



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1188/2021

In the matter between:

MEMBER OF THE EXECUTIVE

COUNCIL FOR EDUCATION, KWAZULU-NATAL

APPELLANT

and

MAYADEVI SINGH

FIRST RESPONDENT

Neutral citation: *MEC for Education, KwaZulu-Natal v Singh* (1188/2021) [2023]
ZASCA 92 (9 June 2023)

Coram: PONNAN ADP and MEYER JA and OLSEN AJA

Heard: 6 March 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 9 June 2023 at 11h00.

Summary: Claim in delict for damages – lost income following early retirement for health reasons – liability of employer for omissions – wrongfulness not established – appeal upheld and claim dismissed.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (K Pillay J, sitting as the court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the trial court is set aside and the following order is substituted for it:
‘The plaintiff’s claim is dismissed with costs.’

JUDGMENT

Olsen AJA (Ponnan ADP and Meyer JA concurring):

[1] Ms Mayadevi Singh, the respondent, was employed for many years by the Provincial Department of Education, KwaZulu-Natal as an educator. During the period material to this appeal she was employed to teach at a primary school in the department’s Umlazi district.

[2] In July 2011, about 7 years before she would reach the usual compulsory retirement age of 65, the respondent took early retirement. She was entitled to do so. The respondent alleged that she was compelled to that course because she came to suffer from clinical depression as a result of the failure of her employer to take any reasonable steps to prevent the principal of her school, a Mr Padayachee, from victimising her over a long period. But for that, the respondent alleges, she would have worked until age 65, and in the result, is entitled to be compensated by her employer for the income she lost because she did not and could not work for what would have been the last 7 years of her working life.

[3] The respondent instituted action in the KwaZulu-Natal Division of the High Court, Durban (the trial court), claiming such compensation in delict, citing the Member of the Executive Council for Education as the defendant. Given the provisions of s 3(1)(b) of the Employment of Educators Act 76 of 1998, the head of the Provincial Department of Education ought to have been cited as the employer. This was raised in the plea, but it is apparent that the parties decided to overlook that error upon the basis that the *de facto* defendant is the Provincial Department of Education. I will refer to it as ‘the department’.

[4] After a much delayed and interrupted trial, the court granted judgment in favour of Ms Singh for payment of a sum of just under R1.3 million, interest and costs. (The amount is said to represent the present value of seven years’ income.) With the leave of this Court the department appeals against that order.

[5] The central feature of the case Ms Singh sought to make in her pleadings, and through the presentation of evidence at trial, is that she was victimised by Mr Padayachee. Counsel for the department were content to argue the appeal on the basis that Ms Singh was victimised. They had little choice in the matter, as unfortunately Mr Padayachee died whilst the trial was underway, and before he could give evidence. Almost all, if not all, the allegations of victimisation made by Ms Singh could only be answered in a meaningful fashion on behalf of the department by Mr Padayachee.

[6] Notwithstanding counsel’s concession, an understanding of what is meant by ‘victimisation’ in this litigation is necessary in order to contextualise, in part, the claim that a cause of action was indeed available to Ms Singh, and that it was proved. The account of the complaints comes almost exclusively from Ms Singh’s evidence, and may be summarised as follows.

- (a) Mr Padayachee took up the post of principal of the school in 2000. Ms Singh had no problems with him in the first two years of his tenure.
- (b) In 2002 it came to Ms Singh's attention that a child had been mistreated by another teacher, and through the head of department, she made a report about the incident. She expected to be told what had become of the matter, despite the fact that her head of department told her that it was not the duty of the principal to report back to her. Ms Singh was called to a meeting in the principal's office where, instead of dealing with the issue, the principal raised what Ms Singh described as petty issues such as the way she dressed, and the time she spent chatting to colleagues, and the like; complaints which, according to Ms Singh, Mr Padayachee could have raised with any number of her colleagues, but did not. Her evidence is to the effect that from this point onwards Mr Padayachee adopted a vindictive attitude to her.
- (c) In March 2003 a meeting was convened to select a head boy and head girl. On 10 March, the principal entered her class and in front of the learners told her that he was going to charge her for breaching confidentiality, presumably in connection with the matter of the selection process underway. He instructed her to see him in his office after school, but it appears that nothing came of the matter.
- (d) In November 2003 Mr Padayachee moderated the English exam paper which Ms Singh had set, and made her redo it, as he regarded it as unsuitable. Although it is not clear from the record, it appears that Ms Singh complains that it was only her English exam paper that was singled out for moderation.
- (e) During 2003 the post of head of department was advertised and Ms Singh was not shortlisted. She lodged a grievance pertaining to Mr Padayachee's participation in the shortlisting process. The outcome was a direction that the process re-commence. The record reveals that the committee dealing with the grievance directed that Mr Padayachee not take part in the process in order to avoid any perception of bias. Notwithstanding this Ms Singh was aggrieved at ultimately not being appointed.

(f) In 2004 Mr Padayachee removed Ms Singh from the science department, notwithstanding that the subject was her speciality. In the result, she had to prepare to teach in new learning areas.

(g) In 2004 her teaching load was increased substantially and Ms Singh found it difficult to cope with marking. The principal's attitude was that he controlled the allocation of work. In the same year Mr Padayachee stopped sending Ms Singh to workshops.

(h) In October 2005 the department conducted an investigation into the affairs of the school. According to Ms Singh 'she got locked in for the whole day' with the team conducting the investigation. She asserts that because she gave evidence, the principal excluded her from the awards-day ceremony, and asked her to leave the staff room on 26 October 2005. (The report generated by that investigation was an annexure to the particulars of claim.)

(i) During 2006 Mr Padayachee ignored Ms Singh altogether, but was nevertheless responsible for allocating her a heavy workload. It seems that he no longer allowed her to run assemblies and continued to exclude her from going to workshops.

(j) In 2007 she was given the same workload as the previous year. On a Saturday in August, when the educators were supposed to work in order to make up for time lost during a strike, she asked for leave to attend her graduation ceremony. Mr Padayachee was obstructive and the intervention of a senior education manager was required in order for her to attend the ceremony, for which she was late.

(k) In 2008, her allocated subjects included Afrikaans, which she was not qualified to teach. It does seem that she nonetheless managed to do it. There was also an issue around Valentine's Day. It seems that a circular was sent to the staff, but not her, about some decorations and celebratory refreshments being available in the staff room on 14 February. Ms Singh wrote a letter to Mr Padayachee

saying that she was being marginalised. Some days later, the principal opened the letter and read it to the staff.

(1) In September 2009 a member of Ms Singh's family died and she wished to attend the funeral. She asked a colleague to seek permission for her, and the head of the department called her to say that the principal had said that if she wished to leave at 11 o'clock in the morning, she must produce a death certificate. Ms Singh asked the principal why it was that the same request was not made of other staff. His response was to become aggressive and he told her that if she was not happy, she should leave the school.

[7] As mentioned earlier the report of the investigation into the affairs at the school undertaken in 2005 was annexed to Ms Singh's particulars of claim. The report records that there were two complainants, Ms Singh and another educator, Ms J Singh. It records also that Mr Padayachee made a series of counter-allegations. The investigation revealed that the staff at the school were divided into two camps, one supportive of Mr Padayachee and the other not. Mr Padayachee's counter-allegations were directed at the camp that did not support him. There was, in addition, a breakdown in the relationship between Mr Padayachee and his deputy. The staff secretary had been marginalised and the deputy principal had been relieved of some of his roles. The report identified 'deep-rooted divisions that exist in the school', as a result of which the discipline of educators had become 'a nightmare for the principal'. The report continued: 'All interventions so far have failed to bring this conflict to an end. Some educators intentionally provoke the principal who easily loses [his] temper'.

[8] Although they were quoted in full in the particulars of claim and in the judgment of the high court, the recommendations of the investigatory committee did not touch at all on the personal position of Ms Singh, nor indeed of her colleague Ms J Singh. All the recommendations were clearly directed at

addressing the divisions amongst the staff at the school. The report made no recommendations which could possibly have been construed by the officials in the department to whom it would be delivered, as a call upon them to attend in particular, or indeed at all, to the relationship between Mr Padayachee and Ms Singh. On the contrary, the finding of the panel was that the problem was a much wider one.

[9] It is against the above factual background that the central allegations in Ms Singh's particulars of claim must be read. After setting out the fact that the investigation occurred, and its recommendations, the pleading continued as follows:

'Despite the foregoing, [the appellant] negligently, wrongfully and unlawfully failed to take any or all of the intervention steps referred to in [the report of the investigation discussed above] or to take any other reasonable steps to protect [the respondent] from being harassed by the principal, as a consequence of which the principal was able to intensify his victimisation of [the respondent] unchecked.'

It is pleaded in the alternative that because the report did not identify measures to deal with her particular situation, the victimisation of Ms Singh could continue. However, the report itself advised against interventions in respect of particular educators. Steps that could or should have been recommended and taken are neither pleaded nor revealed in evidence.

[10] The department denies each of these allegations. Wrongfulness and negligence were put squarely in issue by that denial. The particulars of claim went on to allege that as a result of the victimisation Ms Singh became severely depressed and had to be hospitalised, could no longer function as an educator, and was compelled to take early retirement. Those allegations were also denied. Causation was accordingly also in issue.

[11] Ms Singh seeks to hold the department liable in delict to compensate her on the grounds of its alleged omission to take steps to prevent the onset of depression and the associated emotional cost to her. No authority is needed for the proposition that in our law wrongfulness in the case of omissions is not assumed as it is in the case of physical injury or damage to property. A plaintiff relying on an omission must establish that circumstances were such that the defendant came under a legal obligation to act positively in order to prevent the harm. In the circumstances Ms Singh bore the onus to establish each of wrongfulness, causation and negligence.

[12] There is additional background material that needs to be canvassed before turning to the question as to whether these requirements for the successful prosecution of her claim were met.

[13] Obviously the medical condition of Ms Singh is of some importance. The evidence establishes quite clearly that whereas Ms Singh formerly presented as a happy outgoing person, she became withdrawn, showing signs of not being happy in her life. Her husband's evidence establishes that this state of affairs was quite apparent in their home life. Ms Singh blames the victimisation (which, on the evidence, is as much a cause as it is a consequence of a very poor personal relationship between her and Mr Padayachee) for the onset of her major (ie clinical) depression. In 2009 she eventually consulted a psychiatrist, Prof A E Gangat, for assistance. He made a diagnosis of major depression, and in fact hospitalised her on two occasions during that year, once in September and again in November. He prescribed medication which improved her condition, but not entirely successfully. None of this was disputed.

[14] The department engaged its own expert psychiatrist, a Dr I Chetty. Dr Chetty confirmed Prof Gangat's diagnosis. The two psychiatrists prepared a joint

minute before each gave evidence. The words they used in their joint minute to describe the relationship between the victimisation of which Ms Singh complained and the onset of depression were obviously carefully chosen: 'Furthermore, the onset of depression corresponds to the alleged victimisation suffered by Ms Singh and it is reasonable to say they are connected'. However, that it was a cause seems to have been established on the probabilities, taking into account all the evidence.

[15] Both psychiatrists were of the view that certainly by 2010 it was clear that further progress in the treatment of Ms Singh's depressive condition was not going to be achieved if she remained at the school where everything she complained about took place. Prof Gangat made this clear to his patient in the course of his treatment of her. However, Prof Gangat did not advise her, as her attending doctor, that she should take early retirement. Ms Singh chose that course on her own.

[16] Whilst on the subject of Ms Singh's medical condition, it must be observed that it did not prevent her from performing her functions as an educator. The trial judge put the question as to whether Ms Singh became incapable of teaching, and Prof Gangat replied in the negative. The history of her service at the school from 2002 until her departure certainly does not suggest that she had been rendered incapable of teaching.

[17] In overview, the psychiatric evidence reflects an opinion, well established, that further progress in treating Ms Singh's condition would not be achieved unless she was taken out of the environment which she blamed for her condition.

[18] The last category of background circumstances material to the decisions to be made in this appeal arises from the fact that educators appointed to teach in

public schools are state employees. The primary legislation governing the employment of educators is the Employment of Educators Act 76 of 1998 (the Act).

[19] In terms of s 4(1) of the Act the Minister of Education (the Minister) determines the conditions of service of educators, but must do so subject to both the provisions of the Labour Relations Act 66 of 1995 (Labour Relations Act), and any collective agreement concluded in the Education Labour Relations Council. Acting in terms of that section, the Minister's determination of such conditions was first published in *Government Gazette* No. 19767, dated 18 February 1999. The document is entitled 'Personnel Administrative Measures', and is commonly referred to as 'PAM'.

[20] Subsequently, and by publication in *Government Gazette* No. 29248, dated 22 September 2006, a 'Policy and Procedure on Incapacity Leave and Ill-Health Retirement' (PILIR) which had been prepared by the Department of Public Service and Administration, was declared to be applicable to educators. That was also done in terms of s 4 of the Act. It became in effect an addition to PAM and is commonly referred to as 'PILIR'.

[21] In terms of s 6(1)(b) of the Act the appointment, promotion or transfer of an educator in the service of a provincial department is to be made by the head of the department. The department in this case compiled and implemented a Policy on Transfer for Educators. The version of that document in the record before us is the one implemented with effect from 1 March 2008. Section 6 of the Act states the fundamental principles applicable to the transfer of any educator. Section 8 of the Act deals with the same subject.

[22] Section 11 of the Act permits the discharge of an educator from service on account of continuous ill health or on account of unfitness for duties. Section 12 is to the effect that the discharge of an educator on account of ill health may take place in the circumstances set out in schedule 1 to the Act. The provisions of schedule 1 deal with that subject from the perspective of the department. In terms of item 3(1) the department must investigate the extent of an educator's ill health (or injury) in two circumstances:

(a) when the department believes that the educator is under-performing due to ill health; or

(b) when the educator applies for discharge from service because of ill health. There is no evidence that the department should have formed the view that Ms Singh was under-performing. She did not apply for discharge from service because of ill health. Item 3(6) provides that if it is found that the ill health of an educator is of a permanent nature, the department must investigate, inter alia, the possibility of securing alternative employment for the educator or adapting the duties or 'work circumstances' of the educator to accommodate the educator's ill health.

[23] Chapter 5 of the Act deals principally with misconduct. Two categories are identified in ss 17 and 18, respectively. Section 17 stipulates conduct which amounts to serious misconduct. Section 18(1) introduces a list of other misconduct with the introductory statement: 'Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she –'. Three of the items on the list that follows are relevant in the present context.

(a) An employee 'misuses his or her position in . . . a school . . . to prejudice the interests of any person' (s 18(1)(g)).

(b) An employee 'displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour' (s 18(1)(t)).

(c) An employee ‘intimidates or victimises fellow employees, learners or students’ (s 18(1)(u)).

It is worth observing that these provisions applied equally to both Ms Singh and Mr Padayachee. The latter was not the former’s employer. They were co-workers, the one having a level of authority over the other.

[24] Subsection 18(2) of the Act is to the effect that if it is alleged that an educator has committed any such misconduct the employer is obliged to institute disciplinary proceedings in terms of the disciplinary code and procedures which are contained in schedule 2 to the Act. Schedule 2 to the Act contains detailed provisions governing the principles behind disciplinary proceedings, the manner in which they are to be conducted, sanctions, appeals, and so on, all of which are directed at the establishment of fair and just processes in the sphere of workplace discipline. In addition, item 3(1) of schedule 2 provides that the Code of Good Practice contained in schedule 8 to the Labour Relations Act, in so far as it relates to discipline, constitutes part of schedule 2 to the Act.

[25] PAM is divided into chapters dealing with many employment-related issues affecting educators teaching in schools administered by a provincial department. Grievance procedures are dealt with in chapter H. There is no need to furnish a full account of them. An employee like Ms Singh is entitled to lodge a formal grievance, and where it concerns the conduct of her headmaster, to do so directly to the regional or district level. If lodging the grievance does not generate a satisfactory outcome, she would then be entitled to register a formal dispute with the Education Labour Relations Council, and the matter would proceed from there.

[26] Chapter J of PAM deals with the subject of leave. It includes provisions for normal sick leave, temporary incapacity leave, permanent incapacity leave, and leave for occupational injuries and diseases.

[27] The PILIR deals in considerably more detail with the availability, administration and grant of incapacity leave and ill-health retirement. It provides for the careful administration of such matters, and the right to apply for and be granted such leave. It deals in some detail with what is commonly known as medical boarding. The provisions of the PILIR reflect the need to ensure that the grant of any of these forms of leave or of medical boarding is supported by a proper investigation of the condition of the educator, and fair dealing with the educator who seeks such relief. There are provisions for short periods of temporary incapacity leave (29 working days or less requested per occasion) and long periods of temporary incapacity leave (30 working days or more requested per occasion). It provides for permanent incapacity leave to be granted whilst the assessment of the educator's condition is underway. If the decision of the employer (the department) on a request for any of the forms of relief dealt with in the PILIR is not acceptable to an employee, she has a right to lodge a grievance in terms of the rules made by the Public Service Commission.

Wrongfulness

[28] An enquiry into whether wrongfulness or a duty to act has been established when a plaintiff relies on an omission on the part of a defendant, is in the first instance fact-based. The question as to whether wrongfulness is established is an exercise which requires a consideration of all the relevant facts and circumstances which arise in the case at hand. (See *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41; 2023 (2) SA 31 (CC) para 30.)

[29] In *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) para 12, Nugent JA observed:

‘A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.’ (Footnotes omitted.)

[30] As to the order of things, Scott JA had this to say in *Gouda Boerdery Bk v Transnet Ltd* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) para 12:

‘While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence and wrongfulness.’ (Footnotes omitted.)

[31] In my view one of the difficulties in this case is that an assumption that there was negligence on the part of the department involves assuming the absence

of certain known factors, and perhaps also the presence of factors or circumstances of which there is no proof. In the present case there are important facts and circumstances, the implications of which are material to the enquiries into both wrongfulness and negligence. I deal with wrongfulness first.

[32] Some further principles may be usefully extracted from paras 19, 20 and 21 of *Van Duivenboden*:

(a) One of the traditional justifications for the reluctance in our law to impose liability for omissions is the proposition, supported now by constitutional rights to equality, personal freedom and privacy, that individuals are entitled to ‘mind their own business’.

(b) However, where the conduct of a public authority or functionary is involved one must bring into account that it is usually the very business of the public authority or functionary to serve the interests of others.

(c) The imposition of legal duties on such authorities or functionaries is inhibited ‘instead by the perceived utility of permitting them the freedom to provide public service without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability’. But this consideration should not be unduly exaggerated.

(d) In this country the State has a positive constitutional duty to act to protect the rights in the Bill of Rights. The Constitution requires accountable government.

(e) ‘The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account’.

(For further discussion of these principles see *Esorfranki Pipelines* at paras 30-33.)

[33] For the present, the enquiry is whether the policy and legal convictions of society, understood consistently with the Constitution, and considerations of reasonableness, justify a conclusion that the ‘harm-causing’ negligent omissions asserted here should in all the relevant circumstances be actionable in delict, thereby generating an obligation on the department to compensate Ms Singh. The importance of the criterion of reasonableness should not be underestimated, perhaps especially in claims founded on omissions.

As it was put in *Oppelt v Head: Department of Health, Western Cape* [2015] ZACC 33; 2016 (1) SA 325 (CC) para 51 (a case concerning liability for omissions):

‘The criterion of wrongfulness ultimately depends on a judicial determination of whether, assuming all the other elements of delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct.’

[34] The conclusion reached in the high court on the subject of wrongfulness was that

‘. . . the legal convictions of the community require an employer to take reasonable steps to prevent psychological or physical harm to its employees. Its failure to do so justifies an award of compensation.’

In reaching that conclusion the learned judge referred to a number of judgments dealing with the principles that arise in an enquiry like the present one, which statements of principle are not contentious.

[35] However, the main focus of the judgment of the high court was *Jacobs v Chairman, Governing Body, Rhodes High School and Others* 2011 (1) SA 160 (WCC). The plaintiff in that case was a teacher at Rhodes High School. There had been early indications that one of the learners in her class was a troubled individual, perhaps even prone to violence. On the day in question the plaintiff noticed that the learner was writing in his journal and on examination found that its contents suggested that he might have it in his mind to kill her. The learner

was taken to the headmaster who looked at the journal and was accordingly appraised of the problem. Instead of keeping the learner secure prior to his removal from the school premises, the headmaster told the learner to sit outside the former's office. The learner instead returned to the classroom where he took a hammer from his bag and used it to launch a vicious attack on the plaintiff who was severely injured. She claimed compensation for those injuries. The high court upheld her claim and its judgment was upheld on appeal to this Court.

[36] Although the judgment of the high court in this case does not say so in so many words, it is quite apparent that the outcome in *Jacobs* was regarded by the trial court as of some substantial importance in the adjudication of the present matter. As already mentioned, an inquiry into the wrongfulness of an omission involves in each case the application of recognised legal principles to the particulars facts and circumstances of each case. The inquiry in *Jacobs* was with regard to a set of facts and circumstances which bears almost no resemblance to those present here.

[37] In my view, the recitation of applicable principles extracted from earlier judgments aside, what led the high court to its conclusion is apparent from the following extracts from its judgment

‘[44] . . . Yet on the evidence presented and not gainsaid by the [appellant], it was the said principal that created a hostile environment to such an extent that it led medical officers for the [respondent] and [appellant] to jointly conclude that the [respondent] suffered a major depressive disorder, which corresponded to the alleged victimisation suffered by the [respondent].

. . .

[48] The [respondent] was at all times in the employ of the [appellant] and subject to the control and authority of the [appellant]. In my view, their relationship was sufficiently close to give rise to a duty on the part of the [appellant] to act positively to ensure the safety and security of the [respondent] from the actions of the principal.’

[38] There are a number of difficulties with this approach. The first of these is the perception, recorded in para 2 of the judgment, that the evidence of Ms Singh regarding her treatment by the principal is ‘unchallenged’. Related to that, it is wrong to conclude that the evidence that the principal ‘created a hostile environment’ was not challenged by any evidence led on behalf of the defendant. It is apparent that the learned judge held those views firstly because Mr Padayachee could not be called, and secondly because certain witnesses who were due to be called (that being revealed in cross-examination) were not called. What the learned judge overlooked is that the picture painted of conditions at the school by other witnesses, called by Ms Singh and the department, is somewhat different to the self-serving one presented by Ms Singh’s evidence.

[39] Secondly, the fact that Ms Singh was employed by the department does not on its own render the relationship between the two so close as to, without more, give rise to a duty on the part of the department. The judgment deals almost exclusively with Ms Singh’s position and her perception of matters. Little consideration is given to the position of the department, responsible as it was and remains for teachers numbered in their thousands. To say in those circumstances that the employment relationship between the parties, without more, establishes such a proximity between the department and an individual teacher that there is a duty placed on the department to ensure that no teacher suffers harm is in my view unsustainable.

[40] In my view the reasoning adopted in the high court for reaching the conclusion that wrongfulness was established cannot be supported.

[41] It is necessary when considering the issue of wrongfulness in this case to keep a sharp eye on the bigger picture. The primary object of the department, as far as public schools are concerned, is the establishment and maintenance,

through administrative measures and controls, of a vast web of schools spread throughout the province. The purpose of its efforts is the achievement of a reasonable standard of education for all children in the province of school-going age. Teachers are important, and many thousands of them must be employed in order to achieve the aims of the department. Nevertheless, an overriding concern must remain the best interests of the children in the education sphere.

[42] The terms of the contract of employment between Ms Singh and the department are largely regulated by statutory instruments. As an organ of state, the provincial government, represented here by the department, must in terms of s 7(2) of the Constitution ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. The predominant right in the Bill of Rights which the department’s practices with regard to its employees must fulfil is the right to fair labour practices enshrined in s 23(1) of the Constitution. There are other rights in the Bill of Rights which are significant in considering the manner in which the department can conduct itself as an employer. I think in particular of ss 9 (equality), 10 (human dignity) and 14 (privacy). I do not suggest that this a closed list. It has not been argued that, insofar as it is relevant to the present issues, the framework set up for the administration of the employment of educators described earlier in this judgment, read with the Labour Relations Act, falls short as an instrument for the discharge of the department’s obligation to promote and respect the rights just mentioned.

[43] Ms Singh’s case rests on two primary foundations. The first is that she was victimised and the second is that, as a result of victimisation, she became afflicted with major or clinical depression which prevented her from working. Both the victimisation and her illness are recognised in the statutory instruments which govern her employment relationship with the department.

[44] Ms Singh had a grievance. It concerned victimisation, which falls within the statutory definition of misconduct. She had a right to lodge a grievance as contemplated by her statutorily imposed conditions of service. If she had exercised that right, and resolution could not be achieved by settlement, the department would have been obliged to conduct disciplinary proceedings. On her evidence, those proceedings would have terminated in her favour, which would have obliged the department to take specified measures to put an end to the victimisation.

[45] Ms Singh chose not to employ the remedy available to her with regard to her complaint of victimisation. This analysis of the situation was studiously ignored by Ms Singh's legal representatives at trial and before us. Neither was it considered in the judgment of the court *a quo*.

[46] In my view public and legal policy considerations, and reasonableness, demand that save in exceptional circumstances, it is proper and sufficient that the statutory and regulatory regime leaves issues such as those raised by Ms Singh to be dealt with properly and timeously if the educator concerned chooses, through the grievance procedure, to bring such circumstances to the notice of the department. Leaving the initiation of grievance procedures to the complainant serves to protect an educator's right to dignity and privacy.

[47] In his heads of argument, counsel for Ms Singh advanced the proposition that as a result of Mr Padayachee's conduct, Ms Singh had different causes of action or claims available to her:

- (a) On the grounds of constructive dismissal Ms Singh had the right to resign and seek compensation from her employer under the Labour Relations Act.
- (b) She could follow the grievance procedures set out in PAM and the PILIR.

- (c) She could approach the high court for appropriate relief (presumably interdictory relief).
- (d) She could institute an action for damages, being the course she chose to follow.

[48] The question arises, given that the Labour Relations Act was enacted primarily in support of the rights furnished by s 23 of the Constitution, and that the legislature saw fit for good reason to limit the compensation payable for (constructive) dismissal, whether legal and public policy is served by allowing a delictual claim to coexist with a claim under the Labour Relations Act. If a delictual claim is allowed a dismissed employee can litigate in the courts for more compensation than that provided by the legislature in the Labour Relations Act. Others, who cannot afford such litigation, will have to be satisfied with the more limited compensation provided under Labour Relations Act. That such inequality of treatment should exist is not in accordance with legal and public policy.

[49] The excuse offered by Ms Singh's trade union for the failure to register a formal dispute with the Education Labour Relations Council, that the preliminary processes had not yet terminated, can be dismissed out of hand. It is clear from the evidence that Ms Singh put her case in the hands of her union. It is clear from her evidence that initial discussions did not resolve her complaint of victimisation by Mr Padayachee. That justified the submission of a formal written grievance which would have to be dealt with on the strict timetable set out in items 3.1(b) and (c) of Chapter H of PAM. Item 3.1(c)(iv) then provides that if the grievant is not satisfied with the outcome the matter will then be dealt with by the Education Labour Relations Council. On Ms Singh's version she would undoubtedly have been successful in those proceedings. On Ms Singh's version all the talking that would notionally fall under the provisional steps set out in item 3.1(a) of the grievance procedure took place without any resolution being reached. The idea

that this should have gone on for the number of years it did, according to Ms Singh, without her gaining the right to lodge her formal grievance and pursue it, verges on the preposterous.

[50] Ms Singh claims that she did not follow the grievance procedure because she did not know that it was available. That evidence cannot be accepted and was not accepted by the high court. She utilised the grievance procedure to pursue her claim that the principal's bias had prejudiced her in her application for a promotion. And, as mentioned earlier, she was granted relief in that regard.

[51] What the judgment of the high court signifies is that, despite Ms Singh's failure to engage with the remedies available to her in the case of victimisation, the position is that the department ought to have intervened unilaterally and put matters right. In effect, the judgment of the high court holds that it should indeed have done so.

[52] Mention should be made of the fact that one of the underpinnings for the principle in our law that wrongfulness is not presumed in the case of omissions is a concern about the implications and impact of limitless liability. (See *South African Hang and Paragliding Association and Another v Bewick* [2015] ZASCA 34; 2015 (3) SA 449 (SCA) para 32.) Paragraph 8 of the PILIR, which deals with the subject of ill-health retirement (medical boarding), records that there are five 'high incidence applications' for retirement on medical grounds, the one first listed being applications on psychiatric grounds. Special procedures are laid down for the assessment of such cases. Counsel for the department argued, correctly in my view, that allowing a delictual claim along the lines of that advanced by Ms Singh poses a significant threat to the capacity of a department to perform its functions. A clear line distinguishes, on the one hand, a case where prolonged adversarial working conditions and poor inter-personal relationships are alleged

to be a consequence of negligent omissions on the part of the department, and have brought about a psychiatric condition which developed over a period of years rendering an educator unable to work; and, on the other hand, a case of physical harm and injury suffered by an educator as a result of negligent conduct or omissions on the part of the department. In the former instance the malady is difficult to discern in the absence of clear, unquestionable notice from the educator such as is furnished by an application for a transfer or for ill health leave, or by engagement with the grievance procedure.

[53] In my view, a more complete picture of the factual background against which Ms Singh sues does not support a claim that it would be reasonable to hold the department liable in delict for the financial consequences of Ms Singh's early retirement. Wrongfulness was, therefore, not established. This conclusion means that Ms Singh's claim ought to have failed in the high court. It also renders it unnecessary to turn to a consideration of negligence and causation.

Order

[54] In the result, the following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of the trial court is set aside and the following order is substituted for it:
‘The plaintiff's claim is dismissed with costs.’

P J OLSEN
ACTING JUDGE OF APPEAL

Appearances

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