

SOUTH AFRICA / JUDGMENT

**South African Council for Educators v Deon
Scheepers and Others (CCT 127/22) [2023]
ZACC 23; [2023] 10 BLLR 981 (CC); (2023) 44 ILJ
2191 (CC); 2024 (5) BCLR 663 (CC) (12 July 2023)
[2023] ZACC 23**

COURT

Constitutional Court

BEFORE

Baqwa AJ, Kollapen J, Madlanga J, Majiedt J,
Mathopo J, Mbatha AJ, Mhlantla J, Rogers J, Tshiqi
J

CASE / FILE NUMBER

CCT 127/22

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CONSTITUTIONAL COURT

OF SOUTH AFRICA

Case CCT 127/22

In

the matter between:

SOUTH
AFRICAN COUNCIL FOR EDUCATORS
Applicant
And
DEON
SCHEEPERS
First
Respondent

HOD:

DEPARTMENT OF EDUCATION FREE STATE PROVINCE N.O.
Second
Respondent
MEMBER
OF THE EXECUTIVE COUNCIL FOR EDUCATION FREE STATE PROVINCE N.O.
Third
Respondent

Neutral citation:	South African Council for Educators v Deon Scheepers and Others [2023] ZACC 23 Coram: Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J.
Judgment:	Baqwa AJ (unanimous) Heard on: 17 November 2022 Decided on: 12 July 2023
Summary:	South African Council of Educators — professional discipline ORDER On appeal from the High Court of South Africa, Free State Division, Bloemfontein:
Bloemfontein:	Leave to appeal is refused with costs, including the costs of two counsel.

JUDGMENT

BAQWA AJ (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal by the South African Council for Educators (SACE) against the judgment and order of the High Court, Free State Division, Bloemfontein.[1] The matter involved SACE, on the one hand, and Mr Deon Scheepers (first respondent), the Head of the Department of Education

(HOD), Free State Province N.O. (second respondent) and the Member of the Executive Council for Education Free State Province

N.O. (third respondent), on the other.

[2] The High Court's judgment concerned mainly the issue whether SACE had conducted an investigation as required by law prior to referring Mr Scheepers to a disciplinary hearing or whether it had just done a desktop assessment of the report by an Independent Task Team (ITT) appointed by the HOD and thereafter made its decision.[2]

[3] This was despite the work done by a panel appointed by SACE to do an investigation. The High Court found that the panel had merely gone through the motions to create an appearance of compliance with the provisions of the South African Council for Educators Act (SACEA),[3] in that it simply confirmed the information contained in the ITT report.[4]

Legislative framework

[4] The South African Schools Act (SASA)[5] provides for a uniform system for the organisation, governance and funding of schools. Section 2(2) of the SASA provides for the Member of the Executive Council and the HOD to exercise any power conferred upon them under the SASA, after taking full account of the National Education Policy Act (NEPA).[6]

[5] The discipline of educators is dealt with in the Employment of Educators Act (EEA).[7] Section 18(2) of that Act provides:

“If it is alleged that an educator committed misconduct as contemplated in subsection (1), the employer must institute disciplinary

proceedings in accordance with the disciplinary code and procedures contained in Schedule 2.”

[6] In the present case (that is, in relation to Mr Scheepers), the employer contemplated in the above provision is the HOD, the second respondent. Whilst no impropriety is alleged against the HOD in this application it is apparent from the founding affidavit

that the HOD expressed disquiet at the conduct of SACE regarding its alleged interference with the process implemented by the HOD to deal with the complaints raised against Mr Scheepers in his capacity as the school principal employed by the HOD.

[7] SACE is a juristic person in terms of the SACEA, and the objects of the Act are to provide for the registration of educators, to promote the professional development of educators and to set, maintain and protect ethical and professional standards of educators,

by means of the functioning of SACE.

[8] The discipline of educators is dealt with in section 14 of the SACEA. The primary objective is to maintain and promote professional ethics. Section 14(2)(e) provides:

“(2) The disciplinary committee [of the Council] must—

...

(e) on the basis of a recommendation of the relevant panel, recommend a finding and appropriate action, if any, to the council.”

[9] Section 14(2)(d) of the SACEA requires the disciplinary committee to ensure a fair hearing, in accordance with a procedure determined by SACE in terms of section 5(c)(ii).[8] Section 5 of the SACEA deals with the powers and duties of SACE. Section 5(c) deals specifically with professional

ethics, and section 5(c)(i) provides that SACE must compile, maintain, and from time to time, review the code of professional ethics for educators who are registered or provisionally registered with SACE.

- [10] Clause 3.5 of SACE's Code of Professional Ethics (the Code), under Disciplinary Procedures, provides that SACE's disciplinary committee must refer an alleged breach of the Code to an investigating panel for an investigation.
- [11] Section 14(3) of the SACEA makes provision for the investigating panel to make a recommendation to the disciplinary committee regarding a finding, if any, for disciplinary action concerning a complaint referred to it.[9] Of relevance is the wording of clause 3.9 of the Code which confers on the disciplinary committee a specific but circumscribed discretion. The disciplinary committee may only refer a matter for hearing by a disciplinary panel if the investigating panel is satisfied that there is sufficient evidence of breach of the Code by an educator.
- [12] An outline of the investigative machinery that the investigating panel may trigger in aid of its investigation is provided for in clause 3.6 of the Code. The investigating panel may—
- “3.6.1 interview complainants and other possible witnesses;*
- 3.6.2 subject to clause 3.7 . . . interview [an] educator who is alleged to have breached the code;
- 3.6.3 notify the educator being investigated of the alleged breach and, subject to clause 3.7, give the educator an opportunity to respond within the period specified in that notice;
- 3.6.4 gather evidence relevant to the alleged breach; and
- 3.6.5 if necessary, cause summons to be served on any person who may assist the panel in its investigation as contemplated in section 14(4) of the Act.”
- [13] Because clause 3.6 makes reference to clause 3.7, I think it desirable to quote clause 3.7 as well:
- “3.7 Before interviewing an educator as contemplated in clause 3.6.2, and in any notice contemplated in clause 3.6.3. the investigator/s must warn the educator:*
- 3.7.1 of the educator's right against self-incrimination; and
- 3.7.2 that any admission or explanation given by the educator may be used as evidence against the educator or at the disciplinary hearing.”

Background

- [14] Mr Scheepers was employed by the HOD at Grey College Secondary School as a school principal as from 1 January 2013. Following
- several disputes between Mr Scheepers and the School Governing Body of Grey College Secondary School (SGB), the SGB declared that there was a breakdown of the trust relationship between itself and Mr Scheepers.

- [15] As a result of the deteriorating relationship between the SGB and Mr Scheepers, the HOD established the ITT to investigate the underlying causes of the conflict between the warring parties.
- [16] During January and February 2019, the ITT conducted the investigation by interviewing the SGB, educators, administration staff, hostel staff, and learners at the school. After conducting interviews and obtaining affidavits from witnesses, the ITT submitted its report to the HOD on 15 March 2019.
- [17] The ITT's report recommended to the HOD that Mr Scheepers be charged with serious misconduct, including fraud and corruption and that he be dismissed if found guilty in terms of section 17(1)(a) of the EEA.[10] Furthermore, the report stated that Mr Scheepers had violated section 16A(2)(g) of the SASA.[11] Additionally, that he had contravened section 17(1)(f) of the EEA[12] and had breached a written undertaking of confidentiality.
- [18] The HOD delayed in prosecuting the charges against Mr Scheepers. Aggrieved by the delay, the SGB lodged a complaint against Mr Scheepers with the legal ethics manager of SACE. Part of the complaint was that the HOD's delay in releasing the

ITT's report and implementing its recommendations was not in the interests of the school, the learners and other stakeholders.

- [19] Subsequent to the SGB's complaint, SACE notified Mr Scheepers that its Ethics Committee would conduct an investigation to determine whether there was sufficient evidence to substantiate the allegations that he breached the Code.

- [20] In September 2019, SACE appointed Mr John Eastes and Mr Pierre Homan as an investigating panel. The panel commenced with an

investigation on 8 October 2019, during which they interviewed three people, namely Mr Greg Titus (apparently a NAPTOSA

official), Messrs Buchner and Grobbelaar (members of the SGB). The Department refused to give the panel access to the school, and resultantly they did not interview any of the educators or learners involved. The Department's attitude emanated from the fact that it was already conducting an investigation, which it considered should take precedence. It is common cause that the panel members did not interview Mr Scheepers.

- [21] On 14 October 2019, the panel issued its report, recommending that Mr Scheepers be charged. What is apparent from the contents of the report is that, on the merits of the charges, reliance was placed wholly on the affidavits obtained during the Department's ITT investigation.

[22] On 25 February 2020 SACE invited Mr Scheepers to make representations on the allegations in the ITT report and its recommendations. He complied with this request. On 19 March 2020, the Ethics Committee considered the report together with Mr Scheepers' representations and resolved to refer the allegations to a disciplinary panel for a hearing.

[23] On 31 July 2020, Mr Scheepers was summoned to appear before a disciplinary panel on 31 August to 4 September 2020 to answer the allegations of breach of the Code.

[24] On 24 August 2020, Mr Scheepers addressed a letter to SACE complaining that the documents necessary for him to prepare for the hearing had not been availed to him. On 17 September 2020, in response to the letter, SACE acknowledged its omission and decided

to withdraw the decision to proceed with the disciplinary proceedings and indicated that the process would start afresh. Simultaneously,

Mr Scheepers was requested to make fresh representations in terms of the new process. Mr Scheepers complied with that request on 28 September 2020.

[25] On 15 October 2020, the Ethics Committee considered a report regarding Mr Scheepers' matter and directed that the prosecution should proceed. SACE informed Mr Scheepers of this decision on 19 October 2020, and on 10 November 2020 Mr Scheepers was summoned to appear before a disciplinary panel for a hearing scheduled to take place over the period 1-10 February 2021. This set the stage for the litigation which ultimately landed before this Court.

Litigation history

High Court

[26] The issue before the High Court was whether SACE had conducted an investigation prior to the decision to refer the allegations to a hearing. The debate was whether, in terms of the process of 10 March 2019 and the second process which culminated in the decision on 15 October 2020, SACE owed deference to the Department.

[27] Mr Scheepers' application for review was upheld by the High Court. SACE's decision to refer charges against Mr

Scheepers to a disciplinary panel for a disciplinary hearing was reviewed and set aside.

[28] Three key conclusions of law against which the leave to appeal is directed were made by the High Court. The first one is that SACE did not comply with a mandatory enabling provision.

[13] The Court expressed itself as follows:

"The crucial question is then whether the efforts of [SACE] constituted an investigation as envisaged by the SACEA. The Act itself does not provide for a definition of the word 'investigate'. According to the Oxford Learners Dictionaries the verb 'investigate' means 'to carefully examine the facts of a situation, an event, a crime etc. to find out the truth about it or how it happened'. In terms of this definition it can hardly be found that the [SACE] had investigated the complaint against Mr Scheepers as envisaged by the SACEA."[14]

[29] The second conclusion is that the decision of SACE was procedurally unfair towards Mr Scheepers.[15] Last, the High Court was of the view that SACE's decision was taken on the basis of the unauthorised or unwarranted dictates of the SGB.[16]

Application to the High Court for leave to appeal

[30] SACE was not satisfied with the order of the High Court and applied for leave to appeal on the grounds that its interpretation of section 14(2) of the SACEA was incorrect because "it stifles the discipline and regulation of the educator's profession and negates other rights whose promotion is indirectly linked to the import of the Code of ethics and the disciplinary powers under SACEA". Further, the applicant contended that the High Court incorrectly applied the law to the facts.[17]

[31] On 3 December 2021, the application for leave to appeal was dismissed with costs.

Supreme Court of Appeal

[32] Aggrieved by the outcome, SACE applied for leave to appeal to the Supreme Court of Appeal. That Court dismissed the application with costs on the grounds that there were no reasonable prospects of success and no compelling reasons why an appeal should be heard.

In this Court

Applicant's

submissions

[33] SACE seeks condonation for the late filing of the application, submitting that the delay was occasioned by technological issues at

this Court, which resulted in a seven day delay. SACE refers to several emails illustrating that the application was served timeously even though it did not reflect in the Court's system. SACE further submits that the appeal bears reasonable

prospects of success and that the application for condonation ought to succeed.

[34] On jurisdiction, SACE submits that this matter engages this Court's jurisdiction in terms of section 167(3)(b) of the Constitution. SACE submits that the matter concerns the manner in which a statutory body regulating the conduct of educators, conducts investigations when exercising its disciplinary powers against educators. Furthermore, SACE submits that this matter engages this Court's jurisdiction because the High Court's decision impacts the application of the Code and results in an impermissible and restrictive interpretation of how SACE exercises its disciplinary powers.

First respondent's

submissions

- [35] Mr Scheepers argues that condonation ought to be refused because the application does not engage this Court's jurisdiction and bears no reasonable prospects of success. He submits that this matter does not raise an arguable point of law of general public importance and that the matter involved the High Court applying established legal principles to the facts.

Jurisdiction

- [36] SACE's pleaded case raises a constitutional issue. It argues that a preliminary investigation was conducted before Mr Scheepers was called to attend a disciplinary hearing. Issues relating to the conduct and powers of SACE concern the exercise of public power by a statutory body and are therefore constitutional issues. This matter engages this Court's constitutional jurisdiction. This Court has said as much in Group Five,[18] Senwes,[19] Yara,[20] and Pickfords.[21]

Leave to appeal

- [37] In Jiba,[22] this Court affirmed the two requirements that must be met for leave to appeal to be granted:

"For leave to appeal to be granted in this Court, the applicant must meet two requirements. These are that the matter must fall within the jurisdiction of this Court and that the interests of justice warrant the granting of leave. For this Court's jurisdiction to be engaged the matter must either raise a constitutional issue or an arguable point of law of general public importance that ought to be heard by this Court."[23]

- [38] This Court will grant leave to appeal only if it is in the interests of justice to do so.[24] The interests of justice inquiry involves the weighing up of varying factors. These include reasonable prospects of success which, although not determinative, carry more weight than other factors.[25] The question whether SACE properly exercised its public power to investigate Mr Scheepers is a factual enquiry. Whether an investigation in any given instance, is a proper investigation falls for a case by case analysis. I do not think that this Court's views on the merits would result in the distillation of a principle or principles that would be applicable to all matters of this nature. Irrespective of this Court's decision on the merits, were they to be entertained, SACE cannot be prevented from disciplining Mr Scheepers.

- [39] Whether an investigation as conducted by SACE is adequate involves an evaluation of the facts. This Court has refused to entertain appeals that seek to challenge factual findings or the incorrect application of settled law to the facts by lower courts.[26] Additionally, a factual dispute does not become a constitutional issue because it has been clothed as a constitutional issue.[27]

- [40] In my view, the applicant's application falls to be dismissed and costs should follow the result.

Order

[41] The following order is made:

Leave to appeal is refused with costs, including the costs of two counsel.

For the Applicant: M Manala and M Matlapeng Instructed by Lamola Attorneys For the First Respondents: N Cassim SC and W Van Aswegen Instructed by Peyper Attorneys

[1] Deon Scheepers v South African Council for Educators

[2021] ZAFSHC 212.

[2] Id at para 20.

[3] 31 of 2000.

[4] High Court judgment above n X at para 20.

[5] 84 of 1996.

[6] 27 of 1996.

[7] 76 of 1998.

[8] Section 5(c)(ii) provides that SACE, with regard to professional ethics, must determine a fair hearing procedure.

[9] Section 13(3) reads: “A relevant panel must make a recommendation to the disciplinary committee in regard to a finding, and, if any, disciplinary action

concerning a complaint referred to it.”

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“A relevant panel must make a recommendation to the disciplinary committee in regard to a finding, and, if any, disciplinary action

concerning a complaint referred to it.”

[10] “Section 17 Serious misconduct. — (1) An educator must be dismissed if he or she is found guilty of— (a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports.”

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(1) An educator must be dismissed if he or she is found guilty of—

(a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports.”

[11] Section 16A(2)(g) provides that “[t]he principal must provide accurate data to the Head of Department when requested to do so.”

[12] Section 17(1)(f) states that an educator shall be guilty of misconduct if he or she causes a learner or student to perform any

acts contemplated in section 17(1)(a) to (e).

[13] High Court judgment above n 1 at para 20.

[14] Id at para 21.

[15] Id at para 24.

[16] Id at para 29.

[17] School Governing Body Grey College, Bloemfontein v Scheepers (Federation of Governing Bodies of South African Schools as amicus curiae) [2020] ZASCA 82; [2020] 3 All SA 704 (SCA).

[18] Competition Commission of South Africa v Group Five Construction Ltd

[2022] ZACC 36; 2023 (1) BCLR 1 (CC).

[19] Competition Commission of South Africa v Senwes Ltd [2012] ZACC 6; 2012 (7) BCLR 667 (CC).

[20] Competition Commission v Yara South Africa (Pty) Ltd [2012] ZACC 14; (2012) 9 BCLR 923 (CC).

[21] Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd [2020] ZACC 14; 2021 (3) SA 1 (CC); 2020 (10) BCLR 1204 (CC).

[22] General Council of the Bar of South Africa v Jiba [2019] ZACC 23; 2019 (8) BCLR 919 (CC).

[23] Id at para 35.

[24] African Christian Democratic Party v The Electoral Commission

[2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at paras 17-8.

[25] Id at para 36.

[26] Mankayi v AngloGold Ashanti Ltd [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 12.

[27] National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 at para 14.

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