THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 210/13

In the matter between:

THE PRESIDENT OF SOUTH AFRICA	**First Appellant**
MINISTER OF JUSTICE	**Second Appellant**
THE MAGISTRATES COMMISSION	**Third Appellant**
and	
MACHIEL FREDERICK REINECKE	**Respondent**

Neutral citation: *The President of RSA v Reinecke* (210/13)[2014] ZASCA 3 (28 February 2014)

Coram: Mpati P, Wallis, Petse and Saldulker JJA and Van Zyl AJA.

Heard: 17 February 2014

Delivered: 28 February 2014

Summary: Magistrate – appointed as relief magistrate – removed from work as relief magistrate and generally from performing judicial functions – claim for damages based on repudiation of contract of employment – whether magistrate an employee – whether magistrate can claim constructive dismissal.

ORDER

On appeal from North Gauteng High Court, Pretoria (Pretorius J sitting as court of first instance):

The appeal is upheld and the order of the court below is set aside and replaced by an order dismissing the plaintiff's claim. In both courts there will be no order for costs.

JUDGMENT

Wallis JA (**Mpati P, Petse and Saldulker JJA and Van Zyl AJA** concurring)

[1] In 1996 Mr Reinecke was appointed as a magistrate for the district of Germiston. Although Germiston was his headquarters his duties were those of a relief magistrate and he was sent to courts elsewhere in South Africa, both within and without Gauteng, to relieve magistrates who were indisposed, or absent, or to assist in clearing a backlog of cases. Sometimes he acted in regional courts and sometimes as head of a particular court. He lived in Pretoria. In September 2000, for personal and business reasons, his wife and children moved to a plot some 40 kilometres outside Rustenberg, and it was his intention to join them. As he was based in Germiston and spent most of his time in Gauteng and on the East Rand, he was initially unable to do so. Instead he went to live in Boksburg, whilst the bulk of the family's household effects were placed in storage.

[2] In October 2000 the Magistrates Commission advertised a number of posts for magistrates throughout the country including one at Randburg described as 'magistrate (relief)'.[1] Mr Reinecke applied for this post as, at that time, the Randburg court provided relief magistrates for the North West province and he expected to be undertaking relief duties nearer the new family home outside Rustenburg. He made it clear in his interview for the position that he did not want the post if it meant that he would be performing relief duties primarily in Gauteng. He was appointed as a magistrate in Randburg on 10 May 2001. However, his appointment was not a happy one and on 2 January 2002 he resigned, giving one month's notice.

[3] Mr Reinecke contended that his resignation was brought about by victimisation and discrimination against him by the chief magistrate at Randburg, a Mr Booi. He said that this rendered his working circumstances intolerable and lead to his resignation. He claimed that this was a constructive dismissal amounting to a repudiation of his employment contract, which he accepted, as well as an unfair labour practice. On that footing he sued the first appellant, the President of South Africa (the President), and the second appellant, the Minister of Justice and Constitutional Development (the Minister), for damages based on the difference between the earnings he would have enjoyed as a magistrate until his retirement at the age of 65 and his actual earnings from employment during that period. At the trial he calculated that this would amount to R9 460 270. His claim succeeded before Pretorius J, who awarded damages in that sum, together with interest and costs. The appeal is with her leave.

[1] The same advertisement included two other posts in Randburg that did not involve the performance of relief duties. Mr Reinecke did not apply for either of these posts.

[4] At the outset it is necessary to identify the legal basis for Mr Reinecke's claim as pleaded in the particulars of claim. He alleged that his appointment as a magistrate at Germiston gave rise to an 'agreement of employment' subject to conditions of service determined in the regulations promulgated under s 16 of the Magistrates Act 90 of 1993 (the Magistrates Act). He said that Mr Booi's conduct constituted a repudiation of the agreement between himself and 'the Defendant', without specifying which of the two defendants he was referring to, which repudiation he had elected to accept by way of his resignation. In addition to the damages claimed for loss of earnings there was a further claim for *injuria*, but that was not upheld at the trial and, there being no cross-appeal, nothing more need be said about it.

[5] Mr Reinecke's pleaded claim was therefore one for damages founded on the repudiation of a contract of employment, accepted by him and giving rise to financial loss in the form of loss of income. Counsel confirmed that this was the sole basis for the claim. This formulation of the claim raised the question whether Mr Reinecke was an employee of either the President or the Minister. They pleaded that he was a judicial officer, as contemplated in the Constitution, occupying a constitutional and statutory office. They denied that he was an employee of either of them, or that a contract of employment existed between him and either of them or the Department of Justice and Constitutional Development.

[6] One would have expected this issue, so clearly identified in the pleadings, to have been central to the conduct of the trial and the argument in both courts. Instead it appears to have attracted very little

attention at the trial and was not dealt with in the judgment. Nor was it addressed in the heads of argument and counsel were largely unprepared to deal with it in oral argument. Responding to questions from the bench they admitted that they had not anticipated that it would be necessary for them to do so. This leaves this court in the invidious position of having to deal with an issue of considerable importance for magistrates with very little assistance. That is to be deplored. Nonetheless it cannot be avoided.

[7] At the outset it is appropriate to record that this judgment deals with the position of magistrates in the period between 1996, when Mr Reinecke was first appointed, and 2002. More particularly it is concerned with the position during 2001 and 2002, which was when the critical events occurred. Nothing in the judgment affects the constitutional position of magistrates as part of the judiciary and the judicial authority of this country in terms of Chapter 8 of the Constitution. The narrow question is simply whether at that time magistrates were employees of the State in terms of contracts of employment. (It is not suggested that Mr Reinecke's situation was any different from that of any other magistrate.) A finding that they were so employed does not impact upon their independence, which is constitutionally guaranteed.[2] There are many examples of independent judiciaries in other parts of the world, such as Scandinavia, Germany and France, where the judges are employees of the State but nonetheless independent. The European Court of Justice[3] and the Supreme Court in England have recently affirmed that the requirement of judicial independence does not mean that part-time recorders in England and Wales cannot be workers in terms of directives

[2] *Van Rooyen & others v The State & others (General Council of the Bar of SA Intervening)* 2002 (5) SA 246 (CC) (hereafter *Van Rooyen*).
[3] *O'Brien v Ministry of Justice* [2012] IRLR 421 (ECJ) paras 39 and 51.

of the European Union dealing with employment matters, which apply to those who are employed under a contract of employment.[4]

[8] Historically in South Africa magistrates were employees of the State and part of the public service. Without needing to venture any further into historical matters s 1(2) of the Public Service and Pensions Act 29 of 1912 provided expressly that magistrates formed part of the public service. By contrast, s 1(6) of the same statute specifically excluded judges from the public service. That remained the position under successive iterations of the Public Service Act up to and including the Public Service Act 111 of 1984.[5] Since 1944 the Minister of Justice has appointed magistrates in terms of the provisions of s 9(1)*(a)* of the Magistrates' Courts Act 32 of 1944.[6] This power of appointment of magistrates, is now qualified by the provisions of the Magistrates Act, and has been held to be constitutionally valid.[7]

[9] The Hoexter Commission of Enquiry[8] recommended that magistrates be removed from the ambit of the public service and that their appointment, discipline and discharge be dealt with by advisory bodies consisting of judicial officers.[9] This led to the enactment of the Magistrates Act in 1993. That marked a significant development in regard to the position of magistrates. It established the Magistrates Commission (the Commission) as an independent body,[10] charged under

[4] *O'Brien v Ministry of Justice* [2013] UKSC 6; [2013] 2 All ER 1 (SC) para 34.
[5] The relevant statutory provisions were s 1(2) of the Public Service Act 27 of 1923; s 2(4) of the Public Service Act 54 of 1957 and s 2(5) of the Public Service Act 111 of 1984.
[6] Prior to that the Governor-General appointed magistrates.
[7] *Van Rooyen* paras 102-110.
[8] Commission of Enquiry into the Structure and Functioning of the Courts, part I of the Fifth Report (1983) para 4.4.1.
[9] *Van Rooyen* para 79.
[10] In *Van Rooyen* paras 36-74 the Constitutional Court considered the composition and functioning of the Commission and held that it is an independent body not under the control of the executive in the

s 4*(a)* with ensuring that the appointment, promotion, transfer and discharge of magistrates takes place without favour or prejudice. The Minister's power to appoint magistrates was qualified by s 10, which provided that he should only do so 'after consultation' with the Commission. Whilst that imposed no obligation on the Minister to make appointments in accordance with the recommendations of the Commission, as might have been the case had the provision been that appointments be made 'in consultation' with the Commission, it nonetheless required the Minister to be receptive to the views of the Commission.[11]

[10] The Magistrates Act imposed further important limitations on the powers of the executive in relation to magistrates. Their salaries were no longer determined solely by the Minister and the Public Service Commission, but by the Minister in consultation with the Commission and after consultation with the Commission for Administration and with the concurrence of the Minister of Public Expenditure (s 12(1)*(a)*). Three years later the need to consult the Public Service Commission was removed.[12] The conditions of service of magistrates were to be determined by the Minister by way of regulations (ss 11 and 16(1)) after receiving a recommendation from the Commission. Initially the role of

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person of the Minister. The Commission became nominally the third defendant in the action and the third appellant in the appeal but played no role in the proceedings.

[11] The difference between the two expressions is correctly described in the following passage from para 17 of the judgment of Griesel J in *McDonald & others v Minister of Minerals and Energy & others* 2007 (5) SA 642 (C): 'where the law requires a functionary to act "in consultation with" another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act "after consultation" with another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.' See also *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) paras 285 and 286 and *Van Rooyen* para 109.

[12] This has subsequently been further amended so that the President determines magistrates' salaries after taking into consideration the recommendations of the Independent Commission on the Remuneration of Public Office-bearers. However, that amendment occurred after the events that are in issue in this case.

the Commission in regard to the suspension and discharge of magistrates was limited to carrying out investigations regarding misconduct, continued ill-health or incapacity of magistrates with a view to the Minister taking a decision to suspend the magistrate and report to Parliament on whether the magistrate should be removed from office (s 4(1)*(f)* read with s 13(3)*(a)* of the Magistrates Act as originally enacted).[13] This was amended in 1996[14] to provide that the Commission could provisionally suspend a magistrate pending an investigation into the magistrate's fitness to hold office (s 13(3)*(a)*). The Minister could confirm that suspension if the Commission thereafter recommended that the magistrate be removed from office and if the Minister did so the Commission's recommendation would then be referred to Parliament for a decision whether to remove the magistrate from office (ss 13(3)*(aA)*, *(c)*, *(d)* and 13(4)).

[11] The Magistrates Act served an important purpose in that:

'What is clear from a study of the Act is that Parliament was concerned to grant to magistrates an independence and freedom from interference which they had not previously enjoyed and to that extent at least to bring their position and conditions of tenure and service closer to that of Judges.'[15]

In making provision for the establishment of the Commission, Parliament foreshadowed the provisions of s 109 of the Interim Constitution,[16] which read:

'There shall be a Magistrates Commission established by law to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates, take place without favour or prejudice, and that the applicable laws and

[13] The grounds for discharge of a magistrate were the same as those of a member of the public service and the process was similar to that which has applied to public servants since 1912, save that the Commission discharges the functions that the Public Service Commission discharged in relation to public servants.
[14] By the Magistrates Amendment Act 35 of 1996.
[15] *Government Employees' Pension Fund v Strydom* 2001 (3) SA 856 (SCA) para 20.
[16] Constitution of the Republic of South Africa, Act 200 of 1993.

administrative directives in this regard are applied uniformly and properly, and to ensure that no victimisation or improper influencing of magistrates occurs.'

This requirement was linked to s 96(3) of the Interim Constitution, which provided that no person and no organ of state shall interfere with judicial officers in the performance of their functions, thereby reinforcing the long established legal position of magistrates namely that, notwithstanding their position within the public service, in the performance of their judicial functions they were entirely independent and free of influence from the administration.[17] The Interim Constitution thereby strengthened the position of all courts, including the magistrates' courts, by providing them with institutional protection that they had previously lacked.[18]

[12] The Magistrates Act did not, however, put an end to the status of magistrates as employees within the general public service, although by making special arrangements in relation to them, it removed them from most of the provisions applicable to other public service employees in terms of the Public Service Act.[19] Had it terminated their status as employees that would have involved a radical alteration to the basis upon which they had been appointed as magistrates. It would have converted them from employees of the State to office bearers having no contractual

[17] *Schierhout v Union Government (Minister of Justice)* 1919 AD 30, where Innes CJ (at 42-43) said: 'The South Africa Act (sec. 101) regulates the tenure of office of Judges, who are removable only on an address from both Houses of Parliament; and Act 29, 1912, sec. 1 (3), by specially including magistrates in the Administrative and Clerical Division of the Public Service renders them amenable to its own disciplinary provisions. That does not mean that in the discharge of their judicial functions they are not absolutely independent. In the exercise of such functions they do not act as the servants of the Crown within the meaning of the Crown Liabilities Act. They perform duties imposed upon them by law, and the responsibility for their decisions rests upon them alone. They are judges, entitled to certain protection even against the consequences of their own error; and any attempt to influence them in the discharge of their magisterial duties, by any form of administrative pressure, would be most reprehensible. But it does not follow that they are free from censure or punishment for what in the case of an ordinary public servant would be misconduct, merely because it happens to be connected with their judicial office.'

[18] *Van Rooyen* para 54.

[19] At that time Act 111 of 1984. *Van Rooyen* para 79.

link to the State and dependent solely on public law remedies to enforce the rights vested in them by the Magistrates Act and the regulations made thereunder. If that was the purpose of the legislation one would have expected there to be clear language to that effect, as it would involve the removal of existing rights and their substitution by uncertain other rights. There is no such clear language in the Magistrates Act. On the contrary s 18(3), which is part of the transitional and savings provisions, provides that the conditions of service applicable to magistrates prior to the date of commencement of s 12 of the Magistrates Act[20] 'shall not be affected to his or her detriment'. This provision was protective of the established legal rights of magistrates appointed prior to that date.[21]

[13] As the following summary shows, the terms of the Magistrates Act also indicate that the relationship of magistrates, once appointed, and the State, as represented by the Department of Justice and Constitutional Development, continued to be one of employment under a contract of employment. I start with the objects for which the Commission was established. They were to ensure that the appointment, promotion, transfer and discharge or discipline of magistrates take place without favour or prejudice. Although the word 'appointment' is more appropriate to an office than an employment relationship, under regulation 3(1)*(f)* the appointment is initially probationary, which is characteristic of employment.[22] Promotion, transfer and discharge are typical of an employment relationship. Office bearers are not ordinarily subject to promotion or transfer. Salaries, rank and grade of magistrates were to be determined by the Minister in consultation with the Commission. Again

[20] 11 March 1994.
[21] *Gibbs v Minister of Justice* [2009] 4 All SA 109 (SCA) para 9.
[22] The initial appointment of magistrates is temporary and probationary and based on contract. In preparing this judgment I was furnished through the Commission with a copy of the contract that all persons newly appointed as magistrates are required to sign.

questions of rank and grade are typical of employment especially in the public service at any level of government. The manner in which magistrates could be removed from office was set out in s 13, and in s 16 the Minister was empowered on the recommendation of the Commission to issue regulations dealing with virtually every aspect of the life and work of a magistrate. This included not only terms and conditions of service but also the duties, powers, conduct, discipline, hours of attendance, leave and pension entitlements of magistrates.[23] The matters that can be dealt with by regulation cover every aspect of a conventional employment relationship.

[14] Although the Magistrates Act undoubtedly aimed at removing magistrates from the public service and to some extent certainly has achieved that, it is not clear that the severance has been complete. Under s 16(1)*(c)* the regulations may determine the 'creation of posts on the fixed establishment' and the 'number, grading, regrading, designation, redesignation or conversion of posts on the fixed establishment of any magistrate's office'. This is now dealt with under regulation 54 of the regulations.[24] The significance of this is that under s 1(1)(viii) of the Public Service Act 1984 the 'fixed establishment' meant the posts created for the normal and regular requirements of a department. Under ss 7(1)*(a)* and *(c)* the public service consisted *inter alia* of the posts on the fixed establishment. When that Act was repealed by the Public Service Act, 1994,[25] the composition of the public service was defined in s 8(1*(a)* as including persons who 'are employed … in posts on the establishment of departments'. Reference to the annual report of the Department of Justice

[23] In making regulations the Minister is bound by the recommendations of the Commission. *Van Rooyen* para 128.
[24] Regulations for Judicial Officers in the Lower Courts published in terms of s 16 of the Magistrates Act in GN R 361, GG 15524, 11 March 1994.
[25] Promulgated under Proclamation 103 in GG 15791, 3 June 1994.

and Constitutional Development for 2002, the year of Mr Reinecke's resignation, shows that there were 1761 posts of magistrate on the department's fixed establishment.[26] That does not suggest that magistrates have been removed entirely from the public service, much less that they have ceased to be employed by the State.

[15] What is more, when one reads the regulations actually promulgated in 1993 under the Magistrates Act one finds that there have been few dramatic changes to the actual working circumstances of magistrates. The Magistrates Act and regulations are substantially similar to the provisions of the Public Service Act 1984 and the public service code under the latter. A few illustrations will suffice. Section 4(1)*(a)*, which sets out the primary purpose of the Commission and the language of which is echoed in s 109 of the Interim Constitution, reflects the provisions of s 10(1)*(a)* of the Public Service Act 1984. Section 12(6), which provides that the salary of a magistrate shall not be reduced except by Act of Parliament, was taken over from s 28 of the 1984 Act and had counterparts in all earlier statutes governing the public service.[27] In some respects the regulations incorporate provisions of the public service regulations or the public service code, for example in respect of leave under regulation 38; leave gratuities under regulation 39; the use of official quarters under regulation 40(2) and certain provisions in regard to transport between the magistrate's home and place of duty under regulation 44. Magistrates are also members of the same pension fund and medical scheme as members of the public service. All these are *indicia* that, notwithstanding their whole or partial detachment from the public service, magistrates have not ceased to be employees of the State. There is accordingly substance to Mr

[26] The 2012 report reflects 1935 posts on the fixed establishment of the department.
[27] See s 22 of the Public Service Act 54 of 1957; s 14 of the Public Service Act 27 of 1923 and s 71 of the Public Service and Pensions Act 29 of 1912.

Reinecke's contention that from the time he became a magistrate he was an employee of the State.

[16] However, it is unnecessary to make a final decision in this regard, and perhaps unwise to do so in the light of the absence of full and proper argument, because that conclusion would not on its own serve to resolve the dispute in favour of Mr Reinecke. The reason is that any contract only arose after his appointment as a magistrate and was overlain with elements that derived not from contract but from the Magistrates Act and the regulations made thereunder. In advancing his claim Mr Reinecke sought to rely solely upon contractual elements of the relationship and to disregard the statutory elements governing his appointment and the basis upon which he could be discharged from his post. In my view that is impermissible. It is true that in *Mustapha v Receiver of Revenue, Lichtenburg* [28] this court held that relationships entered into under statutory powers or with statutory bodies could nonetheless, when disputes arose, be dealt with as being purely contractual in nature. However, that view was subject to a powerful dissent by Schreiner JA against the artificiality of the line being drawn between the exercise of statutory powers and the resultant contract,[29] and has subsequently been overruled.[30] The correct view is that one cannot divorce a contract arising from the performance of statutory functions and the exercise of statutory powers from its statutory background. Sometimes the contractual aspects will be crucial [31] and sometimes the statutory. Which are the more important will depend upon the facts giving rise to the dispute. When

[28] *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (AD) at 356G-357C. See also the discussion by Cora Hoexter 'Contracts in Administrative Law: Life after Formalism' (2004) 121 *SALJ* 595 at 602-604.
[29] At 347D-G.
[30] *Logbro Properties CC v Bedderson NO & others* 2003 (2) SA 460 (SCA).
[31] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA).

there is a breach of the basis upon which the magistrate's employment (in the broad sense) is regulated, if the magistrate is an employee of the State it will often be difficult to determine whether the remedies for that breach are to be found in contract or in public law.

[17] Mr Reinecke relied upon the fact that he applied for a post advertised as that of a relief magistrate at Randburg. He made it clear when interviewed by the Commission that he was only interested in being appointed to the position if it was a relief position and he would not be confined to performing relief duties in Gauteng. Had he discovered after being appointed as a magistrate in Randburg that he had been appointed to one of the posts advertised at the same time, but not involving relief duties or to some other post entirely, he would have been entitled to object. If his objection had been ignored there can be no doubt that he could have challenged the recommendation by the Commission and the decision of the Minister, under s 9 of the Magistrates' Courts Act, to appoint him to a post he had not sought. Subject to any possible obligation to follow the grievance procedures in the regulations, that challenge would have been advanced by way of judicial review in the high court. In other words he would have needed to resort to public law remedies, not contractual remedies, in order to resolve the issue. That example illustrates the point that the appropriate remedy for any grievance Mr Reinecke had, or any other magistrate might have had, relating to their appointment as a magistrate would ordinarily have been a public law remedy such as a mandamus, or an interdict or proceedings by way of judicial review, and not a contractual remedy.

[18] An example of a situation where a contractual remedy could possibly have been appropriate is furnished by the first complaint that Mr

Reinecke levelled at Mr Booi. Immediately upon his appointment as a magistrate in Randburg he lodged a claim for payment of a relocation allowance in terms of regulations 23(1)*(g)* and *(h)* of the regulations. Mr Booi took the view that the claim was unjustified because Mr Reinecke's wife and children had already moved to the new family home near Rustenburg before he even applied for the post in Randburg. Whether Mr Booi was right or wrong in that view is immaterial. There was a legitimate dispute over Mr Reinecke's entitlement to be paid this amount, which came to some R18 000. The dispute was over a simple financial claim for payment of an amount that was either due to him or not in terms of any contract of employment. There was no reason for him not to pursue it by way of a claim in the appropriate magistrates' court.

[19] What then was the appropriate remedy for Mr Reinecke's grievances in the present instance? He made various complaints about Mr Booi's conduct, but the straw that broke the camel's back came when Mr Booi summarily and without consultation, decided on 8 October 2001 that from that time on Mr Reinecke would no longer undertake relief work and his functions would be performed only at the Randburg Magistrates' Court. Flowing from that Mr Booi advised the regional office of the department to terminate payments of Mr Reinecke's standing advance and to recover past payments from his salary. The final blow was that when Mr Reinecke reported for work at Randburg he was not allocated any judicial work other than a few postponements and was required to undertake work of an administrative nature. In substance the judicial side of his work was removed.

[20] Such conduct on the part of the employer in a conventional situation of employment is a repudiation of the contract of employment.[32] It was argued on behalf of Mr Reinecke that it was equally the case in regard to his employment as a magistrate. There are however a number of difficulties with this argument. In the same way as his appointment had followed a statutory process with advertisement and interview leading to a recommendation by the Commission accepted by the Minister, the process for the discharge of a magistrate from service is a statutory one. At the time, that is, in 2001, it involved the following. First, the grounds of discharge were limited to misconduct, continued ill-health or incapacity to carry out the duties of the office efficiently (s 13(3)*(aA)* of the Magistrates Act)[33]. Second, discharge could only occur after an enquiry and recommendation by the Commission and the provisional suspension of the magistrate (s 13(3)*(a)*). Third, the Minister was obliged to accept the recommendation of the Commission (s 13(3)*(aA)*).[34] Fourth, the Minister had to place a report before Parliament giving the reasons for the magistrate's suspension (s 13(3)*(c)*). Fifth, Parliament had to resolve either to restore the magistrate to office or that the magistrate be removed (s 13(3)*(d)*) and the Minister was obliged to act upon that resolution and remove the magistrate.[35]

[21] It follows that the process for dismissing a magistrate was at the time (and remains) a statutory process. Non-compliance with any part of that process would have been remediable (and still would be remediable)

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[32] *Stewart Wrightson (Pty) Ltd v Thorpe* 1974 (4) SA 67 (D) at 77H-78H. This court expressly approved Miller J's approach in the subsequent appeal. *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (AD) at 951G-H. In *Union Government (Minister of Justice) v Schierhout* 1922 AD 179 at 184 it was held that similar treatment of a magistrate was degrading.

[33] This provision has subsequently been amended although the grounds for discharge remain the same. The section is referred to as it stood at the time.

[34] This is a power combined with a duty. *Van Rooyen* paras 181 and 182.

[35] *Van Rooyen* para 186.

at the instance of the magistrate by resort to the high court. It would, for example, have been open to Mr Reinecke to apply for an interdict restraining Mr Booi from implementing his decision to remove him from relief work and to prevent the removal of the allowance or any deductions being made from his salary by way of recoupment of past payments of the allowance. But these are public law remedies appropriate to the resolution of a public law dispute. They are not contractual remedies, which are not appropriate to such a dispute.

[22] Conspicuous in the provisions regarding the discharge of a magistrate is that the chief magistrate at the court where the magistrate is stationed has no role to play in it. In practical terms Mr Booi had no power to dismiss Mr Reinecke. How then can his conduct be invoked as constituting a repudiation of the latter's contract of employment as a magistrate? It would be entirely anomalous to hold that conduct by someone, who had no power to appoint or to discharge the magistrate, could nonetheless provide contractual grounds upon which the magistrate subjected to such conduct could terminate their appointment as a magistrate and claim damages. Yet that is the proposition that lies at the heart of Mr Reinecke's case. It could only be correct if Mr Reinecke had no other remedy available to him.

[23] I do not think that Mr Reinecke can contend that there was no remedy other than resignation available to him in response to Mr Booi's conduct. He had available, and used in relation to his financial claims, the grievance procedures laid down in the regulations to address this type of situation. If those were unsatisfactory he could have sued to recover the amounts due to him. He could also have taken any adverse decision by the Commission on review. He could have approached the high court for

interdictory relief in response to Mr Booi removing him from relief work and allocating him largely administrative duties. Those steps would have brought home to the Commission the seriousness of the situation and enabled it to take remedial steps to address the problems. Had the Commission disregarded his grievances, he could have sought a mandamus to compel them to deal with them. If Mr Booi's treatment of him caused the health problems of which he complained, an action for damages based on the failure of the employer to take reasonable steps to protect employees from suffering injury or ill-health in consequence of their working circumstances would have been available. He could have exercised, as he did, his right to take sick leave. In other words there were a number of remedies available to him to enforce his rights and resolve his grievances. I leave aside for present purposes whether he might have had remedies available under the Labour Relations Act 66 of 1995 (the LRA) as that raises other issues.

[24] It follows that, even if he was employed under a contract of employment, it would be inappropriate for Mr Reinecke to have the benefit of a contractual remedy sounding in damages in addition to the public law remedies that were already available to him. The recognition of such a remedy in this case would place him in a significantly better position than a conventional employee. For such an employee the acceptance of a repudiation of the contract of employment constitutes an unfair dismissal in terms of s 186*(e)* of the LRA.[36] A dispute over that dismissal must follow the procedures laid down in the LRA and the claimant's entitlement to relief is limited to at most the payment of two years' salary. Originally Mr Reinecke referred the dispute over his resignation to the CCMA on the basis that he had been constructively

[36] *Jooste v Transnet Ltd t/a South African Airways* (1995) 16 *ILJ* 629 (LAC) at 636-638.

dismissed. He sought an order restoring him to his former position as a magistrate in Germiston, alternatively payment of two years' salary. However, after a commissioner ruled in another case involving a magistrate that they were not employees as defined in the LRA, he abandoned those proceedings and brought the present action in which he claimed a loss of income over a period of thirty years.

[25] In argument counsel sought to justify this claim by reference to the decision of this court in *Fedlife Assurance Ltd v Wolfaardt*,[37] where it was accepted that the existence of remedies for unfair dismissal under the LRA does not exclude contractual claims or the pursuit of such claims in the ordinary courts rather than the structures of the LRA. However, the majority judgment in *Wolfaardt* was based upon a finding that the circumstances of that case – a purported premature termination of a fixed term contract of employment, accepted as a repudiation of that contract – did not fall within the definition of a dismissal in the LRA, more particularly within s 186*(b)* of that definition.[38] Neither that case, nor the later decision in *South African Maritime Safety Authority v McKenzie*,[39] considered the situation of a constructive dismissal falling within s 186*(e)* of the LRA.[40] Nor did they consider the problems surrounding claims for damages by former employees, calculated on the footing that, but for the alleged repudiation of the employment contract, the employee would have enjoyed secure employment until retirement. Such claims raise difficult questions of causation, remoteness and the proper method for

[37] *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA).
[38] Para 18.
[39] *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA).
[40] In *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58; [2012] 2 All ER 278 (SC) the Supreme Court, by a majority, held that a contractual claim based on a failure to observe the contractually agreed terms regarding procedures leading up to dismissal was precluded by the terms of the legislation that afforded a statutory claim for unfair dismissal.

computing damages.[41] In the present instance, for example, Mr Reinecke calculated his claim on the same basis as a claim for loss of earnings in a personal injury claim. That was manifestly inappropriate as was demonstrated when questions were posed in the course of the appeal about the validity of the allowances for contingencies. *Wolfaardt* does not provide support for Mr Reinecke's claim.

[26] In the circumstances the appeal succeeds and the order of the court below is altered to one dismissing the claim. As this is a matter involving the employment relationship in both courts there will be no order for costs.

M J D WALLIS
JUDGE OF APPEAL

[41] Catherine Barnard and Louise Merrett 'Winners and Losers: *Edwards* and the Law of Unfair Dismissal' [2013] 72 *CLJ* 313 at 335-340.

Appearances

For appellants:	M M Rip SC (with him Ms B Matlejoane) Instructed by: The State Attorney, Pretoria and Bloemfontein
For respondent:	N Davis SC (with him R Strydom and Ms L Coetzee) Instructed by: Combrink Kgatshe Inc, Rustenburg Rosendorff Reitz Barry, Bloemfontein.