



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. JR975/21

In the matter between:

C. ASTLE

First Applicant

A.C. GREYLING

Second Applicant

and

**SAFETY AND SECURITY SECTOR
BARGAINING COUNCIL (SSSBC)**

First Respondent

TREVOR WILKES N.O.

Second Respondent

SOUTH AFRICAN POLICE SERVICE

Third Respondent

Heard: 23 January 2025

Delivered: 12 February 2025

JUDGMENT

MAKHURA, JIntroduction

[1] In *AK v Minister of Police*¹, the Constitutional Court stated, in the context of an inefficient investigation of a crime by the members of the South African Police Service (SAPS), that:

‘Our law does not require perfection. It requires conduct in line with a diligent and reasonable person. Lack of negligence does not connote exactitude... It bears emphasis that the duty imposed on the SAPS is not one of result, that is, a successful search or investigation, but one of means. The applicant herself has emphasised that her complaint is not about the lack of an arrest and successful prosecution, but about what she sees as a woefully inadequate search and investigation.’²

[2] The current application was launched by two employees who were members of the SAPS until their dismissal on 21 February 2020. At the center of this dispute is the two employees’ conduct in their investigation of a crime. The employees were dismissed for failing to carry out their duties – to investigate an assault case and/or ensure that the case is investigated and their collective decision to close the docket without investigating the case and without informing the complainant.

[3] Subsequent to their dismissal, the employees referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council (SSSBC), the first respondent in these proceedings. The second respondent, the commissioner appointed by the SSSBC to arbitrate the dispute, declared in his arbitration award dated 22 April 2021 that their dismissal was procedurally and substantively fair, and dismissed their claim.

¹ [2022] ZACC 14; 2023 (2) SA 321 (CC).

² Ibid at para 78.

[4] Aggrieved by the commissioner's decision, they are now before this Court in terms of section 145 of the Labour Relations Act³ (LRA) to review and set aside the award. The SAPS opposes the application.

Material facts

[5] The first applicant is Cecilia Astle (Astle) and the second applicant is Abraham Carel Greyling (Greyling). The employees were each charged with eleven allegations of misconduct for allegedly contravening the South African Police Service Discipline Regulations, 2016 (Regulations). Astle was an investigating officer tasked to investigate an assault case by SAPS members against the complainant, Ntsie Esael Sefuthi (Sefuthi). The case docket was opened at Westonaria SAPS under CAS number 122/02/2017 and then transferred to Fochville SAPS, where Astle and Greyling were based. Greyling was employed as a captain and branch commander.

[6] On 20 April 2017, Sefuthi, through his attorneys of record, addressed a letter to the Minister of Safety and Security and the National Commissioner of the SAPS. In this letter, Sefuthi recorded that on 11 February 2017, at Engen Garage, Losberg Avenue in Fochville, he was brutally assaulted, viciously dragged out of the garage store, placed in a SAPS vehicle, driven towards the police station and unlawfully detained by members of the SAPS who were wearing plain or civilian clothes. This incident, so the letter records, was captured on the CCTV footage.

[7] On their way to the police station, members of the SAPS stopped the vehicle and started questioning Sefuthi. It was during this questioning that they realised that Sefuthi was not the person they were looking for. They then drove back to the garage to drop Sefuthi. For his unlawful arrest and detention, assault, pain and suffering, Sefuthi demanded payment of R350 000.00.

³ Act 66 of 1995, as amended.

[8] After the incident, Sefuthi opened a case of assault on 12 February 2017 at Westonaria SAPS. This case was then transferred to Fochville SAPS on 13 February 2017. In his affidavit to the SAPS deposed to when he opened the case, Sefuthi set out the details of how the incident happened, as captured above. He also stated that he would be able to identify about four of the members of the SAPS who assaulted him.

[9] More than a year later on 22 March 2018, Sefuthi, who had received no feedback nor any report from the investigating officer (Astle), deposed to another affidavit before the SAPS. Sefuthi explained in this affidavit that he opened his case at Westonaria Police Station and was informed that the case would be transferred to Fochville SAPS. He wrote that:

'I never received any feedback until I went to Fochville SAPS to enquire about my case but I was referred to Detectives block. I went there and I was assisted by a white lady who checked through my case number and she told me that it was closed already because there was no evidence. I told her that I will bring evidence because I have footage. Few days later I took footage and I was referred to the I/O which was a white lady again, I forgot her name. I played footage for her and she told me that she will call me for feedback.

A month later I went there again and I find out that the case was still closed. I went for the fourth time to check and it was still closed. I was referred to Captain Masuku who checked and find out that it was still closed. She told me that the advice is to consult with my attorney to request the case to be re-opened.'

[10] Prior to Sefuthi's affidavit above, Nontsokolo Masuku (Masuku) had deposed to an affidavit on 12 March 2018. In it, Masuku stated that Sefuthi, even though she had forgotten his name, enquired about his case. She stated that Sefuthi complained about Astle who was handling his case and alleged that his case was closed without any explanation or any feedback from Astle and that he was still in possession of the evidence. Masuku further stated that she informed Sefuthi that she would retrieve the docket and would contact him the following day. Indeed, Masuku said she telephoned

Sefuthi the following day and advised him to speak to the branch commander to raise his dissatisfaction.

[11] It is common cause that on 29 March 2017, the investigating officer, Astle, deposed to an affidavit motivating for the case to be closed. This is called an investigating officer statement, which is a practice at Fochville SAPS for investigating officers to depose to this before a case or docket is closed. Astle declared in this affidavit that she was the investigating officer, that the suspects were unknown to the complainant and therefore the docket or case should be closed. The full affidavit reads as follows:

‘I am I/O in this case. The suspects are unknown to the complainant and witness. Docket for closure.’

[12] The affidavit was deposed to before Greyling, acting as a branch commander. The case was, with the approval of Greyling, therefore closed as undetected.

[13] On or about 7 February 2018, the employees received a notice of alleged misconduct informing them of a pending investigation against them. The alleged misconduct was stated as a failure to investigate the matter properly and closing the docket as undetected.

[14] On 14 February 2018, Captain Victress Mkwebula (Mkwebula) was appointed to conduct an internal investigation against the two employees. Mkwebula was a Lieutenant Colonel attached to the Westrand Cluster Office as a detective.

[15] Mkwebula signed the outcome of the investigation, allegedly on 14 March 2018. She specified the alleged misconduct as contravention of Regulation 5(3)(b)(i) – (iii), 5(3)(u) and 5(4)(h) and referred to the statements of Sefuthi, Masuku and Boitumelo Mthorwana (Mthorwana) as exhibits. Mthorwane worked as a cashier at Engen Garage and explained that after the assault, Sefuthi brought a memory stick to download the video footage capturing the incident. The outcome indicates that Mkwebula investigated

the matter, found a *prima facie* case of misconduct and recommended that the matter be referred to the departmental hearing.

[16] Mkwebula stated in one of her statements made in late 2018 that the investigation took too long because she was “*forgetful*”, she experienced “*dizziness*” and was always “*sleepy*”. She stated that she informed the employees at some stage that the investigation was complete and that she believed that Greyling misunderstood her to mean that the matter was finalized when in fact she meant that the matter would be referred to the Provincial level to proceed with the disciplinary enquiry. The statement by Mkwebula was written to motivate for the promotion of Greyling. In another statement, Mkwebula stated that she finalized the investigation but “*forgot to forward it [investigation report]*” as she was very sick.

[17] The employees were charged in December 2018 and called to attend a disciplinary hearing on 12 March 2019. Between 12 December 2018 and early January 2019, Mkwebula and Greyling exchanged numerous WhatsApp messages. Greyling wrote that he was in “*big trouble*” or in “*hot water*” because he was informed that the department investigation against him was not finalised, that he had not declared this when he applied for a promotional post and that he thought that the investigation was finalised after their last conversation. Mkwebula said that she had forgotten about the investigation and that she would think about it and call Greyling. Greyling was concerned about the adverse impact the investigation was going to have on his promotion. Greyling asked Mkwebula to provide the Provincial office with feedback on the investigation that it was finalised because the Provincial office did not have any record of the investigation against him having been finalised.

[18] On 2 January 2019, Mkwebula signed a ‘second’ outcome or report of the investigation. This report did not set out the nature of the misconduct. Mkwebula confirms in this report that she investigated the matter and that there was a *prima facie* case of misconduct which, contrary to the 14 March 2018 report, warrants a sanction of a written warning.

[19] However, the written warnings issued against the employees by Mkwebula were, inexplicably, dated 25 February 2018, more than two weeks before the first investigation report and eleven months before the investigation report. These written warnings did not contain the nature of the misconduct which the employees were disciplined for.

[20] As stated above, the disciplinary hearing against the employees was scheduled for 12 March 2019. Armed with the manufactured written warnings, the employees' representative, at the commencement of the hearing, raised the defence of double jeopardy, arguing that the applicants were already disciplined and sanctioned for the same misconduct. Despite the fact that the nature of the misconduct was not recorded on the written warnings, the chairperson withdrew the matter. The chairperson's disciplinary outcome report stated:

'The matter was withdrawn on the principle of double jeopardy wherein new evidence emerged during the hearing. The employee representative produced copies of annexure "B" signed on 2018-02-25, making submission to the fact that the employee had signed the written warning of which the employer representative was not aware of or made aware of.'

[21] On 23 May 2019, the Deputy Provincial Commissioner (DPC) addressed a letter to the District Commissioner, West Rand regarding the disciplinary hearing against the employees. The DPC recorded inter *alia* that:

21.1 After Mkwebula was appointed to investigate the matter, the department docket was completed on 14 March 2018 which indicated that there was a *prima facie* case against the employees and recommended the matter for a departmental trial (disciplinary hearing).

21.2 The functionaries, the chairperson and the initiator were appointed and their appointment letters were emailed on 11 December 2018.

21.3 However, the office of the Provincial Commissioner was notified on 12 December 2018 that Greyling was promoted to Lieutenant Colonel.

21.4 Further enquiries revealed that the investigation was in fact finalised on 25 February 2018 where the employees were issued written warnings. Mkwebula completed a new annexure on 2 January 2019.

21.5 These dates suggest that progressive discipline in the form of written warnings was applied before the completion of the first investigation which recommended a hearing and the second investigation which recommended written warnings.

21.6 The disciplinary hearing against the employees on 12 March 2019 was withdrawn after the employees' representative produced the written warnings.

21.7 The DPC made the following observations:

'Considering the facts mentioned above, this office cannot accept this situation where the written warnings were issued to the employees before the outcome of the first investigation. If this is the case, the Annexure "B" date would have been the same as the Annexure "G" date or after and the Annexure "G" would have indicated that the matter was dealt in a progressive manner.

It seems as if Lt Col Mkwebula, after learning that Captain Greyling's name was on the promotion list, completed the second Annexure "G" dated 2019-01-02 and backdated the written warning to 2018-02-25 to facilitate the promotion of Captain Greyling.' [Emphasis added]

[22] The DPC requested an investigation into the matter. The SAPS subsequently decided to reinstitute the disciplinary hearing and proceeded to appoint the chairperson and initiator.

[23] On 11 November 2019, the employees received notices to attend a disciplinary hearing. They faced multiple allegations of misconduct emanating from their failure to investigate the case and the closure of the docket as undetected on 29 March 2017. Astle was found guilty of charges 1, 3, 7 and 10. These charges are paraphrased below:

23.1 Charge 1: Prejudicing the administration, discipline or efficiency of the department by failing to investigate the case against the police officers who

assaulted Sefuthi, who were well known as they were using a white police vehicle with clear registration number.

23.2 Charge 3: Conducting herself in an improper, disgraceful and unacceptable manner by failing to give Sefuthi feedback about his case.

23.3 Charge 7: Giving a false statement or evidence in the execution of her duties by stating that the suspects were unknown to Sefuthi knowing this to be untrue and that Sefuthi had stated in his statement that he would be able to identify at least four members of the SAPS who assaulted him.

23.4 Charge 10: Negligence in the performance of her duties for her failure to thoroughly investigate Sefuthi's case.

[24] Greyling was found guilty and dismissed on charges 2, 4, 9 and 11. The charges were:

24.1 Charge 2: Prejudicing the administration, discipline or efficiency of the department by failing to ensure that the investigation is conducted into the case of Sefuthi against members of the SAPS.

24.2 Charge 4: Conducting himself in an improper, disgraceful and unacceptable manner by failing to ensure that the investigating officer informed Sefuthi about the progress of the investigation and instead allowed the investigating officer to close the docket even though there was overwhelming evidence that could assist in tracing the suspects.

24.3 Charge 9: Negligence in the performance of his duties in that he failed to thoroughly inspect a criminal case ultimately closing it off as undetected when the suspects were known to Sefuthi and failure to ascertain the correctness of the information supplied by the investigating officer before closing and filing the case as undetected.

24.4 Charge 11: Failure to report an act of misconduct committed in his presence in that he failed to report that his fellow employee, the investigating officer, gave a false statement that the suspects were unknown and case should be closed undetected when Sefuthi mentioned in his statement that he could identify at least four members of the SAPS who assaulted him.

[25] The employees were dismissed with effect from 21 February 2020. On 12 March 2020, the applicants referred an unfair dismissal dispute to the first respondent (SSSBC).

The arbitration proceedings

[26] The material evidence led at arbitration proceedings is very similar to what is already set out above. There is no material dispute of facts insofar as the allegations of misconduct are concerned.

[27] At the arbitration proceedings, the employees invoked the double jeopardy principle and also argued that the chairperson acted *ultra vires*. They also complained about the inordinate delay to charge them and the splitting of charges. On the merits, they challenged the rule breached, that is, they denied that they were guilty and argued that even if they are found guilty the sanction of dismissal is not fair or appropriate and that the SAPS applied discipline inconsistently.

[28] The commissioner upheld in part the argument that there was splitting of charges. As a result, charge 10 against Astle was found to be a duplication of charge 1 and that charge 9 against Greyling was a duplication of charge 11. The commissioner in essence dealt with and determined the dispute based on charges 1, 3 and 7 against Astle and 2, 4 and 11 against Greyling.

[29] The commissioner dismissed the defences of double jeopardy and/or *ultra vires* and delay and which were characterized as procedural issues.

[30] On double jeopardy and *ultra vires*, the commissioner noted that the written warnings, tendered in support of the withdrawal of the charges were subject to serious circumspection and that an interrogation was necessary. He noted that the employees were asked by Mkwabula to sign the backdated written warnings, which they did. The

commissioner further noted the discrepancies in the outcomes of the investigation signed by Mkwwebula, the written warnings which were allegedly issued before the finalisation of the investigation report and the second outcome of the investigation which was purportedly concluded on 2 January 2019.

[31] On the delay, the commissioner acknowledged the inordinate delay in finalising the matter but balanced it with the reasons therefor, the nature of the offence which he found to be serious and assessed the prejudice on both parties. Having considered these factors, he found that the delay did not have an impact on the fairness of the dismissal.

[32] The commissioner dealt with the merits of the dispute and found the employees guilty of the charges, except charge 11 against Greyling. He considered the appropriateness or fairness of the sanction, dismissed the inconsistency argument and found that the dismissal was fair.

Analysis

[33] The employees have approached this Court to review and set aside the award. They take issue with the findings made in respect of the double jeopardy and/or *ultra vires* defence and delay, which they contend the commissioner should have found in their favour and declared their dismissal procedurally unfair.

[34] They also take issue with the findings on the merits of the charges and dispute that they are guilty, that even if they are guilty the sanction of dismissal is not fair and further that the sanction could not be fair because the SAPS applied discipline inconsistently. The inconsistency argument is that Masuku, who had the authority to re-open the case, failed to do so and was not disciplined.

Double jeopardy and/or ultra vires

[35] The employees' contention is that they were previously disciplined for the same allegations and therefore the second disciplinary hearing offended the principle of double jeopardy and/or that the chairperson acted *ultra vires* by proceeding with the disciplinary hearing. The commissioner found that the facts that led to the withdrawal of the charges are questionable. These facts are that which gave rise to the written warnings which ultimately led to the withdrawal of the charges on 12 March 2019.

[36] The so-called written warnings were allegedly issued on 25 February 2018, before the completion of the first investigation on 14 March 2018. They were issued blank, in other words, the allegations for which the employees were found guilty of were not outlined. There was no evidence whatsoever to suggest that the employees were charged and/or disciplined for any allegation relating to their role in the failure to investigate Sefuthi's case and their decision to close the docket as undetected.

[37] The written warnings dated 25 February 2018 were designed to advance Greyling's prospects of promotion and to hide the fact that there was a pending investigation against him. Therefore, the written warnings are not just questionable, they were deliberately designed by Mkwebula, Greyling and Astle. As a result of their conduct, the chairperson of the first disciplinary hearing withdrew the matter. The upshot of the chairperson's ruling is that the charges were withdrawn on the basis that the employees had already been disciplined for the same charges and issued with written warnings. This finding was factually wrong because the warnings did not contain the nature of the charge to enable the chairperson to determine whether the employees were previously disciplined for the 11 charges that served before him. Had the chairperson applied his mind to the contrived written warnings, he would have not withdrawn the charges.

[38] Embedded in the double jeopardy argument is the decision of the SAPS to reinstitute the disciplinary hearing. The employees' argument was that the written warnings stand until set aside by the high court or this Court. Based on my finding that the written warnings do not indicate the allegations that the employees were allegedly

sanctioned for and my finding above that there was no double jeopardy, the commissioner's decision to reject the argument is not only reasonable but is correct. The chairperson did not dismiss the charges on 12 March 2019. He simply withdrew them. The argument that the SAPS had no authority to reinstitute the charges until the decision of the chairperson to withdraw (not dismiss) the charges is unsound and has no legal basis.

[39] Accordingly, the ground for review of the decision on the double jeopardy principle or *ultra vires* is rejected.

Delay

[40] It is not in dispute that there was an inordinate delay in bringing the employees to the disciplinary hearing. The chronology of the events from February 2017 have been set out in detail above.

[41] The commissioner noted that the charges related to the conduct of the employees that occurred between February and March 2017. He noted that in February 2018, the SAPS commissioned an investigation into the conduct of the employees, which was, according to the record, concluded on 14 March 2018. In December 2018, the employees were called to attend a disciplinary hearing on 12 March 2019, when the charges were withdrawn. It is common cause that in May 2019, the DPC intervened and requested an investigation. In November 2019, the charges were reinstituted and the employees were called to attend a disciplinary hearing, which led to their dismissal on 21 February 2020.

[42] The commissioner found that there has been a partial explanation of the substantial delay, that the allegations are serious and that the employees failed to provide any evidence of prejudice. In these proceedings, the employees argued that the SAPS did not call a witness to explain the delay, save for the delay caused during the second disciplinary hearing, which was explained by the chairperson of that hearing.

[43] I have considered the judgments referred to by Mr Groenewald, counsel for the employees, in his heads of argument and during oral arguments.⁴ These judgments emphasise the principle of fairness and ultimately state that whether or not the delay constitutes unfairness is a question of fact. To constitute unfairness, the delay must be inordinate and the explanation unreasonable. Further, the delay must have caused material prejudice to the other party, in this case, the employees, and the nature of the misconduct must be considered.

[44] The delay in this matter should be considered from the time when Mkwebula was appointed to investigate the issue against the employees. It cannot be considered from the time the misconduct occurred, that is, February and March 2017 because only the employees knew about the decision. Mkwebula, in my view, acted rogue in her investigation of the matter. Although she claimed that she was not well, it is clear from her WhatsApp messages with Greyling that Mkwebula was rooting for his promotion despite the allegations and was prepared to assist Greyling in getting his promotion no matter the circumstances, as evinced by her role in the design of the fictitious written warnings. She was the root cause for the delay and her reprehensible conduct should not be used against the SAPS and allow employees who committed this type of misconduct to walk free.

[45] Whilst the delay in this matter from February 2018 is inordinate, the reasons are readily ascertainable from the documentary and oral evidence. The employees did not lead evidence to show any prejudice, as the commissioner correctly found. There was no evidence to show how the delays, which I must say the employees contributed to by being party to the manufactured written warnings, hampered the presentation of their defence to the charges.

⁴ *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and others* (2019) 40 ILJ 773 (CC); [2019] 6 BLLR 524 (CC); *Mapyane v SA Police Service and others* [2023] ZALCJHB 344; (2024) 45 ILJ 564 (LC).

[46] The commissioner's decision, which was taken after consideration of all the relevant factors, is unassailable. The review ground must therefore fail.

The merits of the charges

[47] The commissioner found Astle guilty of prejudicing the administration, discipline or efficiency of the department by failing to investigate the assault case of Sefuthi and for negligence or conducting herself in an improper, disgraceful and unacceptable manner by failing to give feedback to Sefuthi. Astle was also found guilty of giving a false statement or evidence.

[48] Astle was allocated the assault case laid by Sefuthi against SAPS members to investigate. The assault incident took place at the garage. Sefuthi, the complainant, who deposed to an affidavit and outlined his ordeal in the hands of the SAPS members on 11 February 2017, expected the SAPS to investigate the case and waited for feedback. It is common cause that on 27 March 2017, the docket was closed as undetected allegedly because the suspects were unknown.

[49] Astle did not, after she was allocated the matter to investigate, set her foot out of the office to investigate the matter. She did not lift a finger to make a telephone call to contact Sefuthi. She did not investigate the crime. The commissioner found that Astle failed to rebut the SAPS' case and that she did not carry out the investigation. The commissioner found:

'Her defence that she would close docket if there were no easy way to investigate the matter because of the caseload is simply not responsible policing because it has the effect that the public are required to drive their own investigation.

... regardless of what was in the docket at the time, she has not rebutted that she made absolutely no effort to do any investigation at all...'

[50] The commissioner also found that the SAPS discharged its onus in proving charge 7, which was that she gave a false statement or evidence that the suspects were unknown. The commissioner found that with little effort Astle could have established the identity of the suspects.

[51] Greyling was the branch commander and Astle's superior. The commissioner found him guilty of prejudicing the administration, discipline or efficiency of the department by failing to ensure that the investigation into Sefuthi's case was conducted and for negligence or conducting himself in an improper, disgraceful and unacceptable manner by failing to ensure that Astle investigates Sefuthi's case.

[52] The commissioner found Greyling's evidence that he did not do the investigation nor call the complainants every time a docket was presented to him for closure to be plausible. However, he found that:

'he did not rebut the respondent's evidence that there is no evidence, not even from the first applicant that he had ensured that the applicant [Astle] followed up on any of the diary entries in the docket and more particularly his own instructions. He agreed that there was a lot of information available, but he deferred most of the question[s] to the first applicant. Instead, he persisted with his defense that he relied on the investigation officer and did not know whether she had completed the investigation. In cross examination he admitted he had only looked at the investigator's statement.'

[53] Greyling, so the commissioner found, did not apply his mind to the docket before approving its closure. The commissioner noted that closing the docket was Greyling's ultimate responsibility. He rejected Greyling's attempt to relegate the crime to a less serious contact crime. Greyling's own evidence was that he never read the docket. The commissioner concluded that it was the responsibility of Greyling to ensure that members of the public are accorded a sufficient degree of courtesy.

[54] Astle's complaint against the finding of guilt on charge 7 has merit. I have considered the charge sheet, the evidence, the commissioner's reason and decision

and the attack by Astle against this finding. I am persuaded that the finding is not one that a reasonable decision maker could reach. The suspects were unknown, yet they could have easily been identified had Astle carried out her duties to investigate the crime. However, the latter part did not form part of the charge. Astle's statement that the suspects were unknown was not misleading.

[55] The employees' attempts to upset the award on the basis that the commissioner failed to evaluate and assess the respective parties' burden of proof and failed to apply his mind thereto is preposterous. It is also a piecemeal attack on the award, which is unacceptable. SAPS' case against both employees on charges 1 and 3 or 10 against Astle and charges 2 and 4 or 9 against Greyling was overwhelming. The employees had nothing to defend themselves, yet they proceeded with the case that they were not guilty.

[56] The above findings and decisions are unassailable. Astle did not carry out the investigation. She decided, without any form of investigation, to depose to an affidavit declaring that the suspects were unknown and that the case should be closed as undetected. The suspects could not have been known because she did not investigate. Greyling, on the other hand, failed to ensure that his subordinate carried out her duties of investigating the crime. He, without applying his mind to the docket, simply proceeded to approve the closure of the docket. Considering a very brief statement by Astle with no mention whatsoever of what she had done in investigating the case, Greyling could have interrogated the statement by asking whether Astle met the complainant and whether she had obtained the CCTV footage from the garage. Had he done his job, he would have perused the docket, noted that no investigation whatsoever was done by Astle and rejected Astle's reason for closing the docket.

[57] Accordingly, the review grounds on the merits of the charges fall to be rejected.

Inconsistency

[58] The employees' inconsistency ground is meritless. This is probably the reason why this ground was not pursued in the employees' heads of argument and during the hearing. However, the ground has not been expressly abandoned. The employees do not state what their issue is with the findings. They highlight that the commissioner limited his assessment of evidence on this issue to the conduct of Masuku. They make reference to the commissioner's finding and conclude that:

'Notwithstanding the above the commissioner however confirmed that Masuku's failure to reopen the docket immediately and or to discipline the first applicant could very well have avoided much of what has occurred and that the respondent should consider her action in light of the possible disciplinary action.'

[59] Whatever the complaint is, there is no evidence that Masuku committed a similar misconduct of failing to investigate a case and closing the docket or approving the closure of the docket as undetected without conducting the investigation or ensuring that the investigation was conducted. The complaint falls to be dismissed.

Sanction

[60] The commissioner noted that the employees have clean disciplinary records. Astle had about 22 years' service and Greyling 35 years. The commissioner further noted that the misconduct may seem less serious if considered against *"the background of corrupt activities which according to the media, the [SAPS] is saturated with"*. However, the commissioner found that the impression created by the employees was that:

'they had become lulled into bureaucratic complacency revolving around routines, meetings, and statistics which in this instance had resulted in a complete loss of the real purpose for which they had been appointed.'

[61] The commissioner further observed that a perpetual of unresolved criminal cases would only augment the criminals and increase the crime rate. Referring to the Parliamentary Monitoring Group of the Portfolio Committee on Police that met under the

theme “*Undetected docket analysis and structure: SAPS briefing: PCEM project follow up with SAPS & DPCI on their 2014/15 Annual Report*”, the commissioner noted that unnecessary closing of dockets as undetected and failure to liaise effectively with the community are key risk factors in policing.

[62] The employees contend that the Parliamentary Monitoring Group report was never presented as part of the evidence and therefore the commissioner exceeded his powers. The employees then contend that the commissioner failed to consider relevant factors and took into consideration irrelevant factors. The employees placed a lot of focus on Greyling. They contend that the findings of the commissioner as it concerns Greyling are unreasonable because his dismissal was found to be fair based on reasons that did not form part of his dismissal.

[63] The challenge against the report of the Parliamentary Monitoring Group is not that it is not factual. There is no suggestion that the report is distorted. There is nothing unreasonable with the commissioner taking ‘judicial notice’ of the report because it is a public document that reported on the issue that was relevant before him. Regardless, this is not the only factor that the commissioner considered when deciding the fairness of the dismissal.

[64] The commissioner found that Astle failed to do what she was required to do as a police officer and that she had opted to take the easy route out in order to cope with the workload instead of asking for assistance. He noted Astle’s complete failure to do an investigation into the matter and concluded that:

‘I find that the defence offered by her that she had a large caseload and therefore prioritized the dockets accordingly by choosing to investigate only those dockets relying heavily on the standby investigation and the public completely loses sight of her role in society as a police officer and although she has a clean record the fact that she did not make a proper endeavour to get hold of the complainant and properly discuss his case with him before closing it is completely unacceptable.’

[65] There does not appear to be any serious challenge against the findings made against Astle. Astle's conduct was sufficiently serious to warrant dismissal and any suggestion to the contrary is rejected.

[66] With regard to Greyling, the commissioner found that:

'The second applicant as her superior by not adequately ensuring that this was done, which he attempted also explain based on his workload also makes it apparent that he had lost touch with what his primary role was as a commander of investigating officers.

He was above everything else required to ensure that proper policing takes place and in this particular instance it is more serious because the police are required at the very least to police themselves and where members of the police force have been involved in a criminal offence it is critical to ensure that proper investigation is carried out.

The second applicant stated that he intended no harm to the complainant this may be so, but his deference to Masuku and at one point in his statement during the initial investigation to the first applicant is yet another indication that he did not accept the implications of his own responsibility.' [Own emphasis]

[67] The commissioner then recorded that because of Greyling's long clean record, he explored the possibility of progressive discipline with him. The commissioner then found that having carefully evaluated Greyling's responses to his questions, Greyling had not demonstrated the likelihood of responsiveness to progressive discipline.

[68] Mr Groenewald submitted that the commissioner upheld or found the dismissal fair based on the reasons that did not form part of the SAPS' reason for Greyling's dismissal. He submitted that the commissioner had in fact found that Greyling's charges did not warrant dismissal but then used the written warnings as a ground to justify the fairness of his dismissal. The commissioner's finding was:

‘Because the impunity of [Greyling] was relative to [Astle] but it was of a lesser degree. Had the enquiry ended simply at the proof of the first two charges, the decision to dismiss without progressive discipline would not be reasonable⁵.

However, because it has also been established that the second applicant was part of an attempt to cover up the misconduct by contriving a written warning with the cooperation of Mkwebula, simply to be promoted, the facts presented do not indicate a strong likelihood of responsiveness to progressive discipline.’

[69] That the fairness of the dismissal must be considered based on the reason given by the employer at the time of the dismissal is a well-established principle of our law.⁶ However, having considered the award, I am not persuaded that Mr Groenewald’s submission has substance. His submission in my view will hold if one selectively reads the award.

[70] Firstly, the commissioner has expressly made a finding that the nature of the misconduct is more serious as it involved members of the SAPS, that Greyling did not appreciate the extent and impact of his conduct and did not take responsibility for his conduct as he deferred to Astle and Masuku. Based on the above, the commissioner found that progressive discipline would not be appropriate. He found that Greyling’s response to the question of how he would deal with the situation differently if he were to go back to work was defiant. These findings are not challenged.

[71] It is therefore clear that the above factors ultimately influenced the commissioner’s decision that the dismissal was fair. The commissioner then continued to say that had the enquiry ended after the proof of the charge, the decision to dismiss without progressive discipline would have been unreasonable. At this stage, the commissioner had already dealt with the reason why Greyling was not a suitable

⁵ The reference to reasonableness should obviously be fairness because reasonableness is a test applicable in review proceedings and commissioners are concerned with the fairness of the dismissal.

⁶ *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 32; *Samancor Chrome Ltd (Eastern Chrome Mines) v Commission for Conciliation, Mediation and Arbitration and others* (2020) 41 ILJ 2129 (LAC); [2020] 9 BLLR 908 (LAC) at para 10; *Pioneer Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2023) 44 ILJ 2281 (LC) at para 56.

candidate for progressive discipline. This much is also clear when in the next paragraph, where the commissioner states that *“because it has also been established that [Greyling] was part of an attempt to cover up the misconduct by contriving a written warning...”* progressive discipline would not be appropriate. This second reason given by the commissioner, whilst not part of the charge sheet, was part of the evidence led by the SAPS. The evidence established that the employees signed the contrived written warnings.

[72] Secondly, the commissioner dealt with the alleged breakdown of the trust relationship. He referred to the SAPS’ evidence that they consider the charges to be serious. The commissioner rejected the employees’ argument that because they continued with their duties after the misconduct, the SAPS could not claim that the trust relationship had broken down. He found that the matter should be considered based on what the SAPS knew at the time and found that the SAPS’ operational response to the misconduct was justified. This finding by the commissioner remains unchallenged.

[73] The conduct of the employees sends a chilling message to members of the public. It is utter disrespect and disregard to the rights and dignity of the complainants and victims of crimes. The message is essentially that the SAPS will investigate cases they consider important and serious, and only those cases where the suspects have been identified. Greyling was a branch commander. Based on the nature of the charge, the employees’ failure to show remorse and the reasons already articulated in the award, there are no reasons for this Court to interfere with the award. The sanction ground is rejected.

Conclusion

[74] The test for review is trite - it is outcome-based and the question is whether the decision reached by the commissioner is one that a reasonable decision maker could

not reach.⁷ The test has been explicated in many subsequent judgments and it is trite now that mere failings, errors or irregularities on the part of the commissioner are not sufficient to review and set aside the award. Awards will be reviewed only if these failings, errors or irregularities resulted in the commissioner's decision ultimately being unreasonable.⁸ The award is well reasoned and substantiated and therefore meets the requirement for reasonableness.⁹

[75] In conclusion, the decision that the dismissal of both employees was fair is supported by rational reasons, which demonstrates that the commissioner understood the enquiry before him and applied his mind to the issues and the evidence.

[76] The employees have failed to make out a case on review and their application must fail. The parties did not pursue the issue of costs. I do not believe that this is a matter that warrants a costs order being granted.

[77] In the premises, the following order is made:

Order

1. The application is dismissed
2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. DJ Groenewald

Instructed by: Serfontein Viljoen & Swart Inc

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

⁸ *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 25; *Head of Department of Education v Mofokeng and others* [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC) at paras 31 – 33.

⁹ *Duncanmec (Pty) Ltd v Gaylard NO and others* (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

For the Third Respondent: Ms. H Maponya of The State Attorney, Johannesburg

LABOUR COURT