



REPUBLIC OF SOUTH AFRICA

Of Interest to Other Judges

**THE LABOUR COURT OF SOUTH AFRICA,
IN PORT ELIZABETH
JUDGMENT**

CASE NO: P 40/14

In the matter between:

**THE POLICE AND CIVIL RIGHTS
UNION**

Applicant

**PRINCE BLOSSOM THULETHU
NGWEKAZI**

Second Applicant

MQOKOLELI DAVID MNYPHIKA

Third Applicant

BRENDA NTOMBI ZENELE NGXOWA

Fourth Applicant

and

THE MINISTER OF POLICE (N.O.)

First Respondent

**THE NATIONAL COMMISSIONER OF
POLICE**

Second Respondent

Heard: 12 May 2014

Delivered: 10 June 2014

Summary: (Review of administrative action of State in its capacity as employer under s 158(1)(h) of the LRA- Fitness boards convened under s 34(1)(l) not lawful in respect of a matter to be dealt with by way of disciplinary proceedings – decision to convene fitness boards in respect of one category of employees having criminal convictions reviewed and set aside as unlawful – partial cost award in view of overbroad relief sought).

JUDGMENT

LAGRANGE, J

Introduction

- [1] On 14 March 2014, the Honourable Ms Justice Lallie granted an order against the respondents, staying the implementation of decisions by the second respondent ('the National Commissioner') to take certain steps to tackle the problem of SAPS members with criminal records, pending the outcome of a review of those decisions. The review application was heard on 12 May 2014.
- [2] The decisions of the National Commissioner which the applicant trade union ('POPCRU') and three of its members wish to review and set aside as unconstitutional, void and without legal force or effect are the following:
- 2.1 the decision to convene a fitness boards in terms of section 34 (1) (l) of the South African Police Act, 65 of 1995 ('the Police Act') in respect of those members who have criminal records, and those who fall within the ambit of section 36 of the Act prior to 01 September 2013;
 - 2.2 the decision to require an investigation into all members who have been convicted of an offence and had been sentenced, as contemplated by section 36, and members who have criminal records prior to 01 September 2013;
 - 2.3 the decision to discipline members who are found unfit by the said fitness boards, as result of criminal records, and as contemplated by section 36 prior to 01 September 2013;
- [3] The applicants also seek declarations that the decisions mentioned:

- 3.1 be declared arbitrary and influenced by an error of law, and
- 3.2 be declared unjust, unfair and in violation of the disciplinary code of the South African Police Services.

- [4] Further, the applicants seek an order that the second to fourth applicants ('the individual applicants') are entitled to continue in employment with the first respondent on full benefits in terms of their contracts of employment.
- [5] Lastly, the applicant seeks the costs of the review proceedings and the interim application.

The main issues in dispute

- [6] The applicants do not dispute that the SAPS is entitled to dismiss officers who commit crimes. What they are challenging is the process which has been adopted to address the problem of SAPS members with criminal records, which they claim is grossly unfair and unlawful.
- [7] The applicants contended that the boards of fitness which have been established in terms of sections 34 and 36 of the Police Act to entertain representations from the members concerned as to "why they believe they remain fit to serve in the SAPS" cannot be utilised for the purpose of dealing with alleged misconduct. The respondents say they are not addressing a misconduct question, but a policy question about the fitness of members with criminal convictions to continue serving. As such, the claim is that the respondents are not empowered by those provisions to convene fitness boards to deal with disciplinary matters and the decisions are in conflict with the Disciplinary Procedures which are binding on the respondents.
- [8] In the cases of the three individual applicants, they were all convicted of offences of a minor or technical nature and none of them received prison sentences. The applicants also contend that the SAPS was aware of their criminal records. Moreover, in the case of the second applicant, who pleaded guilty to a charge of shoplifting, she had been subjected to a disciplinary enquiry and found not guilty, and in the case of the fourth respondent, her station commander declined to institute charges against her despite being aware of her conviction in a magistrate's court.

[9] The applicant argued that if they had been subjected to individual disciplinary enquiries, they would have been able to raise defences or make representations on such matters as:

9.1 the alleged incompetence of such disciplinary proceedings because of the delay between the alleged misconduct and the inception of disciplinary action;

9.2 the double jeopardy principle which precluded a second disciplinary enquiry into the same alleged misconduct;

9.3 the inconsistent application of discipline by the employer on account of its failure to take disciplinary action against employees with more serious criminal records, and

9.4 the appropriate sanction for such misconduct.

By instituting a Fitness Board inquiry, the applicants claim the Commissioner has deprived them of these rights of procedural fairness which they would enjoy if they were subjected to disciplinary proceedings instead.

[10] In any event, the applicants argue that the boards convened in respect of the individual applicants ought to be converted into disciplinary proceedings before imposing any sanction on them, even if it were competent for the Commissioner to invoke s34 (1)(l) of the Police Act to convene fitness boards to address the problem of serving SAPS members with criminal records. They contend that any such disciplinary proceedings must be ones contemplated in terms of section 40 of the Police Act. That section requires disciplinary enquiries to be instituted "in the prescribed manner" which the applicants state is set out in the SAPS disciplinary regulations.

[11] Further, they contend that section 36 of the Police Act only provides for the discharge of a member convicted of an offence if the member is sentenced to a term of imprisonment without a fine, which does not apply to the individual applicants.

[12] The applicants submit that the only form of misconduct for which SAPS members with criminal convictions might be disciplined in terms of the

SAPS disciplinary regulations contained in agreement 1 of 2006 of the Safety and Security Sectoral Bargaining Council, dated 2 February 2006, and the SAPS Disciplinary Regulations is the “commission of any common law or statutory offence”. If proceedings were conducted in terms of the regulations, the seriousness of the offence would have to be evaluated and the member would have rights to: receive information; be represented; lead evidence; cross-examine witnesses, and have an opportunity to lead evidence in mitigation and to lodge an internal appeal. By avoiding disciplinary processes, the individual SAPS members subjected to fitness boards are denied these rights of procedural fairness.

- [13] The applicants also contend that those boards which have been convened are not proceeding in compliance with the regulations governing such proceedings, in any event.
- [14] In addition, in the case of proceedings conducted by the board of fitness holding its proceedings in Zwelitsha, the applicants complained that hearings have been dispensed with and members have been confined to making written representations as to why their services should not be terminated on account of their criminal convictions.
- [15] Apart from *in limine* matters, including a jurisdictional challenge to this court's ability to consider the application, the respondent's main defence on principle is that no dismissals have yet taken place and the boards of fitness deal only with the disqualification of a member from the SAPS as a result of acquiring a criminal record, which is not a disciplinary matter. The respondents contend that: "Boards of Fitness are called upon to determine the fitness or otherwise of employees who appear before them on [a] policy basis, rooting out criminals in the SAPS, not on the basis of misconduct". While the respondents insist that no dismissals have taken place, they do not explain how 'the rooting out' will be implemented but as the inquiries all concern serving employees it is difficult to conceive of any uprooting process which would not involve the ultimate discharge of those found to be unfit to serve on account of their criminal record.
- [16] The applicants believe that in view of the comments made by General Mazibuko and the Minister, that a decision will be taken to 'discipline and

dismiss them' following the convening of their boards of fitness. The respondents simply dismiss this as conjecture on the part of the applicant's but nowhere do they state what process will follow the outcome of the enquiry. They do not undertake to follow the disciplinary process afterwards if they intend to discharge the members, nor do they allay any concerns that a possible outcome of a fitness board hearing could be that the members are discharged based on the board's findings, save to say that the boards of Fitness "do not dismiss members." In the respondents initial answering affidavit they effectively maintained that the fact none of the members subjected to the board have yet been dismissed by the SAPS was an adequate response.

- [17] In the respondents' supplementary affidavit, they were slightly more forthcoming in admitting that members may be discharged but that would not be an arbitrary decision and would follow due process but were unwilling to reveal what "due process" constituted in their view.

Background to the decisions of the National Commissioner

- [18] The following background to the dispute set out in the applicants' founding affidavit is common cause:

18.1 A two-year long audit by the SAPS as well as the Civilian Secretariat for Police has revealed that approximately 1500 members have criminal records and are still serving members of the SAPS.

18.2 The Minister announced in July 2013 that the audit had been completed after, according to him, following due process. The Minister then gave the National Commissioner "three months" to "act" on the outcome of the audit and requested feedback "on action" by the end of October 2013.

18.3 According to the Minister the process was "very complex" and "painstaking exercise" and it included auditing all the members of the SAPS. The minister is quoted as having said: "... it was protracted and took longer than anticipated because part of our approach on

this matter was to ensure that we exhausted all the avenues, be they legal, operational as well as labour relations aspects".

18.4 The minister was allegedly challenged by members of Parliament on the fact that he and the Commissioner and their predecessors had waited too long and had not timeously dismissed members from the service, when it was, or could have been, established that they had criminal convictions. The point was taken that it had taken two full years to discover that approximately 1500 members of the South African police service had criminal records.

18.5 In July 2013 the Minister indicated that "a legal process" would now be followed by him, and the National Commissioner. He then stated that: "this is a legal process where everyone will be given the opportunity to state his or her side of the story. That said, I resolved to root out any unwanted elements within the police and will never be deterred by anything, no matter how long and what it takes."

18.6 Although the respondents dispute whether the statement of the Minister is quoted within the context of the speech, they accept that the Minister indicated he had instructed officials to develop a "long term" strategy for discipline and related matters.

18.7 In late July 2013 the National Commissioner for Human Resource Management for the SAPS addressed a Parliamentary committee and said the following:

18.7.1 the figure of 1500 convicted members of the SAPS was based on information received in January 2010;

18.7.2 the audit was an ongoing process and annual feedback would be given;

18.7.3 a "board of fitness" had completed a "test case" and the remaining members would be evaluated in batches of 150; various provincial boards of fitness would start work in "mid--August 2013", and

18.7.4 the police did not have a firm date when the boards would complete their work, and suggested a "temporary date" of June 2014.

18.8 General Mazibuko was later placed under pressure in Parliament when the chairperson of the parliamentary committee, Ms A van Wyk, expressed concern that the deadline would ensure that criminals remain in the SAPS for another year and she indicated she would be writing to the minister requesting a "firm date".

18.9 Lieutenant-General S Makgali ('General Makgali') then advised the parliamentary committee that "employees cannot be dismissed summarily without following due process". He further stated that in certain cases where members had been before disciplinary panels and sanctions short of dismissal were issued those sanctions could not be overturned willy-nilly if it effectively meant Management would be in breach of the double jeopardy rule.

18.10 General Makgali stated that "Fitness Boards" would have to be convened "countrywide" in line with sections 34 and 36 of the South African Police Services Act to hear "representations as to why [the members identified] believe they remain fit to serve in the SAPS." He indicated this would be a lengthy process.

The Statutory Framework

The Police Service Act

[19] The fitness boards are purportedly convened in terms of the provisions of s 34(1)(l) of the Police Act. The whole provision reads:

"Inquiries

34. (1) The National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case, inquire into-

(a) the fitness of a member to remain in the Service on account of indisposition, ill-health, disease or injury;

(b) the fitness or ability of a member to perform his or her duties or to carry them out efficiently;

(c) the fitness of a member to remain in the Service if his or her continued employment constitutes a security risk for the State;

(d) the fitness of a member to remain in the Service in the light of a misrepresentation made by such member regarding a matter in relation to his or her appointment;

(e) the absence of a member from duty without leave for more than one calendar month;

(f) an injury alleged to have been sustained by a member or other employee of the Service in an accident arising out of or in the course of his or her duty, or a disease or indisposition alleged to have been contracted in the course of his or her duty, or any subsequent incapacitation alleged to be due to the same injury, disease or indisposition, or an indisposition alleged to have resulted from vaccination in accordance with this Act;

(g) the death of a member or other employee of the Service alleged to have been caused as a result of circumstances referred to in paragraph (f);

(h) the absence from duty of a member or other employee of the Service owing to illness, indisposition or injury alleged to have resulted from misconduct or serious and deliberate failure on his or her part to take reasonable precautions;

(i) the suitability, value and purchase of any property or equipment required for use in the Service or the suitability for further service of any part of property or equipment already in use in the Service;

(j) any deficiency in or damage to or loss of State property or any property in possession of or under the control of the State or a club referred to in section 62(3) or for which the State is responsible, or any property of a member or other employee of the Service which is alleged to have occurred in connection with the performance of his or her duties or functions in the Service, as

well as the liability of any person and the desirability to hold any person liable for such deficiency, damage or loss;

(k) any deficiency, loss, damage or expense occasioned to the State or a club referred to in section 62(3) as a result of the conduct of a member or other employee of the Service and any money or unpaid debts due by such member or employee to the State or such club as well as the liability of any person and the desirability to hold any person liable for such deficiency, loss, damage or expense; or

(l) any other matter which the National Commissioner considers to be in the interest of the Service.

(2) The National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case, investigate or lead evidence in an inquiry contemplated in subsection (1),

(3) The Minister may prescribe-

(a) the procedure applicable to an inquiry contemplated in subsection (1); and

(b) the circumstances under which such an inquiry may be converted or deemed to have been converted into disciplinary proceedings.

(emphasis added)

[20] Further, section 36 of the Police Act provides for the automatic discharge of serving members who are found guilty of an offence and sentenced to a term of imprisonment without the option of a fine. The section does however, permit such discharged members to seek reinstatement if their conviction or sentence of imprisonment is subsequently overturned:

“Discharge on account of sentence imposed

36. (1) A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be

deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.

(2) A person referred to in subsection (1), whose-

(a) conviction is set aside following an appeal or review and is not replaced by a conviction for another offence;

(b) conviction is set aside on appeal or review, but is replaced by a conviction for another offence, whether by the court of appeal or review or the court of first instance, and a sentence to a term of imprisonment without the option of a fine is not imposed upon him or her following on the conviction for such other offence; or

(c) sentence to a term of imprisonment without the option of a fine is set aside following an appeal or review and is replaced with a sentence other than a sentence to a term of imprisonment without the option of a fine,

may, within a period of 30 days after his or her conviction has been set aside or his or her sentence has been replaced by a sentence other than a sentence to a term of imprisonment without the option of a fine, apply to the National Commissioner to be reinstated as a member.

(3) In the event of an application by a person whose conviction has been set aside as contemplated in subsection (2) (a), the National Commissioner shall reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged.

(4) In the event of any application by a person whose conviction has been set aside or whose sentence has been replaced as contemplated in subsection (2) (b) and (c), the National Commissioner may-

(a) *reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged; or*

(b) *cause an inquiry to be instituted in accordance with section 34 into the suitability of reinstating such person as a member.*

(5) *For the purposes of this section, a sentence to imprisonment until the rising of the court shall not be deemed to be a sentence to imprisonment without the option of a fine.*

(6) *This section shall not be construed as precluding any administrative action, investigation or inquiry in terms of any other provision of this Act with respect to the member concerned, and any lawful decision or action taken in consequence thereof."*

(emphasis added)

It must be noted that the section does not apply to a member whose conviction and sentencing pre-dates their date of engagement by the SAPS since the deemed discharge takes place immediately following the handing down of sentence.

[21] Lastly, s 40 of the Police Act provides that Disciplinary proceedings may be instituted 'in the prescribed manner' against a member on account of misconduct. Clearly, the procedures for taking disciplinary action set out in the SAPS Discipline Regulations promulgated by the Minister¹ in terms of s 24(1) of the Police Act prescribe the manner in which disciplinary action should be taken.

Guidelines for fitness boards

[22] Guidelines on the procedure for conducting fitness boards have also been published, presumably by the Minister acting under section 34(3) of the Police Act. The stated purpose of the guidelines set out in clause 2 thereof is:

"To streamline and standardise the procedure which sets to establish rules and further provide quality assurance for

¹ No R 643, GG 9928985, dated 3 July 2006.

conducting of board of fitness to determine suitability/fitness of the employees to remain in the service as contemplated in section 34 (1) read with section 36 (4) of the South African Police Service Act, 1995."

(sic - emphasis added)

[23] The guidelines make provision, amongst other things, for:

- 23.1 an employee appearing before a board to be represented;
- 23.2 interpretation where required;
- 23.3 the contents of the convening notice;
- 23.4 the service of the convening notice on the employee at least 10 days prior to the board sitting;
- 23.5 the calling of witnesses and leading of evidence, and
- 23.6 the conduct of proceedings in accordance with the conduct of criminal proceedings, subject to the necessary changes, in cases where the conduct of the employee is the subject of the proceedings of the board.

[24] Although the Minister is empowered by section 34(3)(b) of the Police Act to prescribe (b) the circumstances under which such an inquiry may be converted or deemed to have been converted into disciplinary proceedings, it is noteworthy that this has not been done.

[25] The guidelines attribute no decision-making powers to the board of fitness, but anticipate findings and recommendations being made to the convening authority. Clause 3.6 of the guidelines makes it clear that the employee only has a right to challenge the outcome of the board of fitness by instituting review proceedings and that the finding of the board is not appealable.

The convening notices issued to affected members

[26] The notices convening the fitness boards in respect of individual members of the SAPS expressly state that each board is convened in terms of

Section 34(1)(l) of the Police Act. Further, the conviction cited in the notice as giving rise to a particular board being convened in respect of a member is prefaced in the following terms: “Reg 34(1) Unfitness to Perform your Duties due to your Criminal Conviction....” It is noticeable that the Commissioner did not seek to invoke any of the other provisions for inquiries into the fitness of a member set out in sub-sections 34(1)(a),(b),(c) and (d) of the Police Act. Those provisions deal with inquiries into a person’s suitability to continue to serve based on ability, or whether they constitute a security risk, or whether they made a misrepresentation prior to their employment which related to their engagement. None of them cover the ambit of the boards of fitness initiated by the Commissioner under section 34(1)(l) of the Police Act, which is a matter the Commissioner considers to be in the interest of the Service, namely the fitness of such members to serve in view of their conviction for a crime.

Evaluation

In Limine Issues

[27] The respondents filed an initial answering affidavit the day before the interim application was heard and filed a further supplementary affidavit for the purposes of the review proceedings. The primary objection of the respondents was that this court does not have jurisdiction to entertain the matter on either of two grounds. At the hearing of the matter, a further procedural objection was raised to the review application proceeding. This procedural objection will be addressed first.

The applicant's failure to call upon the respondents to file a record and reasons for the decision

[28] The respondents allege that the application is flawed in part because the applicants failed in the notice of motion to call upon the respondents to dispatch the record of proceedings together with the reasons required by law or desirable to provide as provided for in the rule 7 A (2) (b) of the

labour court rules. They further alleged that had the applicants done so they would have realised the decision to root out members with criminal records was not the decision of the Commissioner but that of the Minister and therefore an executive decision.

- [29] Rule 7A (2) (b) of the Labour Court Rules closely mirrors rule 53 (1) (b) of the Uniform Rules of the High Court. In Erasmus, Superior Court Practice, the learned authors comment as follows:

“This subrule is primarily intended to operate in favour and to the benefit of an applicant in review proceedings and an applicant is entitled to waive the requirements of the subrule.”²

- [30] In this matter, I do not think the applicants’ failure to require the record in this instance constitutes a material flaw in the review application as such. The decisions which the applicants seek to attack are those set out in the notice of motion, and do not include the decision of the Minister to ‘root out’ members with criminal records. It is the subsequent decisions of the Commissioner in seeking to give effect to that expression of intent which are the subject matter of the review application.

The convening of fitness boards and the deliberations thereof are administrative matters not susceptible to review by the labour court.

- [31] Firstly, the respondents argue that the fitness boards do not concern a matter falling within the ambit of the Labour Relations Act as they concern the implementation of a policy decision and that the decision of a fitness board itself is also a matter of policy. As such, these are administrative matters and the decision of the respondents to convene fitness boards and the decisions of those boards are not susceptible to administrative review by the Labour Court because that is the exclusive preserve of the High Court.

- [32] Accordingly, they argue that the application to review the decisions mentioned above cannot be brought under section 158 (1) (h) of the LRA, which states that the labour court may “...review any decision taken or any

² RS 35, 2010 Rule-B1-p385

act performed by the State in its capacity as employer, on such grounds as are permissible in the law."³

[33] The respondents contend that the court's power of review in terms of section 158 (1) (h) is only available when no other alternative exists or when special circumstances are present. It is not a safety net process disputes in the public servants that should have been channelled through another provision, nor is it a licence to bypass prescribed arbitration and review procedures. The respondents contend that the applicants must follow the relevant procedures of the SSSBC if they wish to challenge the unfairness of the measures it has adopted.

[34] In support of its argument the applicant relies in particular on the decisions in ***Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and another***⁴ and ***Kgotso v Free State Provincial Government & another***.⁵ In the first matter, the applicants sought to review a decision refusing incapacity leave to an employee, which was a matter which fell squarely was in the interpretation and application of the relevant collective agreement and was required to be submitted to arbitration. While agreeing that there were instances in which the labour court might review administrative action by the State⁶, on the facts of the dispute before it, the LAC upheld the Court a quo's decision that the applicants were confined to obtaining relief through such proceedings.⁷ In the second matter, the applicant sought to review the decision of the first respondent to transfer, without referring a dispute to the relevant bargaining council even though it was not disputed by him that the council could deal with the dispute.

[35] The applicants cited the judgement in ***Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional***

³ Emphasis added

⁴ [2012] 9 BLLR 888 (LAC)

⁵ [2006] 7 BLLR 664 (LC)

⁶ At 894, paras [27] – [28].

⁷ At 895, para [34].

Services & others⁸ in which the LAC held that the transfer of the applicant contrary to be published transfer policy of the respondent was unlawful and void. It must be said however, that it does not appear that the question of whether the applicant should have pursued an unfair labour practice claim was an issue that was raised by the respondent in the matter. Also, in so far as the LAC considered whether or not the transfer was invalid because it would have constituted an unfair labour practice under the LRA, it is important to bear in mind that the court only appears to have considered the fairness of the transfer as a factor because the provisions of the employer's policy itself appeared to expressly incorporate the principles of fairness in the LRA.⁹

[36] While it is clear that there may be challenges to the action of the state as an employer based on the principle of legality, where the rationale for the administrative review proceedings is practically indistinguishable from a claim that the applicant has to challenge the employer's actions as an unfair labour practice or as an unfair dismissal, the court is in danger of blurring the line between those actions of the state as employer which are still susceptible to administrative review and those causes of action by state employees that are deemed to fall outside the scope of administrative review and within the exclusive remedies of the LRA, which was drawn in **Gcaba v Minister for Safety & Security & Others**.¹⁰

[37] In relation to the present matter, in my view the applicants' challenge to the Commissioner's convening of fitness boards on the basis that they are procedurally unfair because they might lead to dismissals without complying with the procedural requirements of a fair dismissal for misconduct is difficult to distinguish from an unfair dismissal claim as such. However, the applicants' challenge to the Commissioner's decisions based on a claim that the Commissioner is legally bound by its own disciplinary regulations and to the extent that the fitness board proceedings are

⁸ [2008] 12 BLLR 1179 (LAC)

⁹ At 1194, par [43].

¹⁰ **Gcaba v Minister For Safety & Security & Others** (2009) 30 ILJ 2623 (CC)

intended to bypass those binding regulations is a matter which goes to the lawfulness of the respondents' actions and in my view is a matter which the Labour Court can entertain in the exercise of its powers under section 158 (1)(h) of the LRA. Similarly, to the extent that the respondents' initiatives prove to be plainly unlawful because they conflict directly with provisions of the LRA, that is also a matter which the court could entertain under the principle of legality.¹¹

[38] On this basis, I am satisfied that at least in respect of some grounds of the review, this court has jurisdiction to consider the matter.

The court cannot entertain review proceedings on the basis that the Fitness Board process does not comply with fair disciplinary processes.

[39] The respondents second jurisdictional issue, which is closely related to the first, is that to the extent that the applicants claim that the respondents are not following a fair procedure for disciplinary purposes that is a matter to be dealt with under the ordinary procedures of the Safety and Security Sectoral Bargaining Council ('the SSSBC') for challenging an unfair disciplinary process. I have already indicated that there is some merit in this contention if the ground of review is simply that the effect of permitting the fitness board to proceed is tantamount to allowing the employer to conduct unfair disciplinary proceedings. However, that does not preclude the courts from considering whether or not the decisions taken by the Commissioner relating to the fitness boards are in conflict with her legal obligations in terms of the applicable disciplinary procedures, which are also embodied in regulations.

[40] Accordingly, this objection though possibly valid in respect of some of the applicants' grounds of review does not in principle dispose of all of them.

¹¹ See ***Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others 1999 (1) SA 374 (CC)*** at 399, para [56] viz: "...[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law."

The merits of the review application

[41] In broad terms the applicants' grounds of review fall into two categories. The first concerns whether or not the Commissioner's decisions are permissible in terms of section 34 of the Police Act, read with the LRA. The second is whether the boards convened in respect of the individual applicants were conducted in accordance with the provisions governing them.

The lawfulness of the impugned decisions

[42] The central issue concerning the lawfulness of the Commissioner's decisions is whether the fitness boards are convened contrary to the Respondent's obligations to comply with the Disciplinary Procedures which bind it and whether those boards can be competently convened in terms of s 34(1)(l) of the Police Act. The respondents contend that the determination of the affected members' fitness to serve arising from their criminal convictions is simply not a disciplinary matter. By implication disciplinary procedures have no relevance to the distinct process of convening fitness boards. Moreover, as the respondents have not taken any steps consequent to convening such boards it cannot be said that it is embarking on steps to discharge members for misconduct arising from findings of those boards to the effect that they are unfit to serve by virtue of their criminal records. I agree that the relief sought in this respect by the applicants by way of review is premature, even if the discharge of members following the recommendations of the boards might reasonably be apprehended.

[43] Before considering these issues, it is necessary to analyse a more closely the applicants' contention that the cases of members in issue here are all premised squarely on alleged misconduct, yet section 34 is intended to deal with situations which SAPS cannot be expected to deal with by way of disciplinary action. Leaving aside for a moment the three individual applicants whose situations are not necessarily the same as all other members who have been, or may be, subjected to fitness boards, there are various categories of members having criminal records prior to 1st September 2013 who may be called before a fitness board, namely:

43.1 Members who were found guilty of an offence and sentenced before they were engaged as SAPS members and who revealed the details of their criminal record to SAPS;

43.2 Members who were found guilty of an offence and sentenced before they were engaged as SAPS members and who concealed details of their criminal record to SAPS;

43.3 Members who were found guilty of an offence and sentenced whilst in the Service and whose sentence included a term of imprisonment without the option of a fine.

43.4 Members who were found guilty of an offence and sentenced whilst in the Service but whose sentence did not include a term of imprisonment without the option of a fine, whether they disclosed the details of their conviction to SAPS or not.

[44] If a member falls within of the group described in paragraph 42.1 above, then it is difficult to see how disciplinary action could be taken against such a member for a criminal conviction acquired before their employment of which the SAPS was aware. The enquiry in that case can only be into that member's capacity or fitness to continue to serve in the SAPS, which does seem to fall within the ambit of the Boards of Fitness convened by the Commissioner.

[45] The only difference between the group mentioned in paragraph 42.1 and 42.2 is whether or not the SAPS was aware of the members' criminal convictions at the time they were engaged. In so far as the current Boards of Fitness do not purport to determine whether dishonesty on the part of the member is a further issue to consider in determining the member's fitness to serve, there is no reason why this group's fitness to perform their duties owing to their criminal convictions cannot competently be considered by fitness boards, because the issue also concerns the employee's pre-employment conduct and not the fact of having been found guilty of the commission of a crime, whilst already employed.

[46] The group falling within the ambit of paragraph 42.3 are members who also fall under the provisions of section 36 of the Police Act and in law are deemed discharged already in terms of sub-section 36(1), save that they

may be reinstated subsequently under the remaining provisions of that section. Sub-section 36 (4) (b) provides for an inquiry to be convened in terms of section 34 to determine the 'suitability of reinstating' such a member. In so far as the current fitness boards are concerned, it does seem to me that the question the Commissioner has mandated the fitness boards to determine, namely the fitness of those individuals to perform their duties in view of their conviction for a crime does not incorporate a mandate to consider if they ought to be re-engaged following their automatic discharge. Be that as it may, I do not think that a board of enquiry convened to consider the fitness of a member discharged by operation of law on account of the nature of their criminal sentence can be characterised as a disciplinary enquiry. Accordingly, in respect of this group of persons subjected to a fitness board, it does not seem that the Commissioner has acted unlawfully in convening fitness boards in respect of such persons.

- [47] In passing it should be mentioned that a Fitness Board inquiry in respect of such individuals would be one convened by the Commissioner under s 34(1)(l). It is not an enquiry triggered by the provisions of section 36(2) read with section 36(4)(b) as there is no contention on the papers that members who were deemed to have been discharged in terms of section 36(1) had applied for their reinstatement within 30 days of sentencing, which is a pre-requisite for holding an enquiry under section 36(4)(b).
- [48] The last group of affected members which includes the individual applicants in this matter is in a somewhat different position. It is clear that the Disciplinary Regulation 20(z) clearly identifies the commission of any common law or statutory offence as an act of misconduct. The process for dealing with such misconduct is set out in the Disciplinary Regulations and the employer and employees are bound by it in terms of Regulation 2(1) and the provisions of Collective Agreement 1/2006 concluded at the SSSBC on 2 February 2006.
- [49] Accordingly, it is not open to the respondents to argue that the disciplinary procedure would not apply to such conduct. Convening a Fitness Board enquiry for this group of employees to determine their fitness to serve as a

result of their conviction which could result in a recommendation to discharge that member on account of unfitness is difficult to interpret as anything but a way of a side-stepping disciplinary proceedings over an act of misconduct in the form of the commission of a common law or statutory offence.

[50] By so doing the employee is also denied the procedural advantages of the disciplinary process, which include the right to present relevant circumstances in mitigation, the right of an appeal against both verdict and sanction. Moreover, the fairness of any ultimate decision can be challenged in a *de novo* hearing before an arbitrator in which the findings of the employer can be reconsidered, whereas an employee cannot challenge the findings of a Fitness Board except by way of judicial review.

[51] Consequently I am satisfied that the decision to convene fitness boards in respect of members who are convicted of an offence whilst in service which does not result in their automatic discharge under s 36(1) of the Police Act concerns an act of misconduct in terms of the Disciplinary Regulations. The Commissioner could not invoke the provisions of s 34(1)(l) to convene a Fitness Board to make a finding on the fitness of an employee to perform their duties based on such an act of misconduct. If the Commissioner had the power to convene an enquiry of this sort under the provisions of section 34(1)(l) of the Police Act, there is no reason why the Commissioner could not, in principle, convene a fitness board in respect of any act of an employee which is defined as misconduct, and on the basis of a finding by a board that such conduct rendered the employee unfit to perform their duties then act on a recommendation of that board that the employee be discharged on account of being unfit to perform their duties.

[52] If one has regard to the provisions of sections 34(1)(a),(b),(c) and (d) of the same ±Act, it is evident that the legislature gave specific attention to the circumstances in which fitness enquiries would be appropriate. All those circumstances relate to situations in which a disciplinary enquiry would be inappropriate. In the circumstances, It seems improbable that the legislature intended that the power to convene an enquiry under section

34(1)(l) would include the power to convene a fitness enquiry in circumstances where a disciplinary enquiry would be most appropriate and where there is an existing disciplinary procedure to deal with that very issue. As such, the decision to convene fitness boards in respect of members, who were convicted of a statutory or common law offence whilst in service, was not a decision the Commissioner was entitled to make in terms of that section, and the boards convened in respect of such members were unlawfully convened.

[53] As the second, third and fourth applicants all fall within the class of employee mentioned, the fitness boards convened in respect of each of them and the proceedings of those boards are also of no legal force or effect.

[54] In respect of the contention that other fitness boards which can lawfully proceed are not proceeding in compliance with their own procedures, there is too little evidence before me on those proceedings to make any finding on whether they are being conducted unlawfully or not.

Conclusion

[55] By way of summary, I am satisfied that the power given to the Commissioner to convene an enquiry under the provisions of s 34(1)(l) does not include the power to convene a fitness board inquiry in respect of an act of misconduct which falls to be dealt with under the SAPS Disciplinary Regulations. However, in view of the distinct groups of persons with criminal convictions this does not mean that fitness boards cannot be convened where Disciplinary Proceedings would not be applicable as in the other categories of person identified above.

Costs

[56] As the applicants are successful at least in respect of a portion of the those members subjected to fitness boards and since that group most obviously ought to have been dealt with in terms of the Disciplinary Procedures, I believe it is just and equitable that they recover at least a portion of their costs. However, I do not think it appropriate to award them

all their costs as they launched an unnecessarily broad attack on the decision to convene the fitness boards without considering the appropriateness of convening such boards in respect of the different categories of persons with criminal convictions.

Order

[57] The decision of the second respondent to convene fitness boards in terms of section 34(1)(l) of the South African Police Act, 66 of 1995 in respect of members who have criminal records as a result of the being convicted of a statutory or common law offence whilst serving as members prior to 1st September 2013 is unlawful, void and without legal force and effect and fitness boards convened in respect of such members pursuant to the second respondent's decision were unlawfully convened and have no legal force or effect.

[58] The respondent must pay half the applicants' costs including the costs of two counsel, where applicable



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS: I Smuts, SC instructed by Wheeldon, Rushmere & Cole

FIRST RESPONDENT: J Laka, SC assisted by M Moosa instructed by the State Attorney