

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA9/2020

WESTERN CAPE EDUCATION DEPARTMENT

Appellant

and

AJJ BAATJES

First Respondent

EDUCATION LABOUR RELATIONS

COUNCIL

Second Respondent

ADV J P HANEKOM

Third Respondent

Heard: 17 November 2021

Delivered: 12 January 2022

Coram: Davis JA, Coppin JA and Kubushi AJA

JUDGMENT

Introduction

[1] This appeal, opposed only by the first respondent, is against the order of the court *a quo*. In the appeal, the appellant seeks to overturn the court *a quo*'s order which set aside the arbitration award of the third respondent in so far as it found the dismissal of the first respondent substantively fair, but substituted the sanction of dismissal with a lesser sanction, which includes reinstatement, a final warning and three (3) month's deemed suspension.

[2] The first respondent has not cross-appealed the finding of guilty in respect of charges 2 and 3. Therefore, only the fairness of the sanction is an issue before this court.

[3] The appellant's contention is that the lesser sanction is inadequate in light of the facts of this matter, whereas the first respondent is satisfied with the sanction

imposed by the court *a quo*. For convenience, I shall, in this judgment, refer to the first respondent as the respondent and the third respondent as the arbitrator.

[4] Before the commencement of argument, the appellant applied, unopposed, and was granted condonation to file the notice of appeal and the supplementation of the record with the translations of the Afrikaans portions of the record, out of time. The appeal is with leave of this court on petition.

Factual background

[5] The appeal is based on the following common cause facts: The respondent was employed by the appellant as a level 1 Educator at Roodewaal Primary School in Worcester. At the time of the occurrence of the incidence in question, he had been so employed for a period of twenty-seven (27) years. In 2016, the respondent appeared before a disciplinary hearing charged by the appellant, his employer, with three counts of misconduct, namely: (i) assaulting a learner by hitting him with a pipe on his arm on 27 January 2016 at Roodewaal Primary School, while school was in session; (ii) assaulting the same learner with the intention to do grievous bodily harm, the following day on 28 January 2016 at the same school, by grabbing him by his neck and throwing him to the ground, kicking him and threatening to kill him; and (iii) assaulting the learner's elderly guardian/grandmother also on 28 January 2016 at the same school, by throwing her against a gate, kicking her and hitting her on the face with his fist, as well as kneeling on her.

[6] The respondent pleaded guilty to the first charge of assaulting the learner with a pipe on his arm, but pleaded not guilty to the other two charges that occurred on 28 January 2016. He was, however, found guilty of common assault on each of the three charges and a sanction of dismissal was imposed.

[7] The respondent appealed this decision and the imposed sanction to the Member of the Executive Committee for Education, but the appeal was dismissed. He, subsequently, referred the dismissal dispute to the Education Labour Relations Council, the second respondent herein, disputing the findings of guilty on charges 2

and 3, as well as the fairness of the sanction of dismissal. The dispute was conciliated without success and eventually referred to arbitration.

[8] At arbitration, the pre-arbitration minute recorded the respondent's plea of guilty to charge 1 of hitting the learner with a pipe, and noted his plea of not guilty to charges 2 and 3 of the assault on the learner and his grandmother that occurred on 28 January 2016.

[9] The issues for determination at arbitration were whether the respondent was guilty of charges 2 and 3 and whether dismissal was the appropriate sanction. The arbitrator found on the evidence tendered that the respondent was guilty of common assault in regard to charges 2 and 3 and that the sanction of dismissal was appropriate under the circumstances.

[10] Aggrieved by the arbitration award, the respondent launched an application with the court *a quo*, seeking an order to review and set aside the arbitration award. The court *a quo*, after consideration of the record of proceedings before the arbitrator together with the arbitration award, save for the finding that the respondent was guilty of common assault on the learner and the learner's grandmother, reviewed and set aside the arbitration award, and substituted the findings of the arbitrator on the fairness of the respondent's dismissal, with a lesser sanction.

[11] The appellant is not satisfied with the decision of the court *a quo* regarding the sanction it imposed, and is, as a result, before this court to appeal against the court *a quo*'s decision to impose a lesser sanction.

Arguments

[12] The appellant's argument is that on the facts of this case, it was reasonable for the arbitrator to conclude that dismissal was an appropriate sanction that did not require the court *a quo* to substitute it with a lesser sanction. In essence the appellant's case is that the court *a quo*'s judgment is incorrect on the following grounds:

(a) The nature and gravity of the misconduct which includes two assaults on a learner and another on the learner's elderly grandmother over two consecutive days justify dismissal on the grounds that –

(i) where the respondent had pleaded guilty in charge 1, in the face of an admitted assault of a twelve (12) year old learner, who at the time of the assault appears to have done nothing wrong, coupled with the statutory injunction not to administer corporal punishment against learners, exacerbated further by the respondent's lack of remorse, dismissal on this charge alone, fell within the band of reasonableness.

(ii) where the evidence in charges 2 and 3 demonstrated that the respondent was unable to control his temper, the contention being that the outburst of the respondent's temper was the reason for the confrontational and violent outburst between himself, the learner and the learner's grandmother, coupled with the assault of an elderly fifty-six (56) years old petite woman and thus, cumulatively considered with charge 1, dismissal was the appropriate sanction to mete out.

(b) The respondent's 27 years of unblemished record does not sufficiently mitigate the sanction of dismissal, given the serious nature and gravity of the assaults, his position as an educator, his lack of remorse and heightened levels of aggression which characterise his temperament; and

(c) It was not for the arbitrator to request additional medical evidence to bolster the respondent's case, in circumstances where he was represented by a union representative who was familiar with arbitration process and had indeed placed evidence of treatment before the arbitrator. If the arbitrator had requested additional information, it would have rendered his conduct improper and lent to a perception of bias.

[13] The appellant, thus, submitted that when all the evidence that was before the arbitrator is considered holistically and contextually, it is apparent that the arbitrator formed the view that the nature and gravity of the misconduct clearly outweighed the

respondent's clean record and length of service. It was for that reason that the arbitrator found that dismissal was the appropriate sanction.

[14] The respondent's case in opposition to the appeal is that the court *a quo's* judgment is correct because:

(a) the arbitrator failed to apply his mind to matters which are material to the fairness of the sanction to such an extent that it cannot be said that there was a fair trial. Such matters include respondent's successful rehabilitation, 27 years' service, additional post graduate qualification acquired and a blemish free record;

(b) the arbitrator ought to have looked at the nature and extent of the respondent's conduct within the context of the surrounding circumstances. The argument is that, if the arbitrator had done so, he would have realised that even if the three charges of misconduct are taken together, absent anything else, dismissal was not a proper sanction. A reasonable arbitrator, according to respondent's counsel, would not have come to the decision the arbitrator in this matter reached.

(c) even if the charges are taken cumulatively, the effect thereof does not stand within the ranking of a gross misconduct that justifies dismissal, particularly when considered in the light of the respondent's 27 years of a clean record of service, and the other surrounding circumstances where there was gross provocation constituted by a history of trouble with the learner, coupled with his grandmother's attitude in refusing to go wait for the principal at the office. In addition, counsel contended that even though the evidence showed that the respondent has a short temper, the arbitrator ought to have taken into account the fact that for 27 years of his service as a teacher the respondent maintained an unblemished service record.

(d) the arbitrator should have considered the provisions of section 18 of the Employment of Educators Act ("the Educators Act").¹ which sets out

¹ Act 76 of 1998.

sanctions in terms of the degree of misconduct. According to the respondent's counsel, the section has variable sanctions depending on the degree of the misconduct, and dismissal can only be imposed if the nature and extent of the conduct, in this case assault, justify it. The argument is that, in this instance, though the respondent was charged with assault with intent to do grievous bodily harm, he was, in actual fact, only found guilty of common assault on all the three charges, the degree of which does not justify a sanction of dismissal. Furthermore, the arbitrator, is said to have imposed the sanction of dismissal without even considering whether other forms of sanctions might be appropriate; and that

(e) the arbitrator was duty bound to request medical evidence to fairly determine the respondent's case, in circumstances where the arbitrator followed an inquisitorial approach and gave an indication that he was satisfied with the respondent's evidence of his anger treatment and the result thereof. The arbitrator was, in any event, in terms of the CCMA's Guidelines duty bound to request additional information in this regard.

[15] This court has to determine whether the court *a quo*, considering the evidence that was before the arbitrator, having, also, come to the conclusion that the respondent was guilty as charged, should have taken a view that an arbitrator acting reasonably under such circumstances, could not have imposed a sanction of dismissal.

The Applicable Law

[16] In this matter, the court *a quo* reviewed and set aside the arbitration award in so far as it relates to the sanction of dismissal imposed by the arbitrator, on the basis that it was substantively unfair, and substituted it with a lesser sanction.

[17] In terms of the Labour Relations Act ("LRA"),² it is the duty of an arbitrator to determine whether a dismissal is fair or not. An arbitrator is said not to be given the power to consider afresh what she or he would do, but simply to decide whether

² Act 66 of 1995.

considering all relevant circumstances, the sanction of dismissal as imposed by the employer was fair.

[18] It is, thus, trite that, on review, the test is whether the arbitrator, in arriving at a conclusion about the fairness of the dismissal, arrived at one that a reasonable arbitrator could have reached, given the evidence and the questions of fact and law before such arbitrator.³

[19] Therefore, the test that this court must apply in deciding whether the arbitrator's decision is reviewable is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.

[20] It is my view that in this matter, based on the material that was before the arbitrator, the court *a quo*'s decision in reviewing and setting aside the sanction of dismissal imposed by the arbitrator and thus substituting it with a lesser sentence, is not correct. I say so based on the reasons that follow hereunder.

Analysis

Whether the nature and gravity of the misconduct, in the circumstances of this matter, justify a sanction of dismissal

[21] Before this court, the parties are at odds as to whether the arbitrator made evaluations of evidence that was before him to the extent that these were material to, and affected the outcome that he eventually reached. For instance, the appellant's contention, which in my view is correct, is that the evidence that was before the arbitrator evinced the nature and extent of the misconduct as justifying the imposition of a sanction of dismissal; whereas it is the respondent's submission that the evidence before the arbitrator demonstrated the nature and extent of the misconduct as not justifying dismissal as an appropriate sanction. The cardinal issue here, is whether the misconduct is serious enough to warrant dismissal as an appropriate sanction.

³ See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC); [2007] 28 ILJ 2405 (CC).

[22] When considering this issue, the arbitrator concluded that dismissal is appropriate under the circumstances of this matter. In coming to such a finding the arbitrator considered the following in the award:

“24. In my view, it is a serious transgression for the Applicant to assault a parent or guardian of a learner. The School could not condone the Applicant’s behaviour in that regard, as it needs to look after its reputation. . . If it was only charge one against the Applicant, then one could have argued that dismissal was inappropriate. In this instance, the Applicant went overboard and made himself guilty of assault on three charges that included an assault on a parent or guardian. I cannot lightly interfere with the sanction imposed by the employer. I therefore could not find that the sanction of dismissal imposed by the employer was shockingly inappropriate that I as a reasonable decision maker should intervene. I therefore find the Applicant’s dismissal substantively fair.”

[23] It is, therefore, clear from the reading of the award that the arbitrator considered the cumulative effect of the three charges as manifestly gross and the effect the said misconduct had on the continued employment relationship between the parties, to arrive at the conclusion that dismissal was the appropriate sanction.

[24] The nature and gravity of the misconduct is such that, in his own version in respect of charge 1, the respondent pleaded guilty and confirmed that he assaulted the learner with a pipe. It appears from the evidence that the respondent assaulted the learner for no apparent reason but for his (the respondent) frustrations due to the learner’s previous behaviour that went unpunished. It was the respondent’s case that the learner was inclined to making remarks to and inappropriately touching other learners. According to the respondent’s evidence, on the day he assaulted the learner, the learner had simply walked past his classroom door, he called the learner and gave him (the learner) “*just one blow*” with a pipe. As a result of such assault by the respondent, the learner sustained thick red marks (whorls) on his arm.

[25] The second incident, charges 2 and 3, happened after the complainants went to school to report the first incident to the principal who they found was not available and ended going to the respondent's classroom.

[26] The evidence on record, in respect of charge 2, is that the learner went into the classroom and sat at his desk. The respondent is said to have gone to the learner, pulled him out of his desk and removed him from the classroom. There is a dispute as to the manner in which the respondent removed the learner from the classroom, but the arbitrator having evaluated the evidence that was before him made a finding that the learner's version was more probable, and accepted same as the truth of what happened, that is, the respondent removed the learner by the neck and threw him out of the classroom.

[27] It is common cause that when they were outside, the respondent pushed the learner away and he fell against the gate and injured his arm. The arbitrator's finding in this regard is that the learner was so pushed when he tried to help his grandmother who was lying on the ground with the respondent kneeling over her and pushing one of his knees into her. The learner as a result sustained injuries to his left arm.

[28] As regards charge 3, it is common cause that the learner's grandmother fell with her back onto the cement slab outside the classroom and sustained bruises as a result. It is also common cause that after the respondent fell on top of the learner's grandmother, he was on his knees with one knee pushing the learner's grandmother down, whilst she was lying on the ground. There was a dispute as to the manner in which the respondent and the grandmother fell to the ground, but the arbitrator accepted the grandmother's evidence as probable and as such made a finding that the grandmother fell when she was pushed by the respondent.

[29] The assault on the grandmother was aggravated further in that from the observation of the arbitrator, the learner's grandmother was a small slender person with a tiny body, whilst the respondent, was a big and muscular man. The arbitrator found it greatly inappropriate for the respondent to have assaulted the learner's grandmother, a 56 years old petite woman, in the manner that he did. She was

injured, as a result of the fall, the doctor who examined her after the incident diagnosed bruising and tenderness in the ribs and “behind” area.

[30] It is quite clear from the above evidence that both the learner and his grandmother were left traumatised by the assault which happened on the school premises in full view of other learners as well as teachers, in respect of counts 2 and 3.

[31] The respondent’s contention that if the arbitrator had taken the degree of the misconduct, which is common assault, against the background of the provisions of section 18 of the Educators Act, he would have, as a reasonable arbitrator, not imposed a sanction of dismissal, is without merit.

[32] It is not in dispute that the provisions of section 18 of the Educators Act has variable sanctions depending on the degree of the misconduct, and dismissal can only be imposed if the nature and extent of the conduct justify it. It is, also, not in dispute that from the evidence that was before the arbitrator, although one of the charges facing the respondent was assault with intent to do grievous bodily harm, which justifies dismissal, he was, in actual fact, only found guilty of common assault on all the three charges, the degree of which, individually, does not justify a sanction of dismissal. However, it is clear from the award that the arbitrator took into account the seriousness of the misconduct and its cumulative effect as not warranting the reinstatement of the respondent, from the operational point of view.

[33] Thus, the further contention that the arbitrator failed to consider other sanctions that were available and did not even refer to the other sanctions, is enough to set the award aside, is unmeritorious and not correct. This contention, in my view, is not supported by the reading of the award, which shows that the arbitrator considered the appropriateness of the sanction and found the applicant’s dismissal to be fair on the basis of the seriousness of the misconduct.

[34] The findings of the arbitrator are, furthermore, fortified by the statutory injunctions on educators not to administer corporal punishment against learners, which injunctions on their own justify dismissal on charges 1 and 2.

[35] The Constitutional Court has in *Christian Education South Africa v Minister of Education*,⁴ when providing interpretative content to section 10(1)⁵ of the South African Schools Act,⁶ held, amongst others, that the State was under a constitutional duty to take steps to help diminish the amount of public and private violence in society, generally to protect all people, and especially children, from maltreatment, abuse or degradation.

[36] The Constitutional Court's reasoning continued along the lines that the outlawing of physical punishment in the school represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function manifestly intended to promote respect for the dignity and physical and emotional integrity of all children. Thus, any violence against a child justifies a sanction of dismissal. Regrettably, the court *a quo* failed to engage meaningfully with the best interest of the child, particularly as contained in section 28(2) of the Constitution, which enshrines the principle of the best interests of the child. The fact that an educator, however, frustrated he or she may be with a learner or however troubled the learner may be, should administer punishment in a form of an assault to a learner, as occurred in this case, is so flagrantly a breach of the constitutional rights of the child, renders the decision of the court *a quo* totally inexplicable.

[37] In addition, in terms of section 18(1)(r) of the Educators Act, it is a misconduct for an educator to assault or attempt to assault or threaten to assault another employee or another person. Section 17(1)(d) of the Educators Act, on the other hand, provides that an educator must be dismissed if he or she is found guilty of seriously assaulting, with the intention to cause grievous bodily harm to, a learner, a student or other employee. In addition, section 18(3)(i) of the Educators Act directs that the employer may impose a sanction of dismissal if the nature or extent of the misconduct warrants dismissal.

Whether the respondent showed remorse

⁴ 2000 (4) SA 757 (CC).

⁵ 10. **Prohibition of corporal punishment** – (1) No person may administer corporal punishment at a school to a learner.

⁶ Act 84 of 1996.

[38] The argument by the respondent's counsel that the arbitrator failed to consider the fact that the respondent was remorseful and had rehabilitated himself and that he was provoked, as factors in mitigation of sanction, militates against the finding of dismissal as appropriate, is similarly without any merit.

[39] The arbitrator, having assessed all the material before him, concluded reasonably so, that the respondent has shown no remorse. The following remarks are made by the arbitrator in paragraph 24 of the award:

‘24. As to the appropriateness of the sanction, I have to decide each case on its own merits. I took into account that the Applicant [respondent] blamed Ismail [the learner's grandmother] and Joseph [the learner] for the situation on 28 January 2016. Further, the Applicant wanted to justify his actions in respect of the charge one that occurred on 27 January 2016 when he hit Joseph with a pipe. The Applicant during his testimony claimed that he did so, because Joseph was fond of touching other learners in the class. That might be so, but lately there are other more human ways to punish learners for wrongdoing. The Applicant never raised this issue with Joseph during cross-examination. Accordingly, I find that the Applicant did not show remorse.’

[40] Effectively, when the arbitrator came to the conclusion that the respondent showed no remorse, he, correctly, took into account the fact that, in the first place, though the respondent had pleaded guilty in respect of the charge that occurred on 27 January 2016 when he hit the learner with a pipe, he, however, wanted to justify his actions by claiming that he hit the learner because the learner was fond of touching other learners in class. Although the arbitrator accepted that perhaps, it might have been so, but, he rejected the respondent's explanation on the basis that lately there are other more humane ways to punish learners for wrongdoing. The respondent's explanation was, also, rejected on the basis that such justification remained merely an allegation because the respondent never raised it with the learner during cross-examination. In the second place, the arbitrator took into account the fact that, instead of taking responsibility, the respondent continued to

place blame on the learner and his grandmother for the events that occurred on 28 January 2016.

[41] In oral argument before this court, counsel for the respondent sought to argue that he had showed remorse when he acknowledged that he had anger management issues and that immediately after the incident, he tried 'to repair' (meaning to rehabilitate) himself as an educator and went on his own to a clinic where for three weeks he received specialist treatment for anger management.

[42] It was not in dispute that the respondent was a person with anger management issues. It is, also, not in dispute that a person with anger management issues cannot be employed to deal with children, particularly in a school environment. Both Mr Van der Merwe and Mr Jones, who testified at the arbitration, confirmed that the respondent was short-tempered and that on 28 January 2016, he was very upset. The respondent, also, conceded that he has anger management issues and that on the day in question he was very upset and could not control his temper. And, that was the reason why he, immediately after the incident, sought the assistance of experts to help him with his uncontrollable temper. It is on that basis that it was argued on his behalf that his having attended the treatment to deal with this challenge, on his own volition, should be regarded as an indication of remorse.

[43] The arbitration award deals with this issue of the respondent's attempt to deal with his anger issues, at length. However, based on the material that was before him, the arbitrator could not find, reasonably so in my view, that the respondent could in future control his short temper and, thus, correctly so, could not make a finding that the respondent showed meaningful remorse. In paragraph 24 of the award he stated as follows:

'24. I further could not find that the Applicant was over his short temper, I only have his word for it. The letter of Claro Clinic, submitted as documentary evidence merely confirmed the Applicant's admission for a period of three weeks in March 2016. No detailed medical evidence supported the Applicant's claim as to the prognosis, treatment, and his response to such treatment. Jones and Van der Merwe as witnesses

confirmed that the Applicant had a short temper. Jones knew the Applicant for his short temper from the past. The Applicant did not contest this evidence.'

[44] It is apparent from the arbitration award that only a letter of Claro Clinic, was placed in evidence in support of the respondent's claim that he received treatment there and has been rehabilitated. However, from reading the award, it is clear that the letter submitted, only confirmed that the respondent was admitted there for a period of three weeks to receive treatment. The medical evidence required in support of the respondent's claim as to the prognosis, treatment, and the respondent's response to such treatment was not detailed in the letter, hence no informed decision could be made that the respondent has overcome his short temper.

[45] Moreover, the evidence on record does not give an indication of any actual genuine self-reflection by the respondent. There is no indication that he knows that what he did, in assaulting the learner and his grandmother, was wrong, which, in my view, would be an indication that he was remorseful. The fact that during the arbitration hearing he sought to justify his conduct of hitting the learner with a pipe and also instead of accepting responsibility for the events of 28 January 2018, he continued to put blame on the learner and his grandmother, aggravates his situation.

[46] Essentially, the challenge for the respondent is that, from the evidence tendered at the arbitration, even if it can be accepted that the respondent received treatment from specialists in relation to his anger management issues, and was assisted and/or 'remedied' as contended for by his counsel, but his demeanour shows otherwise. In my view, in order for the respondent to have shown genuine remorse, he would have, after undergoing treatment, asked for forgiveness from the learner and his grandmother. This he would have done by going to them directly and asked for forgiveness or apologised to them when giving evidence at the arbitration as an indication of remorse. Such conduct, would have shown that, through the treatment, the respondent realised and accepted that what he did was wrong.

[47] To the contrary, his counsel sought to argue that the arbitrator ought to have considered the work of the several specialists who had worked on the respondent,

who would have verbalised the respondent's feelings because as a person who has anger problems the respondent is not able to express himself, but the specialists' view of what was going on in his mind, could have assisted the arbitrator in reaching a different conclusion. I do not agree.

[48] In my view, for the respondent to have shown genuine contrition, it would not have been expected of the specialists to inform the arbitrator what was going on in the respondent's mind. But, what ought to have happened, was for the respondent to show the arbitrator what was going on in his mind. The respondent should have, during the treatment, been assisted by the specialists to realise that what he did was wrong and to accept that it was wrong. It is not a question of what the specialists had to say, but it is a question of self-reflection. The respondent ought, on his own, to know that he has done wrong, irrespective of whether he was provoked or not, and go back to the person he offended and ask for forgiveness. There being no such evidence on record, the only inference that can be drawn is that the specialists failed to adequately deal with the respondent's anger issues and the respondent still requires further treatment. Not only was there no evidence to justify that there was remorse but the manner in which the respondent prosecuted his case was, clearly the opposite of that expected of a self-reflective, remorseful teacher. Consequently, it would be safe to conclude that the respondent has not been rehabilitated, and is, as such, not suitable to continue to work in a school environment.

[49] It is my view that the respondent's 27 years of unblemished record, which the respondent's counsel contended for, does not sufficiently mitigate the sanction of dismissal, given the serious nature and gravity of the assaults, the respondent's position as an educator, his lack of remorse and heightened levels of aggression which characterise his temperament, which it has been shown he has not overcome. Therefore, when all the evidence that was before the arbitrator, is considered holistically and contextually, it is apparent that the arbitrator formed the view that the nature and gravity of the misconduct clearly outweighed the respondent's clean record and length of service and for those reasons he found that dismissal was the appropriate sanction.

[50] The further submission by the respondent's counsel that the arbitrator ought to have taken the respondent's plea of guilty on charge 1 and his thinking that on charges 2 and 3 he was acting in self-defence, as showing remorse, is also without merit.

[51] On his version, the respondent states that, even though he did not plead guilty in respect of charges 2 and 3, he eventually did apologise because when he was advised to abide by the decision of the arbitrator, he followed suite and did not appeal the finding. This, in my view, does not show any contrition on the part of the respondent. Contrition, as I have said, is a self-reflection and must come from the respondent.

[52] The arbitrator further accepted the evidence of Mr Van der Merwe, the principal of the school, that he expected educators to control themselves and to respect others and that he would not appoint educators that lose their temper. It is on this basis that the arbitrator found it understandable that though educators have to work under difficult circumstances and sometimes have to deal with tense situations, they still have to be able to control themselves and respect the learners, regardless of the circumstances. The arbitrator, consequently, could not find any guarantees that the respondent would not commit the same transgression when and if provoked.

Whether there was provocation

[53] There can never have been provocation on the part of the learner and his grandmother. The arbitrator when rejecting this evidence, made a finding that, as regards charge 1 the respondent assaulted the learner for no apparent reason as he called him whilst passing his classroom and hit him on the arm. The arbitrator, as well, rejected the explanation the respondent sought to make, as mere allegations which were unproven and that there were other ways of disciplining learners rather than hitting them with a pipe.

[54] In regard to counts 2 and 3, there is no evidence on record of the gross provocation alleged by the respondent. The findings of the arbitrator, in this regard, is that the learner and his grandmother had gone to the school to report the incident

that had happened the previous day. The learner and his grandmother were attacked by the respondent, who conceded that he could not control his anger on that day. The learner had gone into the classroom and sat at his desk when the respondent pulled him by the neck to remove him from his classroom, he then pushed the learner's grandmother who was standing at the door enquiring about the manner the respondent was handling his grandson. The grandmother fell outside the classroom on the cement slab. The respondent further pushed the learner when the learner tried to assist his grandmother whilst she was lying on the ground with the respondent pushing her down with his knee.

Whether the arbitrator was duty bound to request medical evidence

[55] It is my view that the argument on behalf of the respondent that the process followed by the arbitrator when considering the evidence in regard to the treatment of the respondent for anger management, had a lot of shortcoming, has no basis.

[56] The shortcomings, as I understand, were as a result of the arbitrator failing to request more information about the treatment the respondent received for his rehabilitation. The submission by respondent's counsel was that the respondent having referred to his treatment for anger management during his testimony, it was for the arbitrator, in exercising 'the helping hand principle' and in terms of the CCMA's Guidelines, to have requested more information instead of holding it against the respondent that the evidence was lacking.

[57] It is my view that, the proposition by the respondent that the arbitrator was duty bound to request medical evidence to fairly determine the respondent's case, is in similar vein, without merit. I am more inclined to agree with the argument by the appellant's counsel that it was not for the arbitrator to request additional medical evidence since it would be tantamount to bolstering the respondent's case.

[58] The evidence of treatment was placed before the arbitrator by the respondent's union representative who further confirmed that such evidence was relevant and sufficient in support of his argument that the respondent has been rehabilitated.

[59] Even if it can be accepted that the arbitrator did give an indication that he was satisfied with the respondent's evidence of his anger management treatment and the result thereof, it, however, does not detract from the fact that there was inadequate evidence before him in support of the respondent's claim that he was rehabilitated. The letter as earlier indicated, only confirmed the respondent's admission to the clinic for three weeks. There was no mention of the prognosis, treatment, and the respondent's response to such treatment to support the respondent's claim in this regard.

[60] Additionally, the respondent was represented by a union representative who had, before the hearing commenced, assured the arbitrator that he was knowledgeable about arbitration proceedings. The union representative must have, therefore, been fairly familiar with the arbitration process to have given such assurances. Furthermore, the arbitrator took it upon himself to explain the rules of evidence and the manner in which he would apply the rules to the evidence adduced, if the union representative did not understand this explanation, he should have indicated as such.

[61] It is, also, worthy to note that the specialist report referred to in the court *a quo's* judgment, did not serve before the arbitrator and can, therefore, not be of any assistance to the respondent's case.

[62] Effectively, the arbitrator acted reasonably in making a finding that the respondent was not rehabilitated and showed no remorse at all.

Conclusion

[63] It is trite that adjudging the severity of misconduct in context, is a power conferred on an arbitrator. The law is clear: the choice of sanction made by the arbitrator must stand unless it is demonstrable that no reasonable arbitrator could have reached that conclusion.⁷ In this matter, there is no demonstrable evidence that no reasonable arbitrator could have reached the conclusion reached by the arbitrator

⁷ See *TMT Services & Supplies (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* 2019 (40) ILJ 150 (LAC) at para 21; and *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2000 (2) SA 24 (CC) at 178 and 179.

in this instance. The result is that there is no irregularity in how the arbitrator assessed the appropriateness of the sanction and/or fairness of the dismissal.

[64] To the contrary, the nature of the misconduct, which includes two assaults on a 12 year old learner and another on the learner's 56 year old elderly petite grandmother over two consecutive days, exacerbated further by the gravity of the misconduct which includes the unprovoked manner in which the respondent hit the learner and his grandmother and the injuries sustained, coupled with the statutory injunction not to administer corporal punishment against learners, the overriding constitutional principle of the best interests of the child, as well as, the respondent's lack of remorse, manifestly justify dismissal as an appropriate sanction. As such, the dismissal stands to be confirmed.

Costs

[65] No order for costs is warranted in the circumstances of this matter. I, in that regard, am not making an order for costs.

Order

[66] In the circumstances the following order is made:

1. Condonation is granted for the late filing of the Notice of Appeal and the supplementation of the record with the translations of the Afrikaans portions of the record.
2. The appeal is upheld.
3. The judgment and order of the court *a quo* is set aside and is substituted with the following order: "The review application is dismissed".
4. There is no costs order.

Kubushi AJA
Davis JA and Coppin JA concur.

APPEARANCES:

FOR THE APPELLANT:

B Joseph

Instructed by Office of the State Attorney

FOR THE FIRST RESPONDENT:

D C Le Roux

Instructed by the Murray Fourie & Le Roux

Inc