublesome and it is this area that the Midlands unit of the NITU was principally involved with. By July 1998 the situation in Richmond had flared up again with the result that the First Respondent called a meeting in Pretoria for 12 July 1998 to urgently deal with the matter. After being given a report on the situation the First Respondent requested urgent proposals as to the way forward.

(5) After a meeting between the First Respondent and Director Nkabinde of the KwaZulu-Natal SAPS with (then) Deputy President Mbeki, Director Nkabinde on 12 August 1998 submitted a comprehensive proposal to the Second Respondent in which he suggested that the previously deactivated Investigation Task Unit (the "ITU") be re-established. This was because it appeared that the NITU was unable to adequately address the progressively worsening situation. He was unable to determine the precise cause for this inability but stated that it was common knowledge that the NITU units did not enjoy the co-operation of the communities in which they were deployed. The

new unit would then also absorb the Provincial Project Team which had investigated political massacres prior to the 1995 elections. Command of the unit would be centralise under a Provincial Commander.

(6) This proposal was largely taken up in a report dated 10 September 1998 to the Second Respondent in which the structure and mandate of the new unit was set out. The intention was inter alia that all officers of NITU be transfer to the new unit. The Second Respondent approved this recommendation on 16 September 1998 as follows:

"1. Approved

2. D/Comm's Schoeman, Pruis and Asst. Comm Williams were tasked to insure that the incumbents (especially the Commander of the Midlands Unit) are the best possible quality detectives".

(7) In a letter dated 28 September 1998 Director Nkabinde then informed the different NITU Units in KwaZulu-Natal of the new situation. Paragraph 2 of this letter reads as follows:

"2. The National Investigation Task Unit is now closed and is replaced by the Violence Investigation Unit (VIU). The members attached to the NITU are automatically transferred to the VIU.

2.1 Members who do not desire to be part of the VIU must indicate in writing their preferences where they would like to be placed. This must be done on or before 1998/10/02.

2.2 The only change in the VIU is the Commanders for VIU Durban and Midlands.

2.2.1 NO. 0488481/7 Supt EN Masinga will be the new Commander for VIU Durban.

2.2.2 NO. 0513536.2 Supt ND Ntoyi will be the new Commander for VIU Midlands."

(8) The endorsement by the Second Respondent of 16 September 1998 must have been preceded by his verbal approval. I say this because the Provincial Commissioner for KwaZulu-Natal endorsed the recommendation of Director Nkabinde already on 10 September 1998 and the following day he issued a directive to the affect that the establishment of a Violence Investigation Unit for KwaZulu-Natal had been approved by the Second Respondent. In this document he gives details of this unit and also refers to the fact that Superintendent Ntoyi, the Fourth Respondent, had been appointed Commander of the Midlands unit.

(9) This changeover from the NITU to the VIU was then the result of extensive consultations and discussions both at National and Provincial level in order to find a solution to the violence problem, particularly in the Richmond area. Here it was found that the lack of success of the NITU was largely the result of the local community having no faith in the police. This was then also stated by Assistant Commissioner Truter in paragraph 13 of his answering affidavit:

"During these discussions and consultations, there was general consensus that

the problem lay not with the quality of the detective work but with the fact that the community had no faith in the police service and the unit headed by the Applicant. They had also demanded the removal of the Applicant from the area. All of this was common knowledge. The Applicant knew of this."

(10) Although claiming that the Applicant knew what was going on, what stands out to me is how vague Truter becomes, in an otherwise detailed affidavit, when it comes to the Applicant's inclusion in all that was going on relating to the re-structuring. The Applicant claims that he was kept in the dark. This being the case, one would have thought that Truter would for instance have put up minutes of meetings showing the Applicants presence. There is none of this.

(11) According to Truter he visited the NITU offices on 3 September 1998. At this meeting, according to him, the members of the unit were told about the decision to restructure the unit and the reasons for this. He presented them with an organogram setting out the new structure.

(12) He goes on to say that after the other members left he then told the Applicant that the Second Respondent had decided that he should be replaced as head of the unit. He told the Applicant that he was of the opinion that "that it was better for him to be removed from the political playground, where he had to put up with constant pressure." He suggested to the Applicant that there was a need for a staff officer at the provincial head office. He made this suggestion because he was under the impression that the Applicant lived in Pinetown. When the Applicant told him that he lived in Pietermaritzburg he then discussed with him the possibility of transferring him to the office of Senior Superintendent Delport, the area head of Detective Services in the

Midlands. He would then be second in command to Delport. He went on to tell the Applicant that he should think about these suggestions and then revert to either him or Delport.

(13) The Applicant insists that all that took place at this meeting was that Truter suggested that it might be better if he, the Applicant, got out of the political arena. He goes on to say that he did not understand what was meant by this suggestion.

(14) I cannot accept that the Applicant was told by Truter on 3 September that he was to be replaced by the Fourth Respondent. The Applicant after all did nothing about it and simply went on leave. However, on his return on 2 November 1998 and on discovering that the Fourth Respondent had been appointed in his place, he immediately took the steps that I have referred to above. Had Truter informed him of his being replaced on 3 September already he would surely have done something about it then already. Furthermore, Truter only requested the Second Respondent on 3 September 1998 to appoint the Fourth Respondent in an acting capacity. The approval by the Provincial Commissioner of Director Nkabinde recommendation and the Second Respondent's approval only came thereafter.

(15) I accordingly find that the Applicant was not informed of his replacement by the Fourth Respondent and only found out about it when he returned from leave on 2 November 1999.

(16) But even if I am wrong, on the Respondent's own version the Applicant was not consulted before the decision was taken to transfer him. No reason is given for this failure. The approach in the answering papers is basically to the

effect that in terms of their conditions of employment all policemen can be transferred and that they know this. They also do not have a “fundamental right” not to be transferred. The affidavit of Truter then goes on to say the following:

"Nor can there be an interest or legitimate expectation not to be transferred where such transfer is not of a punitive nature."

(17) The suggestion then as I understand it is that unless the transfer involves some form of sanction the policeman concerned is not given an opportunity to be heard before the decision is taken. To this the Applicant in reply put up two letters which show the very opposite. There is no objection to this evidence and I accept these letters for what they are. The first one is a letter dated 14 January 1999 to a certain Sergeant Selolo. In it it is explained that due to a shortage of personnel his Area Commissioner was considering transferring him from Tembisa to Norkem Park. The letter then continues as follows:

"6. Should you wish not to be transferred to SAPS Norkem Park you are afforded the opportunity to submit a representation stating your reasons and personal circumstances within three (3) days upon receipt of this letter. The representations must be handed to Captain Subbiah not later than 1999-01-22 at 10:00.

7. Should you not submit a representation within the specified time limit it would be assumed that you have no objection to the said transfer and your transfer will be finalised."

In the second letter, dated 26 January 1999, from the manager of legal services for the SAPS, North Rand, Adv TF Van Tonder, one finds the following paragraph:

"2. I confirm that the Acting Area Commissioner has decided to proceed with the process of transferring members of the Police Service in adherence to the audi alteram partem principle."

(18) Apart from Truter telling the Applicant that he was of the opinion that it was better for him to be removed from the "political playground", no reasons were given to the Applicant for his replacement and transfer. When the Applicant arrived from leave on 2 November 1998 to find the Fourth Respondent installed in his position, he immediately sent a fax to Senior Superintendent Delport protesting this and also asking for reasons. Delport replied on 5 November 1998 stating that he could not reverse the transfer. Delport did not give any reasons and simply referred the Applicant to the departmental procedures which he suggested he should follow if he had any grievance. The Applicant then handed the matter over to his attorneys who on the same day wrote to Delport demanding the Applicant's reinstatement and also asking for reasons for the decision as well as any underlying documentation. Nothing happened and a reminder was sent to Delport on 11 November. On 13 November Assistant Commissioner Reid of the SAPS legal services responded. Instead of supplying reasons and documents the attorneys were "advised that we are of the opinion that your client, as a member of the SAPS, must follow the internal remedies available to him which are contained in the SAPS Grievance Procedure Regulations." Further correspondence followed which I do not propose setting out in detail. Suffice to say that the actual reasons and the underlying documentation to which I

have referred were only filed in response to the bringing of this application. A bundle of documents was filed in terms of Rule 7A(3) on 3 February 1999 and the actual reasons were filed on 28 April 1999.

(19) The Applicant bases his relief on sections 32 and 33, as well as section 23, of the Bill of Rights in the 1996 Constitution.

(a) Section 23 (1) provides:

“(1) Everyone has the right to fair labour practices.”

(b) Item 23 of Schedule 6 to the Constitution provides:

"(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted -

(a) section 32(1) must be regarded to read as follows:

'(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights'; and

(b) section 33(1) and (2) must be regarded to read as follows:

'Every person has the right to -

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened".

(20) The first issue argued before me is whether section 157 of the LRA gives this Court jurisdiction to grant this relief. Sub-sections (1) and (2) read as follows:

"(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that else where in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 3 of the Constitution of the Republic of South Africa, 1996, and arising from -(a) employment and from labour relations;

(b) in respect of 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;

(c) the application of any law for the administration of which the *Minister* is responsible."

(21) Section 157(1) gives the Labour Court exclusive jurisdiction in respect of unfair labour practices which stand to be adjudicated by the Labour Court, including the residual unfair labour practices included in Schedule 7 which have to be adjudicated by the Labour Court. These are then procedures created to give effect to the fundamental rights entrenched in terms of section 23 of the Constitution. In respect of the other fundamental rights entrenched in the Constitution the Labour Court has concurrent jurisdiction with the High Court. See Denel Informatics Staff Association and another vs Denel Informatics (Pty) Ltd (1999) 20 ILJ 137 (LC) at 140G-141B.

(22) It was argued by Mr Soni, who appeared on behalf of the First to Third Respondents, that in order for this Court to have jurisdiction under section 157(2) to deal with alleged violations of the rights in sections 32 and 33 of the Constitution the relief sought must also fall within the ambit of section 23. In other words it must violate the right to fair labour practices. In this regard he has referred me to the judgment of the Constitutional Court in Shabalala and others vs Attorney-General of the Transvaal and another 1995 (12) BCLR 1593 (CC) at paragraphs 33 and 34 (at p.1607).

(23) Such an interpretation in my view firstly militates against the plain reading of section 157(2). It would also make the sub-section largely superfluous. As was stated in the Denel case at 140H, the High Court does not have unfair labour practice jurisdiction. This is the sole preserve of the Labour Court in terms of sub-section (1). This being the case, the concurrent jurisdiction referred to in sub-section (2) must refer to jurisdiction other than that already conferred on the Labour Court by sub-section (1).

(24) Such other jurisdiction then relates to violations of other fundamental rights, provided such violations relate to the matters described in sub-paragraphs (a), (b) and (c) of section 157(2). One of the rights protected in the Bill of Rights is the right to fair administrative action. If the alleged violation involves the State as employer, then the Labour Court has jurisdiction to deal with it in the same way as does the High Court. Such jurisdiction is then separate and distinct from the jurisdiction conferred upon the Labour Court under section 157(1).

(25) In Shabalala's case the Constitutional Court in the passage referred to

dealt with a general right to information, section 23 of the 1993 Constitution, and a species of that right as provided for in section 25(3). That is not the case here.

(26) The second issued is then whether on the papers the Applicant has made out a case for relief under sections 32 and 33 of the Constitution.

(27) In the Sixth Edition of Administrative Law Sir William Wade in the chapter entitled "The Right To A Fair Hearing" states the following at page 520:

"The classic situation in which the principles of natural justice apply is where some legal right, liberty or interest is effected, for instance where a building is demolished or an office-holder is dismissed or a trader's licence is revoked. But good administration demands the observance in other situations also, where the citizen may legitimately expect to be treated fairly".

(28) It seems to me that it is basically this right which is now entrenched in section 33(1) of the Constitution. As was stated in Administrator, Transvaal, and others vs Traub and others 1989 (4) SA 731(A) at 758G to I, fairness in the context of a legitimate expectation to be heard will depend on the facts of each case. This will include for instance the observance in the past of an established practice. See in this regard also Minister of Justice, Transkei vs Gemi 1994 (3) SA 28 (Tk AD). The right to procedurally fair administrative action must also be interpreted generously - Van Huyssteen vs Minister of Environmental Affairs and Tourism 1996(1) SA 283 (CPD) at 305G.

(29) The Applicant had been in charge of the Midlands unit since June

1996. He clearly had an interest in his transfer from the unit 2 years later. By all accounts this was a high profile police unit. His transfer to an unspecified post in circumstances where the unit's performance was being questioned must have been a clot on his record. The question mark placed over the unit's performance inevitably reflected in particularly on its commander. This is more particularly so where everything indicates that the failure by the unit was at least to some extent placed at the door of the Applicant. Why otherwise, one asks oneself, was he the only one in the unit that was replaced.

(30) This furthermore all happened against the background of the evidence of a practice that police officers be given an opportunity to be heard before being transferred. This evidence as I have pointed out is not disputed.

(31) In my view then the Applicant was treated unfairly. This in turn violates the Applicant's entitlement to procedurally fair administrative action as protected in section 33(1)(b) of the Constitution.

(32) Despite repeated requests the Applicant was not furnished with reasons for his transfer and replacement. Such reasons were only furnished after this application was brought and clearly in response to it. He is then also entitled to this part of the relief sought. This aspect has in any event not been seriously challenged before me.

(33) With regard to costs it seems to me that these should be borne by the First to Third Respondents. Although the Fourth Respondent opposed the application, he is before the Court as a result of an application for him to be joined which was made by First to Third Respondents. In all the circumstances it seems to me that he should not be burdened with a costs order.

(34) Certain of the prayers overlap. Also, the information sought has by now been provided. For this reason it would in my view suffice to declare the initial failure to supply such information to have been a violation of the Applicant's constitutional rights.

(35) There will accordingly be an order in terms of prayers two, three and six of the notice of motion, together with an order that First to Third Respondents pay the Applicant's costs, jointly and severally.

GH Penzhorn AJ

1. Matter argued on 29 October 1999.
2. Judgment delivered on - December 1999.
3. For the Applicant Advocate KGB Swain SC, instructed by Von Klemperer Davies and Harrison Incorporated of Pietermaritzburg.
4. For the First to Third Respondents: Advocate V Soni, instructed by the State Attorney, Durban.
5. For the Fourth Respondent: Attorney PR Falconer of Larson Bruorton and Falconer Incorporated of Durban.

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