THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1289/2022

In the matter between:

CENTRE FOR CHILD LAW	**FIRST APPELLANT**
MOTHER OF TZ	**SECOND APPELLANT**
MOTHER OF MPM	**THIRD APPELLANT**

and

SOUTH AFRICAN COUNCIL FOR EDUCATORS	**FIRST RESPONDENT**
KHUTSO FRANCINAH SATHEKGE	**SECOND RESPONDENT**
VANGILE MIRRIAM MOKOENA	**THIRD RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION: GAUTENG PROVINCE	**FOURTH RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION: LIMPOPO PROVINCE	**FIFTH RESPONDENT**
MINISTER OF BASIC EDUCATION	**SIXTH RESPONDENT**

SCHOOL GOVERNING BODY: MADUME PRIMARY SCHOOL **SEVENTH RESPONDENT**

SCHOOL GOVERNING BODY: REABILWE PRIMARY SCHOOL **EIGHTH RESPONDENT**

THE CHILDREN'S INSTITUTE **AMICUS CURIAE**

Neutral citation: *Centre for Child Law and Others v South African Council for Educators and Others* (1289/2022) [2024] ZASCA 45 (9 April 2024)

Coram: Nicholls, Mbatha and Mothle JJA and Tolmay and Mbhele AJJA

Heard: 26 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 8 April 2024.

Summary: Administrative law – when does the clock begin to run under s 7(1)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in the absence of reasons – held SACE unlawfully fettered its statutory discretion by applying its mandatory sanctions policy as a rigid set of rules that permitted no discretion – held that it was impermissible for SACE to deny the children and their parents the opportunity to be heard on the question of appropriate sanctions – held that SACE committed a material error of law by not considering rehabilitative and corrective sanctions.

ORDER

On appeal and cross-appeal from: Gauteng Division of the High Court, Pretoria (Fourie J, sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following:

(i) The decision of the first respondent of 11 February 2020 and confirmed in a letter dated 25 February 2020 to approve the plea and sentence agreement and to confirm the sanction imposed on the second respondent, Mrs Vangile Mirriam Mokoena, following a disciplinary hearing finalised on 20 September 2019, is declared unlawful and invalid, and is set aside.

(ii) The decision of the first respondent of 16 October 2019 to approve the plea and sentence agreement and to confirm the sanction imposed on the third respondent, Mrs Khutso Francinah Sathekge, following a disciplinary hearing finalised on 18 September 2019, is declared unlawful and invalid, and is set aside.

3 The decisions and sanctions are remitted to the first respondent for reconsideration in order to comply with its constitutional obligations to act in the best interests of learners and to consider appropriate rehabilitative sanctions to ensure that the two educators referred to above are assisted and enabled to apply appropriate and non-violent disciplinary measures.

4 The first respondent is ordered to pay the costs of the appeal and cross appeal, including the costs of two counsel.

JUDGMENT

Tolmay AJA (Nicholls, Mbatha and Mothle JJA and Mbhele AJA concurring):

Introduction

[1] This appeal finds its genesis in an application brought primarily by the first appellant, the Centre for Child Law, to review and set aside the decision of the first respondent, the South African Council for Educators (SACE) in disciplinary proceedings against two educators, who assaulted children in the school environment. The complaint was that the 2016 Mandatory Sanctions that applied at the time were unlawful, as they did not provide for the exercise of any discretion when imposing a sanction and did not provide for any rehabilitative or corrective sanctions. The disciplinary proceedings also fell short as they did not allow for meaningful participation by the learners and their parents in the hearings. During 2020, SACE revised the mandatory sanctions but the appellant and the Children's Institute, that was admitted as amicus curiae, were still not satisfied that the amended mandatory sanctions catered for the best interests of the child. In addition, they failed to follow a child centred approach and the sanctions to be imposed did not provide for any rehabilitative measures to address the unlawful conduct of the educators.

[2] The appellants in the high court sought three primary forms of relief. The first form of relief was in terms of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) and the constitutional principle of legality, seek essentially to set aside the decisions of the disciplinary hearings and to remit the matters back to SACE with appropriate directions. The second what was referred to as systemic relief, in that SACE be ordered to reconsider and review its '2020 Mandatory Sanctions on the Code of Professional Ethics' in order to make provision for corrective and

rehabilitative sanctions, to consider the best interests of the child and the need for a child centred approach. Finally, the appellant sought condonation, to the extent necessary for bringing the application outside the time periods prescribed by PAJA.

[3] The court of first instance dismissed the review on the basis that there was an undue delay in the launching of the application. The court, however, granted the systemic relief. It found that it was appropriate in the circumstances of the case to exercise its discretion to grant a just and equitable remedy in terms of s 172(1)*(b)* of the Constitution. The court ordered SACE to reconsider and revise the revised mandatory sanctions adopted in June 2020 to address the deficiencies in the decision-making process, with particular regard to the need for the inclusion of corrective and rehabilitative sanctions, the need to consider the best interests of the child and the need for a child centred approach.

[4] The appellants appeal against paragraph 1 of the order[1] that dismissed prayers 1 to 5 of the amended notice of motion[2] and the part of the judgment that dealt with

[1] The order of the High Court delivered by Fourie J on 13 October 2022 reads as follows:
'1. The application with regard to prayers 1 to 5 of the amended notice of motion, is dismissed.
2. The first respondent is ordered, within six months of the granting of this order, to reconsider and revise its "Mandatory Sanctions on Contravention of the Code of Professional Ethics", adopted in June 2020, to address the deficiencies in the decision-making process and, in particular, to pay due regard to:
2.1 the need for the inclusion of corrective and rehabilitative sanctions such as anger management and training on non-violent child discipline techniques;
2.2 the need to recognise the best interests of the child and the rights of learners in the guiding principles; and
2.3 the need for a child-centred approach, which requires that children and their parents be consulted on the appropriate sanction and be afforded a meaningful opportunity to make representations on an appropriate sanction;
3. The first respondent is ordered to engage meaningfully with the first applicant and the *amicus curiae* in order to give effect to the order in paragraph 2 above;
4. The first respondent must serve on the applicants and the *amicus curiae*, and lodge with this Court, affidavits setting out the process that have been followed to reconsider and revise its mandatory sanctions referred to above, and to furnish and file copies of the revised mandatory sanctions, by no later than one month after the expiry of the six month period referred to in paragraph 2 above;
5. The first respondent is ordered to pay the costs of the applicants, including the costs of two counsel where so employed, with no order as to costs regarding the *amicus curiae*.'
[2] Amended notice of motion at pages 196-197 reads as follows:
'1 The following decisions of the first respondent (SACE) are declared to be unlawful and invalid, and in breach of SACE's obligations to protect the constitutional rights of learners:
1.1 The decision of 11 February 2019, communicated in a letter dated 25 February 2019, to approve the plea and sentence agreement and to confirm the lenient sanction imposed on the second respondent, Mrs Vangile Mirriam Mokoena, following a disciplinary hearing finalised on 20 September 2019;

the delay in bringing the application. SACE cross-appealed against paragraphs 2, 3, 4 and 5 of the order and the paragraphs of the judgment which deals with the revised mandatory sanctions. At the hearing the court was informed that SACE was not proceeding with the cross-appeal, as a result the part of the order that obliged SACE to reconsider its revised mandatory sanctions of 2020 is no longer in dispute. Because the Children's Institute interest lay only in making submissions on this aspect, the fact that the cross-appeal was not proceeded with put an end to its

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1.2 The decision of 16 October 2019, communicated in a letter dated 30 October 2019, to approve the plea and sentence agreement and to confirm the lenient sanction imposed on the third respondent, Mrs Khutso Francinah Sathekge, following a disciplinary hearing finalised on 18 September 2019;
1.3 Which resulted in the following sanctions being imposed on the second and third respondents:
1.3.1 Removal from the roll of educators, wholly suspended for 10 years on condition that the educator is not found guilty of further misconduct during the period of suspension.
1.3.2 A fine of R15 000 of which R5 000 is suspended, with the R10 000 being payable to SACE over a period of 12 months.
2 The following decisions and recommendations of the SACE disciplinary hearing presiding officers and SACE Ethics Committee are declared to be unlawful and invalid and in breach of SACE's obligations to protect the constitutional rights of learners:
2.1 The recommendations and decisions of SACE disciplinary hearing presiding officer, Ms Malele, dated 13 October 2019, and the SACE Ethics Committee, dated 11 February 2020, in respect of the second respondent.
2.2 The recommendations and decisions of SACE disciplinary hearing presiding officer, PM Molabe, dated 18 September 2019, and the SACE Ethics Committee, dated 16 October 2019, in respect of the third respondent.
3 The impugned decisions in paragraphs 1 and 2 are reviewed and set aside.
4 The decisions in paragraph 1 and 2 are remitted back to SACE for reconsideration, subject to appropriate directions.
5 Pending the outcome of any further disciplinary proceedings and SACE's further decision on the appropriate sanction, as contemplated in paragraph 4 of this order:
5.1 The sanctions referred to in paragraph 1.3 of this order remain binding; and
5.2 The second and third respondents are not relieved of any obligation to comply with those sanctions and accompanying conditions.
6 SACE is directed, forthwith, to reconsider and revise its "Mandatory Sanctions on Contravention of the Code of Professional Ethics (Towards a robust SAGE Sanctioning Philosophy)" (Revised Mandatory Sanctions), adopted in June 2020, to address the deficiencies in the decision-making process identified in this review application. In particular, SACE is directed to pay due regard to:
6.1 The need for the inclusion of corrective and rehabilitative sanctions such as anger management and training on non-violent child discipline techniques;
6.2 The need for the mandatory removal from the educators register in circumstances of serious assaults of learners.
6.3 The need to recognise the best interests of the child and the rights of learners in the guiding principles; and
6.4 The need for a child-centred approach throughout the disciplinary proceedings, so that children and their parents/ guardians can participate in the entire process. In light of this case, this would include that children and their parents be consulted on the appropriate sanction and afforded a meaningful opportunity to make representations on the appropriate sanction.
7 To the extent necessary, the applicants' delay in bringing this application outside of the 180-day time limit contemplated n section 7(1) the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is condoned and/or the 180-day time period is extended so as to terminate one day after the institution of this application.
8 The costs of this application are to be paid by SACE together with any other respondents who oppose this application, jointly and severally.
9 Further and/or alternative relief.'

concerns. It however persisted with the request that the evidence provided by Ms Quail, an expert in non-violent discipline skills be allowed and entered into the record. This was not opposed by the other parties and the evidence was duly admitted.

Background

[5] This case concerns the disciplinary proceedings by SACE of two educators. Ms Mokoena assaulted TZ and NT, during August 2015, with a piece of PVC pipe; both learners were in grade two at the time. TZ allegedly started having headaches that became progressively worse and was eventually hospitalised for two weeks and had to undergo emergency surgery for a brain haemorrhage. During his hospital stay Ms Mokoena visited him and allegedly threatened him not to tell anyone of the assault. TZ's mother set out in a supporting affidavit how this incident had negatively impacted on TZ's life. The other incident concerns Ms Sathekge who assaulted MPM by hitting her on the head. Her mother said she bled from her ear, was taken for several medical examinations, and was admitted to hospital twice. Her mother also explained how this incident negatively impacted on MPM's life. SACE disputed that these injuries were caused by the assaults as well as the severity and consequences of the assaults.

[6] During 2019 the mothers of both children were assisted by their attorneys in lodging formal complaints with SACE against the two teachers. SACE investigated the matters and recommended that both teachers be charged with assault. Ms Mokoena pleaded guilty to four breaches of SACE's Code of Professional Ethics (the Code), which included two charges of assault and two charges of threatening the children not to report the assault. Ms Sathekge pleaded guilty on one charge of assault. Ms Sathekge's disciplinary hearing occurred on 18 September 2019 and Ms Mokoena's hearing was on 20 September 2019.

[7] In both instances the appellants and the children were invited to attend the disciplinary hearings, but they were made to wait in a separate room at SACE's office. They were not present in the hearings and were not afforded an opportunity to present evidence, or to make representations, nor were they consulted about the sanctions imposed. They were subsequently merely notified about the fact that the teachers pleaded guilty and the sanctions that were imposed. Both teachers received identical sanctions, despite the circumstances and the severity of the assaults not being comparable. Both were removed from the roll of educators, wholly suspended for ten years; and a fine of R15 000 payable over a period of twelve months, of which R5 000 was suspended.

[8] At the hearing of the appeal only two issues were persisted with by SACE. The first was that the court of first instance correctly found that there was an unreasonable delay in the launching of the application and correctly dismissed the review on that ground and the second was that the appeal was moot.

Undue Delay

[9] Section 7(1) of PAJA requires judicial proceedings to be instituted without unreasonable delay and not later than 180 days from the day on which the proceedings have been concluded, or on which the person concerned was informed, or could reasonably be expected to have been aware of the administrative action and the reasons for it. It is common cause that no reasons were provided despite various requests by the attorneys of the appellants. The court of first instance accepted that the appellants requested reasons and that none were provided.[3] The court *a quo*

[3] Paragraphs 53-54 in the judgement of the court *a quo*, reads as follows:
'53. . . . A request for reasons was already made on 15 November 2019 with regard to the third respondent as well as on 12 March 2020 in respect of the second respondent. This presumption would therefore operate in favour of the applicants.
54. . . . When these proceedings were ultimately instituted, the applicants had still not received any reasons.'

found that in a case like this, where no reasons were provided, s 7(1) of PAJA came into play which, on the court's interpretation, meant that the applicants would have to show that there was no unreasonable delay in the bringing of the application.[4]

[10] The court of first instance's reasoning is at odds with the decisions of both the Constitutional Court and this Court where it was held that: 's 7(1) of PAJA explicitly provides that the proverbial clock begins to tick from the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to the applicant'.[5] As a result there is only one trigger date for both the unreasonable delay and the calculation of the 180 day period under PAJA.

[11] The appellants, before launching the application made repeated requests for reasons to no avail. SACE was generally unresponsive and when it did respond it blamed the closure of offices during Covid-19 and indicated that a response would be forthcoming once circumstances improved. The importance of investigating matters before launching review applications to set aside administrative action in order to avoid unnecessary litigation was stressed in *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*.[6] The appellants cannot be faulted for attempting to obtain reasons before proceeding with litigation. In the absence of reasons, the 180-day period did not even commence before the application was

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[4] Paragraph 55 in the judgement of the court *a quo*, reads as follows:
'55. The argument that in the absence of reasons, the 180-day period had not yet started at the time the applicants launched this application cannot, in my view, be stretched too far. If that were to be the only consideration to be taken into account, it would mean that in the absence of reasons, an applicant can wait as long as it pleases him or her before launching a review application. The short answer to this argument is that in such a case the first part of s 7(1) will become relevant in which event the applicant will have to show that the application was instituted without unreasonable delay, notwithstanding the absence of reasons. Put differently, the absence of reasons did not prevent the applicants to launch their application within a reasonable time. Taking into account all these considerations, I am of the view that the applicants failed to institute these proceedings without unreasonable delay as contemplated in s 7(1) of PAJA. This means that the applicants' application for condonation must now be considered.'

[5] *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* [2022] ZASCA 56; 85 SATC 216 para 30. See also *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) para 41.

[6] *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP) paras 52 and 55.

launched. The court of first instance misdirected itself when finding that there was an unreasonable delay in the launching of the application.

Mootness

[12] The second point raised by SACE is that the appeal is moot. The two educators were sanctioned in terms of the 2016 Mandatory Sanctions. It was argued on behalf of SACE that the application is moot for two reasons. Firstly, the educators have served their sentences and secondly, the 2016 Mandatory Sanctions were replaced by the 2020 Mandatory Sanctions. For these reasons, it was argued, the issues between the parties had been rendered abstract, academic, and hypothetical and the court should therefore refrain from exercising its discretion in favour of the appellants.[7]

[13] The Constitutional Court in *Police and Prisons Civil Rights Union v South African Correctional Service Workers' Union and Others*[8] confirmed that courts exist to determine concrete live disputes, but that mootness is not an absolute bar to justiciability when justice so requires. A court must exercise a judicial discretion, taking into account various factors including whether an order will have some practical effect.[9] There can be no doubt that if this Court were to set aside the administrative action and remit this matter to SACE, it would have a practical effect. SACE would be obliged to reconsider the sanctions. That the educators have partially complied with the sanctions imposed on them, is a consideration when determining an appropriate remedy. However, it does not render the matter moot. In

[7] *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514 para 15.
[8] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC); (2018) 39 ILJ 2646 (CC); 2019 (1) SA 73 (CC) para 44.
[9] Ibid paras 43-44. See also *Minister of Tourism and Others v Afriforum NPC and Another* [2023] ZACC 7; 2023 (6) BCLR 752 (CC) paras 22-23 and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 Id at fn18.

any event the suspension imposed on the educators during September 2019 is for a period of 10 years and therefore it cannot be convincingly argued that the educators have served their sentences. The inappropriate conduct that led to the sanctions can, and should, still be addressed in an appropriate manner.

[14] The second point raised on the issue of mootness is that the 2016 Mandatory Sanctions had been replaced by the 2020 Mandatory Sanctions. These sanctions postdate the sanctions imposed. It was pointed out by the appellants that these sanctions still do not address the *lacunae* that were apparent in the 2016 Mandatory Sanctions. The dispute remains very much alive as the constitutional concerns have not been addressed. The 2020 Mandatory Sanctions still do not address the need for corrective rehabilitative sanctions, the need to recognize the best interests of the child, the rights of children and the need for a child centred approach. These concerns were addressed by the systemic relief granted by the court of first instance and does not require any further consideration by this Court. The issue is however not moot as it must be addressed by SACE in compliance with the systemic relief granted in the context where the cross appeal was only abandoned at the hearing before this Court.

The review

[15] The question of whether a case has been made out for a review in terms of PAJA or the principle of legality now needs to be determined. The decision taken falls squarely within the definition of an administrative action as defined in PAJA and the review will be considered as such.[10]

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[10] Section 1 of PAJA reads as follows:
'1 **Definitions**
In this Act, unless the context indicates otherwise –
"administrative action" means any decision taken, or any failure to take a decision, by –
(a) an organ of state, when -
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or

[16] There is no doubt, that SACE's exercise of disciplinary powers must be guided by its constitutional obligations. The appropriate starting point for all matters relating to children is s 28(2) of the Constitution that dictates that a child's best interests are of paramount importance in every matter concerning a child. This principle is echoed in s 9 of the Children's Act.[11] Section 6(3) and s 10 goes further and emphasises that the views of a child and the family of the child must be given due consideration. There is thus no doubt that the best interests of a child take centre stage in all matters concerning a child. A child and its family have a right to be heard and to participate in proceedings concerning the child. SACE is as an organ of state in terms of s 7(2) of the Constitution obliged to respect, protect, and fulfil the rights in the Bill of Rights.[12]

[17] Section 39(1)*(b)* of the Constitution creates a further obligation to consider international law when interpreting the Bill of Rights. Section 233 states that when interpreting legislation, the court must prefer any reasonable interpretation of legislation that is consistent with international law.[13] South Africa is a signatory to the United Nations Convention on the Rights of the Child (CRC)[14] and the African Charter on the rights and Welfare of the Child (ACRWC)[15] and is duty bound to protect and ensure that the rights of children as envisaged in these instruments are prioritized.

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision.'

[11] Children's Act 38 of 2008.

[12] *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 para 47.

[13] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) para 16.

[14] Articles 19(1), 28(2) and 37 the African Charter on the Rights and Welfare of the Child (ACRWC).

[15] Preamble and articles 3 and 11(5) to take all appropriate measures to protect children from violence.

[18] The South African Schools Act[16] in s 10 outlawed corporal punishment in all schools and by doing so ensured that no child should be subjected to any form of physical violence in the school environment. This legislative prohibition should have been the end of any notion that an educator is allowed or justified to use any form of physical violence against a learner. Sadly, as illustrated by the incidents that form the subject matter of this case and the expert evidence provided by the amicus, corporal punishment is still rife in the school environment.

[19] In a society besieged by violence this must be of grave concern, and it cannot be gainsaid that violence as a form of ensuring corrective behaviour should be addressed at its roots. In the process of creating an environment that is conducive to the protection and development of children as citizens who will not resort to violence as a solution to conflict. It is imperative that educators not only be prohibited to resort to physical violence as a form of discipline, but also be assisted to develop the necessary skills to discipline appropriately and with the required measure of personal control. It is by example that children are taught to navigate a complex conflict-ridden world, without resorting to violence as a solution.

[20] SACE is established under The South African Council for Educators Act[17] (the SACE Act). SACE must, as all organs of state, exercise its powers in accordance with the constitutional injunction set out above. This includes its powers to adopt disciplinary proceedings. In terms of s 21 of the SACE Act all teachers are required to be registered with SACE on the national roll of educators and fall under SACE's disciplinary jurisdiction.

[21] Section 14 of the SACE Act deals with the disciplinary committee and ss 2 provides inter alia that the disciplinary committee must *inter alia* from time to time

[16] The South African Schools Act 84 of 1996.
[17] The South African Council for Educators Act 31 of 2000.

review the code of professional ethics. The SACE Code of Professional Ethics (the Code) is compiled in accordance with s 5 the SACE Act[18] and is binding on all

[18] Section 5 of the South African Council for Educators Act No 32 of 2000, reads as follows:

'**5 Powers and duties of council**

Subject to this Act and the National Education Policy Act, 1996 (Act 27 of 1996), the council –

(a) with regard to the registration of educators -

(i) must determine minimum criteria and procedures for registration or provisional registration;

(ii) must consider and decide on any application for registration or provisional registration;

(iii) must keep a register of the names of all persons who are registered or provisionally registered;

(iv) must determine the form and contents of the registers and certificates to be kept, maintained or issued in terms of this Act, the periods within which they must be reviewed and the manner in which alterations thereto may be effected; and

(v) may prescribe the period of validity of the registration or provisional registration;

(b) with regard to the promotion and development of the education and training profession –

(i) must promote, develop and maintain a professional image;

(ii) must advise the Minister on matters relating to the education and training of educators, including but not limited to –

(aa) the minimum requirements for entry to all the levels of the profession;

(bb) the standards of programmes of pre-service and in-service educator education;

(cc) the requirements for promotion within the education system;

(dd) educator professionalism;

(iii) must research and develop a professional development policy;

(iv) must manage a system for the promotion of the continuing professional development of all educators;

(v) may develop resource materials to initiate and run, in consultation with an employer, training programmes, workshops, seminars and short courses that are designed to enhance the profession;

(vi) may compile, print and distribute a professional journal and other publications;

(vii) may establish a professional assistance facility for educators;

(c) with regard to professional ethics –

(i) must compile, maintain and from time to time review a code of professional ethics for educators who are registered or provisionally registered with the council;

(ii) must determine a fair hearing procedure;

(iii) subject to subparagraph (ii), may-

(aa) caution or reprimand;

(bb) impose a fine not exceeding one month's salary on; or

(cc) remove from the register for a specified period or indefinitely, or subject to specific conditions, the name of, an educator found guilty of a breach of the code of professional ethics; and

(iv) may suspend a sanction imposed under subparagraph (iii) *(bb)* or *(cc)* for a period and on conditions determined by the council;

(d) with regard to fees –

(i) must, in consultation with the Minister, determine fees payable to the council by registered educators and educators applying for registration;

(ii) may require from the relevant employers to deduct fees from the salaries of educators and to pay it over to the council;

(iii) may, after a fair hearing –

(aa) caution or reprimand; or

(bb) remove from the register for a specified period or indefinitely, or subject to specific conditions, the name of, an educator found guilty of failing to pay the fees determined by the council; and

(iv) may suspend a sanction imposed under subparagraph (iii) *(bb)* for a period and on conditions determined by the council; and

(e) in general –

(i) must advise the Minister on any educational aspect which the Minister may request it to advise on;

(ii) may appoint staff and determine their conditions of service;

(ii) may establish committees and assign duties to them;

(iv) must perform any duty which is necessary for the proper functioning of the council; and

educators. Paragraph 3 of the Code *inter alia* includes that an educator must respect the dignity of learners,[19] exercise authority with compassion[20] and avoid any form of humiliation and refrain from any form of physical or psychological abuse.[21]

[22] The 2016 Mandatory Sanctions on Contraventions of Professional Ethics applied at all relevant times. These sanctions did not allow for the exercise of any discretion, whatever the circumstances of a matter. The sanctions imposed on the educators were in accordance with this document. In the answering affidavit it was confirmed that, according to SACE, these sanctions allowed for no discretion whatsoever and any deviation from them would have amounted to an illegality. This approach loses sight of the fact that the sanctions are policy and not law. In *Long Beach Home Owners Association v Department of Agriculture, Forestry and Fisheries and Another*[22] the following was said:

'Although not strictly necessary for the determination of this appeal, I should say something concerning the Policy, referred to above, which has been adopted by the first and second respondents. As stated in *Computer Investors Group Inc & another v Minister of Finance* 1979 (1) SA 879 (T) at 898C-E: (affirmed in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA)):

'Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter, the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive

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(v) may advise the Minister on any relevant educational aspect.'

[19] Paragraph 3.1 of the SACE Code of Professional Ethics, reads as follows:
'3.1 respects the dignity, beliefs and constitutional rights of learners and in particular children, which includes the right to privacy and confidentiality.'

[20] Paragraph 3.4 of the SACE Code of Professional Ethics, reads as follows:
'3.4 exercises authority with compassion.'

[21] Paragraph 3.1 of the SACE Code of Professional Ethics, reads as follows:
'3.5 avoids any form of humiliation, and refrains from any form any form of abuse, physical or psychological.'

[22] *Long Beach Homeowners Association v Department of Agriculture, Forestry and Fisheries (South Africa) and Another* [2017] ZASCA 122; 2018 (2) SA 42 (SCA) para 17.

factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to its merits. The public body will not have applied the provisions of the statutory enactment.'

[23] SACE argued that the 2016 Mandatory Sanctions were revised and replaced by the June 2020 Mandatory Sanctions. The revised sanctions, however, still suffer from certain impediments. This was however sufficiently addressed in the systemic relief granted by the high court; those orders remain operative and SACE will be well advised to carefully consider the systemic relief and comply with it when revising the Code.

[24] In *AB and Another v Pridwin Preparatory School and Others*[23] it was confirmed that s 28(2) incorporated a procedural component affording the child concerned an opportunity to make representations.[24] That the rights of children, which include the right to be heard is part of our law is undeniable.[25] It follows that if legislation and policies impact on the rights of children, those must refer back to what is contained in the Constitution, related legislation and applicable international law. How the child will participate in the proceedings will depend on the circumstances of the specific case and must be approached in a manner that will best serve the interests of the child.

[25] SACE has a duty to assess, *inter alia*, the impact of the actions of educators on the children, including whether it is advisable that the educators return to the classroom; whether it is necessary to protect the children from harm; and, whether the underlying causes of the educator's violent behaviour require addressing. I would

[23] *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC).
[24] Ibid paras 73-74.
[25] *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) paras 19-22.

add to that, that the question of whether the child may need assistance psychological or otherwise to limit the harm done to her must also be considered.

[26] A perusal of the record leaves one none the wiser as to the reasons for the educators' defiance of the law and this illustrates the necessity to consider rehabilitative measures. To merely impose a sanction without addressing the root cause of the problem is counterproductive. There is no impediment in law to impose such sanctions when appropriate, nor should there be.[26] Such sanctions should protect the best interests of the child and should assist the educator in developing the appropriate skills to function appropriately in the workplace.

[27] The decisions taken by SACE in relation to these incidents did not comply with numerous provisions of PAJA. The decisions taken in accordance with these sanctions were procedurally unfair as envisaged in s 6(2)*(c)* of PAJA as the children and their parents were not given an opportunity to be meaningfully heard or participate in the proceedings. In terms of s 6(2)*(d)* of PAJA the decisions were materially influenced by an error of law, in that it did not take into consideration any of the provisions in the Constitution and Children's Act relating to the best interests and protection of the rights of children. The decisions were also taken capriciously and arbitrarily as envisaged in s 6(2)*(e)*(vi) as no discretion was allowed when the sanctions were imposed. It is undoubtedly so that the 2016 Mandatory Sanctions unlawfully fettered the discretionary powers of the disciplinary committee.

[28] In light of the above the review should have been granted as the decisions taken in terms of the 2016 Mandatory Sanctions are unlawful and stand to be reviewed and set aside. The court of first instance correctly acknowledged the need for compliance with SACE's constitutional and statutory obligations and the

[26] *Preddy and Another v Health Professions Council of South Africa* [2008] ZASCA 25 para 15.

remedies provided for in terms of section172(2)*(b)* will address the existing defects. Due to the decision to abandon the cross appeal this part of the order of the court of first instance remains in force.

[29] The analysis of the law in relation to the facts requires of this court to declare the decisions by SACE in relation to the two educators unlawful, invalid and in breach of its obligations to protect the rights of learners. The question that remains is what the appropriate remedy is, because part of the sanctions has already been complied with. The appellant's main concern at this stage is that the core issues were not addressed, namely the possibility of rehabilitative sanctions, the child's right to be heard and the absence of a child centred approach to be followed.

[30] It was argued by SACE that due to the effluxion of time this court should not remit the matter as it would result in the educators being punished twice for the same transgressions. If, however, the matter is remitted on a limited basis to address the educators' apparent inability to act appropriately and to ensure no further unconscionable conduct on their part there will be no prejudice to them. On the contrary, they can only benefit if the sanctions are rehabilitative in nature. The matter should therefore be remitted to SACE to consider the imposition of corrective rehabilitative sanctions, like anger management and alternative corrective discipline skills programmes to assist the educators in executing their duties properly.

[31] The following order is made:

The appeal against the first order of the court of first instance is upheld, that order is set aside and substituted with the following:

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following:

(i) The decision of the first respondent of 11 February 2020 and confirmed in a letter dated 25 February 2020 to approve the plea and sentence agreement and to confirm the sanction imposed on the second respondent, Mrs Vangile Mirriam Mokoena, following a disciplinary hearing finalised on 20 September 2019, is declared unlawful and invalid, and is set aside.

(ii) The decision of the first respondent of 16 October 2019 to approve the plea and sentence agreement and to confirm the sanction imposed on the third respondent, Mrs Khutso Francinah Sathekge, following a disciplinary hearing finalised on 18 September 2019, is declared unlawful and invalid, and is set aside.

3 The decisions and sanctions are remitted to the first respondent for reconsideration in order to comply with its constitutional obligations to act in the best interests of learners and to consider appropriate rehabilitative sanctions to ensure that the two educators referred to above are assisted and enabled to apply appropriate and non-violent disciplinary measures.

4 The first respondent is ordered to pay the costs of the appeal and cross appeal, including the costs of two counsel.

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R G TOLMAY

ACTING JUDGE OF APPEAL

Appearances

For appellants:	C J C McConnachie (with him T Pooe)
Instructed by:	Section 27, Johannesburg
	Webbers Attorneys, Bloemfontein
For first respondent:	M M Mojapelo (with him F N Zulu)
Instructed by:	Mketsu & Associates Inc., Pretoria
	Matsepes, Bloemfontein
For amicus curiae:	E Webber
Instructed by:	Equal Education Law Centre, Cape Town
	Care of Savage Jooste and Adams, Pretoria