



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: ☒ YES / ☐ NO
(2)	OF INTEREST TO OTHER JUDGES: ☒ YES / ☐ NO
(3)	REVISED.
13/10/22	
DATE	SIGNATURE

Case No: 61630/2020

In the matter between:

CENTRE FOR CHILD LAW

First Applicant

MOTHER OF TZ

Second Applicant

MOTHER OF MPM

Third Applicant

and

SOUTH AFRICAN COUNCIL FOR EDUCATORS

First Respondent

V M MOKOENA

Second Respondent

K F SATHEKGE

Third Respondent

MEC: GAUTENG PROVINCE

Fourth Respondent

MEC: EDUCATION: LIMPOPO PROVINCE

Fifth Respondent

MINISTER OF BASIC EDUCATION

Sixth Respondent

**SCHOOL GOVERNING BODY:
M PRIMARY SCHOOL**

Seventh Respondent

**SCHOOL GOVERNING BODY:
R PRIMARY SCHOOL**

Eighth Respondent

THE CHILDREN'S INSTITUTE

Amicus Curiae

JUDGMENT

D S FOURIE, J:

[1] This is an application to review and set aside the decisions of the first respondent in disciplinary proceedings against two educators, the second and third respondents. The application is opposed by only the first respondent. On 29 March 2022 the second respondent withdrew her opposition and has filed a notice to abide. The third respondent filed an answering affidavit consisting of a few pages, but there was no appearance for her at the hearing.

[2] The first applicant (Centre for Child Law) is an impact litigation organisation that was established at the University of Pretoria in 1998. It is a registered law clinic based in the Faculty of Law and has established itself as a children's rights organisation and has over the years commissioned reports and litigation on corporal punishment and related issues. The second and third applicants are respectively the mothers of the two learners concerned.

[3] The first respondent (South African Council for Educators) is the professional council established in terms of the South African Council for Educators Act No 31 of 2000. It is responsible, amongst others, to maintain and protect ethical and professional standards for educators. The second and third respondents are educators who are registered with the Council. It is not necessary to refer to the fourth, fifth and sixth respondents as they have all filed notices to abide.

[4] On 16 March 2022 the Children's Institute was admitted as *amicus curiae* for purposes of introducing expert evidence and making written and oral submissions. The institute was established in 2001 as a multi-disciplinary policy

research unit in the Faculty of Health Sciences at the University of Cape Town. The institute's primary objectives are, *inter alia*, to conduct research and to ensure that children's rights are respected and protected.

BACKGROUND

[5] This matter arises from two disciplinary proceedings in which two educators, the second and third respondents, pleaded guilty to assaulting two young learners in their care.

[6] It is alleged that during August 2015 the second respondent beat a 7 year old learner with a PVC pipe during which he suffered a head injury. She also assaulted a second learner, leaving him with a bloody nose. She further threatened both learners not to report the incident.

[7] It is further alleged that during February 2019 the third respondent slapped and beat a 10 year old learner on the head with her hands, leaving her bleeding from the ears.

[8] Later during 2019 the second and third applicants were assisted by their attorney of record in lodging formal complaints with the first respondent against the two educators. The complaints were investigated whereafter it was recommended that both educators be charged with assault.

[9] The second respondent was charged with four breaches of the Code of Professional Ethics: two charges of assault relating to the two learners and two

charges of threatening them not to report the assaults. The third respondent was charged with a single breach for assaulting the learner.

[10] The second respondent's disciplinary hearing was held on 20 September 2019 and the third respondent's hearing was held two days earlier, on 18 September 2019. In both cases the second and third applicants as well as their children were invited to attend the disciplinary hearings. It is alleged that they were made to sit in a separate room and played no part in the proceedings. According to the first respondent the circumstances of this case did not call for the evidence of the victims as the sentence of the educators who had been found guilty, was prescribed.

[11] Both the second and third respondents pleaded guilty to the charges. They both received the same sanctions: removal from the role of educators, wholly suspended for ten years and payment of a fine of R15 000.00, over a period of twelve months, of which R5 000.00 was suspended.

THE RELIEF SOUGHT

[12] In terms of the amended notice of motion, the applicants seek three primary forms of relief, i.e. review relief; systemic relief; and to the extent necessary, condonation for the applicants' delay in bringing this application.

[13] In terms of the review relief, the applicants apply for an order:

- (a) declaring that the impugned decisions of the disciplinary hearing presiding officers, the Ethics Committee and that of the Council are to be declared unlawful, unconstitutional and invalid;
- (b) reviewing and setting aside the impugned decisions and remitting the matters to the first respondent for reconsideration, with appropriate directions; and
- (c) preserving the binding force of the sanctions pending the outcome of the first respondent's reconsideration of the sanctions.

[14] In terms of the systemic relief the applicants apply for an order that the first respondent be directed to reconsider and revise its mandatory sanctions on contravention of the Code of Professional Ethics adopted in June 2020 (after finalisation of the disciplinary proceedings), to address the deficiencies in the decision-making process identified in this review application.

[15] Finally, it is requested, to the extent necessary, that the applicants' delay in bringing this application outside the time-periods contemplated in s. 7(1) of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA") be condoned or that the 180 day time-period be extended so as to terminate one day after the institution of this application.

[16] The first respondent prays that the application be dismissed in its entirety. As already indicated above, the second, fourth, fifth and sixth respondents have filed notices to abide. It was pointed out by the *amicus curiae*

that the first respondent is well placed to introduce a more considered approach to the sanction of its educators where corporal punishment violations have occurred and the interventions of the Children's Institute are designed to assist the first respondent with this approach.

STATUTORY PROVISIONS

[17] Section 28 of the Constitution sets out the rights of children. Subsection (1)(d) provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation. Subsection (2) stipulates that a child's best interests are of paramount importance in every matter concerning the child.

[18] The s. 28 constitutional rights are given specific content and effect in the Children's Act, No 38 of 2005. Section 6(2) provides that all proceedings, actions or decisions concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights as well as the best interests of the child standard.

[19] The Children's Act also makes provision for child participation. Section 6(3) provides that if it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.

[20] Section 10 stipulates that every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that

child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

[21] The South African Council for Educators Act No 31 of 2000 makes provision for the registration of educators, the promotion of the professional development of educators and to set, maintain and protect ethical and professional standards for educators (s. 2).

[22] Section 5 of this Act sets out the powers and duties of the South African Council for Educators. Subsection (c) provides that the Council:

“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; 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;”.*

[23] Section 14 of this Act deals with the disciplinary committee of the Council. Subsection (2) provides, *inter alia*, that the disciplinary committee must compose, maintain and from time to time review a code of professional ethics and must establish panels to investigate and hear complaints against educators. The disciplinary committee must also, on the basis of a recommendation of the relevant panel, recommend a finding and appropriate action, if any, to the Council.

THE DISCIPLINARY PROCESS

[24] The Code of Professional Ethics (annexure “FA25” to the founding affidavit) as amended during May 2016 and which was applicable at the relevant time (*“the 2016 Code”*) is divided into two parts: a section setting out the ethical standards which teachers must observe and a further section setting out the disciplinary procedures.

[25] The essential aspects of the disciplinary process, as reflected in the Act and the Code, are the following:

- (a) the Council is obliged to establish a disciplinary committee;
- (b) the disciplinary committee must establish panels to investigate and hear complaints against educators;
- (c) the disciplinary committee must ensure that all disciplinary hearings are conducted fairly in accordance with the procedure determined by the Council;

- (d) on receipt of a complaint, the disciplinary committee must refer the matter to an investigating panel. If the panel is satisfied that there is sufficient evidence of a breach of the Code by an educator, the disciplinary committee may refer the matter to a disciplinary panel for hearing;
- (e) the disciplinary panel must conduct a fair hearing and then prepare its recommendations for the disciplinary committee on whether there has been a breach and the appropriate sanction;
- (f) on receipt of a recommendation from the disciplinary panel, the disciplinary committee may accept, reject or substitute the recommendation or refer the matter to the panel's committee for review;
- (g) once the disciplinary committee has come to a decision, it must refer its recommendations to the Council which exercises the ultimate power to impose sanctions (s. 5(c) of the Act);
- (h) the Council must inform the educator of its decision on the finding and sanction. Its decision is final.

[26] Attached to the supplementary founding affidavit is a copy of the Council's *"MANDATORY SANCTIONS ON CONTRAVENTIONS OF THE CODE OF PROFESSIONAL ETHICS"* (annexure "SFA20"). According to the answering affidavit this document was applicable at the relevant time and it is explained that *"the sentences are mandatory"*. This document should be read together with the

2016 Code referred to in paragraph 24 above. According to this document the sanction for common assault on a learner was, at the relevant time, *“a struck off from the Educators’ Roll, which struck off is suspended for a period of 10 years with a view that the educator is not found guilty of a similar contravention and a fine of a minimum of R15 000.00 payable within a minimum period of 18 months”*.

THE CASE FOR THE APPLICANTS

[27] It was contended by counsel for the applicants that there is a constitutional obligation on the first respondent, as an organ of state, to take effective action to protect learners from corporal punishment in schools. This flows from s. 7(2) of the Constitution, which obliges the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. It was also pointed out that corporal punishment violates several constitutional rights, including the right to dignity under s. 10, the right to freedom and security of the person under s. 12, and the children’s rights set out in s. 28.

[28] It was also argued that the documents disclosed in the Rule 53 record have exposed serious deficiencies in the first respondent’s handling of corporal punishment cases. First, there was a failure to afford the children and their parents any opportunity to make representations on the appropriate sanctions. The sanctions were the result of plea and sentence agreements concluded with the two educators, without consulting the children and their parents or affording them the opportunity to make representations.

[29] Second, according to the applicants there was an unlawful fettering of discretion. The first respondent has adopted a set of “*mandatory sanctions*”, which it believes permits of no discretion, resulting in a rigid approach to sanctions that fails to give proper effect to the rights and the best interests of children.

[30] Third, it was suggested that this case illustrates the imposition of unreasonable and shockingly inappropriate sanctions. The sanctions imposed were unreasonable in various respects, including the failure to consider rehabilitation and training in non-violent discipline techniques.

[31] Finally, the applicants complain that the first respondent failed to provide adequate reasons for the decisions taken and that, according to the record, it appears that there was an absence of Council deliberations. It was submitted that there is no evidence that the Council applied its mind to the matters, nor has it provided adequate reasons for its decision to approve the sanctions.

[32] The applicants also seek further relief to direct the first respondent to reconsider and revise the latest version of its “*mandatory sanctions*” policy document dated June 2020 (after finalisation of the disciplinary process), and to address the deficiencies in its procedures that have been exposed in this case. This, according to the applicants, is the just and equitable remedy which is required to ensure that the first respondent upholds its constitutional obligations to protect the rights of learners in future cases.

THE CASE FOR THE FIRST RESPONDENT

[33] It was submitted by counsel for the first respondent that this matter has become moot as the sanctions that are subject to this litigation “*have been fully served by now*” and the 2016 mandatory sanctions which were applicable at the time, have long been replaced.

[34] It was also contended that a serious problem facing the applicants’ case is the delay in bringing this application. This delay has resulted in a situation where most of the issues have been overtaken by events.

[35] The relief sought by the applicants that the Court should order the first respondent to reconsider and revise its mandatory sanctions on contravention of the Code of Professional Ethics, adopted in June 2020, will not be justified, as the Court should not enter into an arena reserved for another branch of the state and violating the principle of the separation of powers.

[36] Finally it was contended that both disciplinary proceedings took place in terms of the 2016 mandatory sanctions prior to its amendment. The proceedings took place in terms of this code and the mandatory sanctions were imposed in terms of this code. There is no reason to interfere with this procedure. The sanction of a suspended sentence and a fine is prescribed and a different sentence will be unlawful as it is not authorised by either the Act or the mandatory sanctions that were applicable at the time.

SUBMISSIONS MADE BY THE *AMICUS CURIAE*

[37] It was pointed out by the *amicus curiae* that its intervention relates only to the relief sought in paragraph 6 of the amended notice of motion, in which a *mandamus* is sought directing the first respondent to reconsider and revise its mandatory sanctions policy document dated June 2020.

[38] It was submitted that the mandatory sanctions fail to afford child victims and their parents an opportunity to make representations on the appropriate sanctions to be imposed on educators. It was pointed out that the basis for advocating a child-centred approach in the discipline of educators is fundamental to the first respondent achieving its statutory obligations under the South African Council for Educators Act. There is therefore, so it was contended, no legitimate reason to exclude the best interests of the child in the first respondent's disciplinary process and that indeed it is incumbent on the first respondent to do so.

[39] It was also contended that the use of corporal punishment in schools remains pervasive and commonplace. The effects of this conduct by educators within classrooms have consequences not only for the learners on the receiving end of the assault, but also for those learners exposed to and who are present in the room at the time of the assault. The effects may be severe and potentially long-lasting. It was further emphasised that s. 28(2) of the Constitution "*incorporates a procedural component, affording a right to be heard where the interests of children are at stake*".

[40] With reference to the expert affidavit of Karen Quail it was pointed out that there are programmes to teach educators skills of non-violent alternatives to classroom discipline that have been used with success. It was then submitted that these programmes should be considered by the first respondent as options for sanctions when developing the mandatory sanctions to align with the constitutional rights recognised in the Children's Act and those that are applicable in disciplinary proceedings.

WAS THERE A DELAY?

[41] The first issue now to be considered is whether there was any delay in bringing the application, and if so, whether it was an unreasonable delay. It is common cause that on 30 October 2019 the third applicant's attorney of record received correspondence from the first respondent confirming that the disciplinary hearing had been finalised and that the third respondent had been found guilty. The correspondence confirmed that the sanction that had been approved by the Council on 16 October 2019 was the removal from the roll of educators (suspended for a period of 10 years) and a fine of R15 000.00 (R5 000.00 suspended).

[42] It is also common cause that on 25 February 2020 the second applicant's attorney of record received correspondence from the first respondent confirming that the disciplinary hearing had been finalised and that the second respondent had been found guilty. The correspondence also confirmed that the Council approved the sanction on 11 February 2020, with the result that the second respondent's removal from the roll of educators was wholly suspended

for a period of 10 years and that she received a fine of R15 000.00 (R5 000.00 suspended).

[43] In both cases the said attorney sought to establish the reasons for the sentences and also requested a copy of the charge sheet pertaining to the second and third respondents. Various requests had been made but no response was received. On 23 November 2020 the applicants launched this review application.

[44] The relevant part of s. 7(1) of PAJA provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of it. Section 9(1) makes provision for the extension of time-periods. It provides that the 180-day period may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a Court on application by the person or administrator concerned. In terms of s. 9(2) the Court may grant such an application “*where the interests of justice so require*”.

[45] Two stages are envisaged by s. 7(1), i.e. a stage before the effluxion of 180 days and another one thereafter. It has been explained as follows by Brand JA in Opposition to Urban Tolling Alliance v SANRAL [2013] 4 All SA 639 (SCA) par 26:

“Before the effluxion of 180 days, the first enquiry in applying s. 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day

period the issue of unreasonableness is predetermined by the Legislature; it is unreasonable per se. It follows that the Court is only empowered to entertain the review application if the interests of justice dictates an extension in terms of s. 9. Absent such extension the Court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay ...".

[46] The onus is on an applicant who has delayed in bringing review proceedings to make out a proper case that the delay be condoned in the interests of justice. An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. In short, a reasonable explanation must be given (Van Wyk v Unitas Hospital & Another 2008 (2) SA 472 (CC) par 22).

[47] The other factors ordinarily considered by a Court in deciding whether "the interests of justice so require" are the nature of the relief sought, the extent and cause of the delay, its effects on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success (Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) par 54).

[48] Also relevant is the extent to which the administrative act has been acted upon subsequently, and if prejudice is held to exist, the nature and extent thereof as well as the prejudicial consequences to affected parties that arise and which cannot be undone (Oudekraal Estates & Others v City of Cape Town & Others 2004 (6) SA 222 (SCA) par 46 and Camps Bay Ratepayers and Residents' Association v Harrison, *supra*, par 57).

[49] The applicants launched the present application on 23 November 2020. That is 12 months and 3 weeks after the third applicant's attorney of record was informed about the finalisation of the third respondent's disciplinary hearing (par 41 above) and almost 9 months after the second applicant's attorney was informed that the second respondent's disciplinary hearing had been finalised (par 42 above).

[50] Was there a delay, and if so, was it an unreasonable delay? Counsel for the applicants argued that in terms of s. 7(1) of PAJA, the 180-day period for launching a review application only starts to run from the date on which the reasons for the administrative action became known, or ought reasonably to have become known, to an applicant. It was pointed out that the first respondent had failed to provide reasons for the sanctions, despite numerous requests from the applicants. Therefore, so it was contended, in the absence of reasons, the 180-day period had not yet started at the time the applicants launched this application.

[51] Counsel for the first respondent pointed out that the first enquiry in applying s. 7(1) is whether the delay, if any, was unreasonable, and the second one is the 180-days (six months) time-bar clause. He submitted that the applicants had a duty to act within a reasonable time, i.e. prior to the sanctions that are sought to be set aside, have been served.

[52] As already pointed out above (par 45), two stages are envisaged by s. 7(1), i.e. a stage *before* the effluxion of 180-days and another one *thereafter*. Before the effluxion of 180 days, the first enquiry in applying s. 7(1) is whether

the delay (if any) was unreasonable (*Opposition to Urban Tolling Alliance v SANRAL*, *supra*, par 26). This difference is also emphasised by the learned author of *Administrative Law in South Africa*, 2nd Ed, Cora Hoexter, p 534 where it is stated that “... *it is possible for a delay to be found to be unreasonable even if the proceedings are brought within the 180-day limit*”. Reference is then made to the dictum in *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ) where the learned Judge pointed out that “[i]t is only if a delay of 180 days is not unreasonable that the time-limit of 180 days becomes relevant”.

[53] It should also be borne in mind that in terms of s. 5(3) of PAJA it must be presumed that the administrative action was taken without good reason if an administrator fails to furnish adequate reasons within 90 days after having received the request for reasons (ss. (2)). 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] In both cases (that of the second and third applicants) it appears that there was a considerable delay in bringing the application. In the case of the second applicant the applicants waited almost 9 months and in respect of the third applicant, they waited 12 months and 3 weeks before instituting these proceedings. When these proceedings were ultimately instituted, the applicants had still not received any reasons.

[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.

THE APPLICATION FOR CONDONATION

[56] The section dealing with condonation in the founding affidavit (par 174 - 177, following a section on the merits, grounds of review, legal contentions and the relief sought) consists of only four paragraphs, the first two containing legal argument and the last two which read as follows:

"176. As detailed above, the applicants' legal representatives have made ongoing efforts to engage with SACE (first respondent) to determine the reasons for its decision, with no result. The applicants wished to avoid launching a review application without any information or insight into SACE's decisions.

177. *The lockdown conditions in response to the Covid-19 pandemic created further difficulties in arranging consultations with the applicants and in sourcing the necessary information to support this application. These papers were drafted and finalised as soon as circumstances allowed.”*

[57] The supplementary founding affidavit does not take the matter any further. Under the heading “*PROCEDURAL MATTERS*” (par 82 and further) it is explained that the applicants have made repeated efforts, over many months, to secure a full and complete Rule 53 record. The problem with this explanation is that these efforts relate to a time-period *after* the review application was launched. No further explanation regarding the condonation application was given.

[58] This issue has been pertinently raised in the answering affidavit. It is pointed out that the reasons offered by the applicants for not instituting the application within a reasonable time, “*are not justified at all*” as they would be entitled to supplement their papers in terms of rule 53. In the replying affidavit it is only alleged that “*a proper justification for the delay has been set out in the founding affidavit*”.

[59] It must also be pointed out that this is not a case where the applicants should to be regarded as “*a layman regarding the law*”. The first applicant is a litigation organisation registered as a law clinic and the second and third applicants had legal representation (according to the correspondence) from as early as April and July 2019 respectively, i.e. before the disciplinary hearings were finalised, as well as thereafter, until the hearing of this matter.

[60] As already indicated above, the onus is on an applicant to make out a proper case that the delay should be condoned in the interests of justice. In this application very little is said about the entire period of the delay, save to refer to repeated requests for reasons. Likewise, a bald explanation is given regarding the cause of the delay. There is a brief reference to “*lockdown conditions*” without giving any particulars. It sounds like the usual excuse which must fit all cases, irrespective of what the facts are. In short, save for blaming the absence of reasons, no proper explanation has been given as to why the applicants waited such a long period before instituting these proceedings. Put differently, what prevented the applicants to launch this review application within three or even four months after having been notified about the impugned decisions? The explanation that has been given appears to be vague, bald and sketchy.

[61] I have to add, as far as the absence of reasons (or other documents) are concerned (prior to the launching of the application), rule 53(1)(b) makes provision for a procedure (after launching of the application) to obtain a copy of the record of the proceedings “*together with such reasons as he or she (the administrator) is by law required or desires to give*”. An applicant may thereafter vary the terms of the notice of motion and supplement the supporting affidavit (sub-rule 4). The papers indicate (notice of motion dated 23 November 2020) that the applicants (through their legal representatives) were aware of this procedure.

[62] It also appears that the effects on the administration of justice and the public interest in bringing certainty and finality to administrative action have not been taken into account by the applicants. In *Gqwetha v Transkei Development*

Corporation Ltd and Others 2006 (2) SA 603 (SCA) par 22 Nugent JA who wrote the majority judgment, held as follows:

“It is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at 321 – is twofold: First the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly and in my view more importantly, there is a public interest element in finality of administrative decisions and the exercise of administrative functions.”

[63] Further on, in the same judgment (par 23) reference was also made to the *“inherent potential for prejudice”*, both to the efficient functioning of the public body and to those who rely on its decisions, if the validity of its decisions remains uncertain. It was then pointed out that it is for this reason that *“proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay.”* This was also not considered by the applicants.

[64] Another factor to be taken into account is the potential prejudice to a respondent, in this case the second and third respondents. It is pointed out in the founding affidavit (par 9) that after finalisation of the disciplinary hearings, these two respondents were allowed to continue with their profession as educators. No doubt, they did so well-knowing that the disciplinary hearings had been finalised, their removal from the roll as educators is suspended for ten

years and they can now proceed with their lives. It was only when this application was launched, that it was indicated they should face another disciplinary hearing relating to the same events. These two educators cannot be blamed for the criticism levelled against the administrators who conducted the disciplinary hearings. In short, this matter (the review application) was heard during June 2022 and even if the impugned decisions were to be set aside already at that stage and remitting both matters for another disciplinary hearing, it would mean that the second and third respondents would be subjected to another disciplinary hearing, on the same facts, after more than two years.

[65] I shall now consider the prospects of success. This requires an examination of its merits, not their determination. Put differently, a court is not required to decide the merits before considering whether the application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect (Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality 2017 (6) SA 360 (SCA) at par 12).

[66] When considering the prospects of success, the proper approach is to establish, factually, whether an irregularity occurred. If it is concluded that an irregularity occurred, it must be legally evaluated to determine whether it amounts to a ground of review under PAJA (Allpay Consolidated v Chief Executive Officer, SASSA 2014 (1) SA 604 (CC) par 28). It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious (Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality, *supra*, par 12).

[67] It was contended on behalf of the applicants that there was a failure to afford the learners and their parents the opportunity to make representations or to give evidence on an appropriate sanction during the disciplinary proceedings. Reference was made, *inter alia*, to s. 28 of the Constitution as well as to sections 6(3) and (10) of the Children's Act. I take into account that a child's best interests are of paramount importance and that the Children's Act makes provision for child participation in any matter concerning that child. I was referred to *AB and Another v Pridwin Preparatory School* 2020 (5) SA 327 (CC) where it was emphasised that s. 28(2) of the Constitution incorporates a procedural component, affording a right to be heard where the interests of children are at stake (par 141).

[68] It was also contended that the mandatory sanctions on contravention of the Code of Professional Ethics have no formal legal status. They are a policy document, intended to provide guidelines for determining appropriate sanctions and should therefore not be prescriptive without allowing any form of discretion. I take into account the principle that policy determinations cannot override, amend or be in conflict with statutory provisions (*Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at par 7). Although s. 5(c) of the South African Council for Educators Act provides for the compilation of a Code of Professional Ethics, there is, in my view, a *prima facie* indication that exercising a discretion is permitted when imposing a sanction.

[69] Without deciding the merits, and taking into account the abovementioned considerations, it seems to me that the failure to afford the learners or their parents the opportunity to make representations as well as the failure to allow

the exercising of a discretion when imposing a sanction, should be regarded as an irregularity which would amount to a ground of review under s. 6(1)(b) and s. 6(2)(e)(iii) of PAJA. I shall assume, without deciding, that these irregularities are egregious, notwithstanding the fact that the second and third applicants and the learners would not, as witnesses or other participants, be as directly involved in the disciplinary proceedings as the second and third respondents were as accused persons.

[70] I have now considered the two most important grounds of review. I do not think it is necessary to consider all of them. This is in my view sufficient for a consideration of the prospects of success without determining the merits. Taking into account the abovementioned considerations, I am of the view that the prospects of success would favour the applicants.

[71] As already pointed out above, the prospects of success is not the only consideration to be taken into account. The extent of the delay, the reasons given for the delay, the effects of the delay on the administration of justice and the potential prejudice for other parties must also be considered. An unreasonable delay without a proper explanation may have serious consequences for an applicant. In the absence of an extension of time or condonation granted by the Court, the question whether or not the decision was unlawful no longer matters (*Urban Tolling Alliance v SANRAL*, *supra*, par 26). Taking into account all the abovementioned considerations as well as the fact that there is, in my view, no acceptable explanation for the unreasonable long delay, the application for condonation must be refused. Put differently, I am not convinced that it will be in the interests of justice to grant condonation. This

means that the relief sought in paragraphs 1 to 5 of the amended notice of motion must be refused.

THE REVISED MANDATORY SANCTIONS

[72] The applicants apply in paragraph 6 of the amended notice of motion that the first respondent be directed to reconsider and revise its “*mandatory sanctions on contravention of the Code of Professional Ethics*” adopted in June 2020 to address certain deficiencies in the decision-making process identified in this application. These revised mandatory sanctions came into operation after the disciplinary hearings of the second and third respondents had been finalised.

[73] It was pointed out in the supplementary founding affidavit that these revised mandatory sanctions are problematic in at least three respects. First, clause 6 sets out the various sanctions that may be imposed. The sanctions include a reprimand, suspension, fine, and removal from the register. No provision is made for rehabilitation, such as anger management, training on appropriate child discipline techniques and other corrective measures.

[74] Second, clause 4 thereof sets out the guiding principles for sanctions. These include a whole host of principles, including preserving the credibility of the profession, protecting the general public, maintaining professional standards, etc. There is no mention of constitutional principles such as the best interests of the child principle or the rights of learners.

[75] Third, the revised mandatory sanctions make no provision for a child-centred approach, which requires that children and their parents be consulted on

the appropriate sanction and also be afforded a meaningful opportunity to make representations on an appropriate sanction.

[76] Counsel for the first respondent argued that paragraph 6 of the amended notice of motion is formulated in such a way that the Court is requested to direct the first respondent not only to reconsider, but also to revise its mandatory sanctions. It is pointed out that this is a statutory function, assigned to the first respondent, and an interference by the Court would amount to a violation of the principle of separation of powers. I was referred, *inter alia*, to Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at paras 46 and 48 where it was emphasised that the need for Courts to treat decision-makers with appropriate deference or respect, flows not from judicial courtesy or etiquette “*but from the fundamental constitutional principle of the separation of powers itself*”.

[77] The *amicus curiae* also made submissions with regard to the relief sought in paragraph 6 of the amended notice of motion. She supported submissions made by counsel for the applicants. It was submitted that the mandatory sanctions adopted in June 2020 should make provision for a child-centred approach as well as to accommodate corrective and rehabilitative sanctions for educators in disciplinary proceedings.

[78] It does not appear that the first respondent takes issue with the applicants regarding the merits of the criticism levelled against the revised mandatory sanctions. It is however argued that there is nothing in the new mandatory sanctions that *precludes* the presiding officer to recommend a

rehabilitation if the facts and circumstances justifies such a conclusion or that it *precludes* a learner or the parents to make representations on an appropriate sanction.

[79] Is this a case where the Court should direct the first respondent to reconsider and revise its mandatory sanctions without granting a declaration of constitutional invalidity under s. 172(1)(a) of the Constitution? I was referred to the case Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) where it was pointed out by Moseneke DCJ (in par 97) that s. 172(1)(b) of the Constitution confers wide remedial powers on a competent Court adjudicating a constitutional matter and that this power *“is not only available when a Court makes an order of constitutional invalidity of a law or conduct under s. 172(1)(a)”*.

[80] In that case the school governing body was directed to reconsider its language policy and to bring it in line with constitutional values (par 98):

“In the present matter, it is just and equitable to all concerned that the school governing body be directed to reconsider the school language policy in light of the considerations set out in this judgment. These considerations are underpinned by an understanding of the power to determine language policy in terms of s. 6(2) of the Schools Act as informed by the peremptory provisions of s. 29(2) of the Constitution”.

[81] In a judgement by Khampepe J in Head of Department, Department of Education, Free State Province v Welkom High School 2014 (2) SA 228 (CC) the

learned Judge said the following (in par 125) with regard to the pregnancy policies of school governing bodies:

"I therefore find it apposite to grant an order that respects the scheme of powers of the Schools Act and the principle of cooperative governance. Mindful of the fact that the respondents have not made submissions justifying the constitutionality of the policies, I believe it appropriate for this Court to refrain from making a declaration of invalidity thereof. Instead, invoking s. 172(1)(b) of the Constitution, I find it appropriate to order the school governing bodies to review their pregnancy policies in the light of this judgment."

[82] It therefore appears that in principle a competent Court may exercise its powers in terms of s. 172(b) of the Constitution without granting a declaration of constitutional invalidity under s. 172(1)(a) if that Court deems it just and equitable to do so. Furthermore, where it is apposite to grant an order *"that respects the scheme of powers"* of a litigant, such as the first respondent, as reflected in the South African Council for Educators Act, recognising the constitutional rights of children and taking into account the principle of cooperative governance, I am not convinced that in a case such as this, it can be said that the separation of powers principle will be violated or even be affected negatively.

[83] The next question to be considered is whether there is a constitutional imperative to make provision for a child-centred approach as well as to accommodate corrective and rehabilitative sanctions in the first respondent's new mandatory sanctions? In my view there is such a requirement. It is appreciated that not all contraventions and sanctions which are referred to in the

new code relate to children, but many of them do involve children, for instance corporal punishment and assault; making remarks of a sexual nature to a learner; showing pornographic material to learners; and sexual intercourse with a learner.

[84] Section 28(2) of the Constitution stipulates that a child's best interests are of paramount importance "*in every matter concerning the child*". I was referred to *AB and Another v Pridwin Preparatory School*, supra, where it was emphasised (par 141) that s. 28(2) incorporates a procedural component, affording a right to be heard where the interests of children are at stake. There the Court was concerned with the expulsion (cancellation of agreement) of two children from a private school without hearing the parents or children. In my view the interests of learners are also at stake during disciplinary proceedings of educators where a child was involved.

[85] Section 6(3) and s. 10 of the Children's Act are also applicable. Both these sections make provision for child participation in a matter concerning that child. In s. 6(3) it is provided that if it is in the best interests of the child, the child's family "*must be given*" the opportunity to express their views "*in any matter concerning the child*". Section 10 clearly provides that a child "*has the right to participate*" if that child is able to participate meaningfully.

[86] The effect of these provisions is that children have a right to express their views, either in person or through an appropriate representative, on matters that concern their interests.

[87] As far as corrective discipline of educators is concerned, I am of the view that this is also a consideration to be taken into account in matters that concern the interests of a learner. Put differently, it is in the interests of a learner that his educator be provided with the necessary support and be taught the necessary skills regarding non-violent forms of discipline in the classroom and school environment. No provision is made in the revised mandatory sanctions for child participation or the option of rehabilitative sanctions in matters that concern the interests of children.

[88] Taking into account all the above considerations, I am of the view that the first respondent is obliged to give effect to the rights of children and to incorporate measures into the revised mandatory sanctions that will recognise this principle. Furthermore, it is just and equitable, having regard to the provisions of s. 172(1)(b) of the Constitution, that the first respondent be directed to reconsider and revise this document as I will more fully set out hereunder.

[89] When considering an order, I take into account the following: First, the order should not be too prescriptive. The first respondent should be allowed to apply its mind properly and to have the opportunity to discuss these measures with the first applicant and the *amicus curiae*. The first respondent should then be given the opportunity to report back to this Court.

[90] Second, the first applicant and the *amicus curiae* are not the usual litigants. They specialise in child law. They appear to be professional bodies and I have good reason to believe that both of them enjoy the necessary respect in

the legal profession. They should therefore be suitable candidates to assist the first respondent in formulating the necessary measures.

[91] Third, these measures, as identified hereunder, will not only be in compliance with a constitutional imperative, but they will also serve the best interests of children as learners in all South African schools.

[92] The subjects to be addressed, without limiting the scope, are at least the following:

- (a) the need for the inclusion of corrective and rehabilitative sanctions such as anger management and training on non-violent child discipline techniques;
- (b) the need to recognise the best interests of the child and the rights of learners in the guiding principles; and
- (c) 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.

ORDER

In the result I make the following order:

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*.



D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 13/10/22

Matter heard: 14 June 2022

Counsel for the applicants: adv C Mcconnachie and adv T Poore instructed by Section27

Counsel for the first respondent: adv MM Mojapelo instructed by Mketsu and Associates inc

Counsel for the *amicus curiae*: adv N Rajab-Budlender SC and adv S Kazee instructed by Equal Education Law Centre