

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: JA39/2006

2008-02-28

10 **In the matter between**

MEC FOR EDUCATION DEPARTMENT: LIMPOPO

Appellant

And

MOKGADI EVAH SEBETHA

Respondent

J U D G M E N T

DAVIS JA:

20 [1] From 14 June 2001, first respondent applied corporal punishment to a minor pupil aged 6. In the first respondent's statement, she indicated that she had applied corporal punishment because the minor child had been absent from school on 13 June 2001. Her statement insofar as it is relevant reads thus:

 "I gave him lashes on head only and he had bruice (sic) on the right-hand side of his eye. The child was sitting on the chair, I used plastic pipe. I

immediately reported the matter to the principal and principal confirmed the bruice (sic) as the only injury on the child body (sic). The principal took the child home during break. After break the father came to school and he was very angry as the mother of Thabang phoned him. He promised to report the matter to the police and the media ... The police came to school, they asked me to report at Gakgapane Police Station on 10 15 June 2001, the case was postponed to 11 July 2001. On that date I was fined R300 for pleading guilty. During the reopening, the child was withdrawn from my class, the father's decision."

[2] As a result, appellant instituted disciplinary proceedings against first respondent in consequence of which she was dismissed. She referred the matter to the Education Labour Relations Council. Second respondent was appointed as an arbitrator. In his award, he recorded the only issue before him was whether or not the 20 dismissal of first respondent was fair and had been justifiable. He found that a clear rule existed in the workplace prohibiting educators from assaulting learners and that the first respondent knew or should have known such a rule.

[3] Second respondent however, went on to find that the sanction of the dismissal was too severe. He interfered with the sanction of dismissal and considered certain mitigating factors in favour of first respondent. In short, he took into account the remorse she has shown, her length of service and the bruise which in his view was of a minor nature. Accordingly the first respondent was reinstated.

[4] Appellant then applied to review and set aside the arbitration award issued on 17 November 2004 in terms of which the second respondent had found that the first respondent be unfairly dismissed by the appellant: "As the sanction given to her was
10 excessive and not befitting of the offence she committed."

[5] The review application was instituted approximately ten and a half months late; it was accompanied by an application for condonation. The application for condonation was dealt with by the court *a quo* and was in effect dismissed. As noted, this review application was approximately ten and a half months out of time. Appellant received the award on 18 November 2004. The mandatory period expired on 29 December 2004; the review was only instituted on 17 October 2005.

20 [6] Second respondent obtained an order from the Labour Court making the arbitration award an order of court. This award had first to be rescinded before the review could be processed. An application for rescission was pursued and the judge in making the arbitration an order of court was rescinded on 16 September 2005.

[7] Ms Cassiem, who appeared together with Mr Skoskana on behalf of the appellant, sought to make much of the dates and that the date insofar as condonation was concerned, should have begun from the time of rescission. The point however, was that the rescission of the award of the court, that is the decision of the court which had made the arbitration award an order of court, was not the crucial date. The crucial date was the award which had been granted on 18 November 2004 and the six week period expired on 29 December 2004.

10 [8] In the explanation provided by appellant, no reasons were given as to why there had been a delay, particularly between January 2005 and 28 April 2005. It was this particular unexplained delay which the court *a quo* emphasised its decision to refuse condonation.

[9] In the heads of argument which were prepared on behalf of appellant by Mr Boda, the concession is made that it is difficult to fault the court *a quo*'s analysis of this explanation for delay, and no criticism is made of the court's finding with regard to this particular aspect of the case.

20 [10] Before us this morning, Ms Cassiem emphasised that the real basis for the appellants approaching this court for condonation of the delays, was that the case was of paramount importance to appellants and further that there were clear prospects of success which flowed on the merits thereof. It is to this particular issue that I now turn.

[11] Appellant essentially argues that it is in interest of justice for the court to grant the appellant condonation, particularly because of the strong prospects of success and the fact that this dispute concerns the interest of a child. In particular, the argument was raised by appellant that the court *a quo* had failed to deal with the merits of the case in the proper legal manner.

[12] In this connection, reference must be made to two critical sections of the Employment of Educators Act 76 of 1998. Section 17(1)(d) of that Act provides that “an educator must be dismissed if he or
10 she is found guilty of serious assaulting, with the intention to cause grievous bodily harm to a learner, student or other employee. Section 18(1)(r) of Act provides that it is misconduct for an educator to assault or attempt to assault or threaten to assault another employee or another person. In terms of Section 18(2)(i) the employer may impose a sanction of dismissal if the nature or extent of the misconduct, warrants dismissal.”

[13] In my view, the court *a quo* erred in its approach to these sections. In a case where assault with intent to commit grievous bodily harm is proved, it is clear that a dismissal is mandatory. *Non constat* that
20 if there is an assault, absent grievous bodily harm, that a dismissal cannot take place. In this particular case, the minor child was six years old. She suffered an injury above the eye. I am not impressed by first respondent’s hermeneutic arguments regarding the nature of the weapon. In this case, the fact that it was a plastic

pipe is irrelevant. What is relevant is that a serious violation of the child's rights, was in fact caused by the assault administered by first respondent. These rights are now protected by our constitution and even more than previously would have been a case, courts have to take extremely seriously any violation of children's rights. Remorse after the fact in a case such as the present cannot surely be a sufficient basis for a employer never to dismiss an assaulter such as the first respondent particularly where it has a clear policy regarding corporal punishment and when the victim is a six year old child.

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[14] The employer in these cases, is certainly entitled to say, that notwithstanding any remorse, notwithstanding an impeccable record, given the violence perpetrated upon a minor child, dismissal may well be justified in such a case.

[15] The fact is; the court *a quo* erred in its evaluation of the prospects of success. It emphasised wrongly that dismissal can only take place in the case of an assault with the intent to do grievous bodily harm. As I have already mentioned, that becomes a mandatory case of dismissal. In a case such as the present, a dismissal would certainly have been justified on the facts. Were there not to have been a delay, unquestionably on the basis of the powers of review which are granted to the Labour Courts to review decisions of an arbitrator, a different result may have ensued from that which took place in this case. Most certainly this court wants to

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emphasise again that an appellant in a situation of this case, applying its mind properly to the case, is entitled to dismiss a teacher who assaults a minor child. See insofar as the powers of review are concerned; **Sidumo v The Rustenburg Platinum Mines Limited, 2008 (2) BCLR 158 (CC)**; particularly at paragraphs 61, 110 and 119 of the judgment of Navsa AJ.

[16] Having concluded that the court *a quo* erred on the law and that a dismissal of first respondent was certainly a justifiable option, given the facts of the case, the question arises as to whether on this basis alone, condonation should be granted? The facts are, that the events which gave rise to this dispute occurred almost seven years ago. More than four years have transpired since the legal proceedings commenced which followed that incident. There have been inordinate delays in this case for at least four months. The appellant (Ms Cassiem sought to place the fault at the door of the State Attorney rather than the Department), clearly delayed. Whoever is directly at fault, appellant cannot be excused. Appellant is no ordinary litigant. It is part of the government of this country. It needs to act fastidiously insofar as these cases are concerned, precisely because if long delays occur as occurred in this case, it is a case of justice delayed being justice denied. It would be inappropriate to recommence proceedings which took place so long ago, particularly in circumstances where the explanation for condonation is as skeletal as it is in this case.

[17] For these reasons and only for these reasons, the appeal is dismissed. There is no order as to costs.

JAPPIE & LEEUW JJA: Conkurs.

COURT: It is so ordered.

On behalf of Appellant: Ms Cassiem/Mr Skoskana

On behalf of Respondent: Mr Maklasi