



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case no: DA10/2022

In the matter between:

C.T BUTHELEZI

Appellant

and

MEC DEPARTMENT OF EDUCATION KZN

First Respondent

HEAD OF DEPARTMENT OF EDUCATION KZN

Second Respondent

EDUCATION LABOUR RELATIONS BARGAINING

COUNCIL

Third Respondent

A.S DORASAMY N.O

Fourth Respondent

Heard: 16 May 2023

Delivered: 23 May 2023

Coram: Waglay JP, Musi JA et Gqamana AJA

JUDGMENT

WAGLAY JP

Introduction

- [1] The Labour Court confirmed the fairness of the dismissal of the Appellant in an application brought by the Appellant to review and set aside the arbitration awarded handed down by the Fourth Respondent (arbitrator) under the auspices of the Third Respondent (Education Labour Relations Bargaining Council).
- [2] The Labour Court, however, found that the Appellant should not have been found to have committed misconduct in respect of the first two of the four counts of misconduct preferred against him and that the arbitrator had correctly found the Appellant guilty of the other two charges and held that the Appellant's dismissal was an appropriate sanction. The Labour Court did not interfere with the findings of the arbitrator that the dismissal of the Appellant was procedurally unfair and in that respect, ordered the First and Second Respondents (Respondents) to pay the Appellant compensation equal to the salary that the Appellant would have earned over a period of two months. As the cross-appeal was made out of time, condonation for the late filing of the cross-appeal was dismissed.
- [3] This appeal is with the leave of the court *a quo*.

Background

- [4] This matter has a long history dating back to 2008. The Appellant was appointed as the principal of Isolemamba Senior Secondary School in KwaZulu-Natal in 1998 following the fatal shooting of his predecessor on school grounds.
- [5] He had been employed with the Department of Education, KwaZulu-Natal for a period of 23 years and whilst employed as the principal of Isolemamba Senior Secondary School, he, as was required to, served as a member of the school's governing body (SGB).
- [6] Following receipt of an anonymous complaint detailing allegations of financial mismanagement on the part of the Appellant, in July 2006, the Department

instructed its internal control and risk management directorate to commence an investigation into the finances of the school. This investigation included conducting interviews with staff and auditing financial documents to determine whether the allegations were valid. During the investigation, it was discovered that the school failed to appoint a financial committee for 3 consecutive years, 2004 – 2006. At the commencement of the investigation, the Appellant refused to cooperate with the investigators as he sought to be provided with a copy of the anonymous complaint for his perusal, the investigators refused to provide him with the complaint on the basis that they wished to protect the identity of the “whistle-blower”. The Appellant was informed that he was required to provide the investigators with the school’s financial documents regardless of the content of the anonymous complaint and this is when he stated that the school had been burgled and some of the financial documents sought had been among the items stolen.

- [7] Interestingly, he informed those investigating the complaint that the documents that were stolen included, amongst others, monthly reconciliation statements, deposit books, educators’ individual request letters for refundable advancements, SGB minute book and monthly bank statements. One wonders why a thief would want to steal these documents. He said that the theft occurred in or about June 2005. He, however, reported the theft to the police on 19 September 2005 and in that report, he indicated that the theft had taken place on 18 September 2005.
- [8] He also indicated to the investigators that as a result of the break-in and theft at the school, he decided to remove the financial and other crucial documents still on the premises and retained some of them at his home and others in the boot of his vehicle. He later claimed that there was a leak of battery acid in the boot of his vehicle which led to the documents in his vehicle being destroyed.
- [9] From the documents received from the Appellant and other sources, the investigators were able to determine *inter alia* that payments were made without supporting documentation being provided which amounted to R410 151,65; that loans were paid to educators during 2004 and 2005 which had not been repaid; that cash cheques were issued in contravention of the rules; school

funds were utilised for celebratory functions and to contribute towards a “benefactor’s” funeral; and finally, that monies collected for school funds from were not deposited into the school’s banking account.

[10] The investigation took almost 2 years to complete with the result that on 26 March 2008, the Appellant was issued with a notice to attend a disciplinary enquiry to answer four counts of misconduct. The charges can be summarised as follows –

10.1 Charge 1: related to the misappropriation of R410 951.65;

10.2 Charge 2: related to the Appellant operating a “money-lending scheme” for employees;

10.3 Charge 3: related to the issuing of cash cheques in contravention of departmental regulations; and

10.4 Charge 4: related to the failure to deposit into the school’s banking accounts money collected for the school amounting to about R75 000,00 in contravention of section 18(1)(a) of the Employment of Educators Act¹ (EEA).

[11] A disciplinary hearing was duly convened. At the hearing, the Appellant applied to be allowed legal representation, this was refused and he proceeded with having a trade unionist representing him. He was found to have committed the misconduct for which he had been charged and was dismissed.

[12] The Appellant, believing his dismissal to be unfair, referred the matter to the Third Respondent for conciliation and when that failed, for arbitration. The Appellant did not raise procedural unfairness at the arbitration. The arbitrator found the Appellant’s dismissal to be fair.

[13] The Appellant, aggrieved with the arbitration award referred the matter to the Labour Court on review. Surprisingly, the record of the arbitration hearing could

¹ Act 76 of 1998. Section 18(1)(a) of the EEA provides that: “[m]isconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she... fails to comply with or contravenes this Act or any other statute, regulation or legal obligation relating to education and the employment relationship...”

not be traced and for that reason, it appears, the matter was referred back to the Third Respondent for a hearing *de novo*.

- [14] At the rehearing of the arbitration, the Appellant took issue with both the procedural and substantive fairness of his dismissal. In respect of procedural fairness, the Appellant took issue with the chairperson's refusal to allow him legal representation at the disciplinary hearing; the delay between the time he was charged and the commencement of the disciplinary hearing; the Respondents' failure to suspend him pending the disciplinary hearing and the formulation of the charges.
- [15] In respect of the substantive fairness of his dismissal and more particularly, in respect of charge 1, the Appellant argued that the Respondents failed to explain or otherwise justify how it came to the conclusion that the Appellant had misappropriated funds amounting to R410 951,65 stating that the Respondents merely put up a total amount without justification or reasoning on how this amount was determined. The Appellant further averred that the school had been burgled in June 2005 and that certain key financial documents had been stolen. The theft of the documents, as stated earlier, prompted the Appellant to keep the remaining financial information and documentation at his house and/or in his car for safekeeping however due to the spillage of battery acid in the boot of his car, some of the documents in his possession were damaged.
- [16] In respect of charge 2, the Appellant said that the charge is not competent in terms of section 18 (1)(w) of the EEA² as he did not benefit from the alleged misconduct and further that he did not operate a 'money lending scheme' but rather had approached the SGB to obtain salary advances or loans in order to pay the school's educators who had not been paid by the Department in accordance with their employment contracts. The Appellant argued that no one, including himself, benefitted from the salary advances and that the ultimate decision maker in advancing the employees' salaries was the SGB, not him.

² Section 18(1)(w) provides that: "an educator commits misconduct if he or she...operates any money-lending scheme for employees for his or her own benefit during working hours or from the premises of the educational institution or office where he or she is employed..."

- [17] In respect of charge 3, he denied ever having issued any cash cheques as the duties relating to the issuing and signing of cheques fell to the chairperson of the SGB and its treasurer. Further that, at the time he became principal of the school, he was not aware of the School Fund Regulations nor was he informed by the Department that neither he nor the SGB were allowed to issue cash cheques. He alleged that at the time of his appointment as the principal of the school, it was a chaotic environment given the circumstances surrounding his appointment and as such, certain induction or training documents were not handed to him at the commencement of his employment as principal nor was he adequately trained on the financial management of the school. Accordingly, he was not aware of certain policies and procedures that applied at the school.
- [18] In respect of charge 4, the Appellant denied mismanaging school funds and failing to deposit certain amounts owing to the school. He argued that as the school did not have a financial committee, the duties relating to the financial management of the school fell on the SGB adding that the Department was aware that the school did not have a finance committee and had not complained about that or the manner in which the school was managed. He said that where monies collected were not deposited in the school banking account, it was because he had to ensure that school service providers who had requested to be paid in cash, were paid in respect of the provision of services to the school and that the monies received from learners and or other sources were used for the benefit of the school and/or its learners.
- [19] In respect of the functions and obligations of a school principal insofar as it relates to the financial management of the school, the Appellant argued that prior to the 2007 amendment of the South African Schools Act³ (SASA), principals of public schools were not responsible for the financial management of schools and that these duties, as set out in the amendment, only arose after the alleged misconduct was committed. Further, a principal of a school was not responsible for the management of the school's funds and accordingly, he was not responsible for the financial management of the school including, informing

³ Act 84 of 1996.

the SGB about the applicable policies and legislation, managing the school funds and reporting maladministration of financial matters.

- [20] The Respondents' evidence on the other hand was that when the appellant applied for the position of principal in Isolemamba Senior Secondary School, he responded to an advertisement and was aware of the requirements that had to be met as a principal. Upon the appellant's assumption of duties in 1998, he was aware that he was responsible for all managerial decisions taken. Also during his first year, he encountered a problem with teachers at the school wanting to be in the finance committee, he then convened an SGB meeting and motivated that the finance committee that existed at the time to be disbanded and it was.
- [21] Furthermore, when principals are appointed, induction and training sessions are held in order to provide the principals with the relevant policy documents and that as the principal of each school is responsible for the financial management of the school, it is reasonable to expect the principal to guide the SGB in the implementation of the relevant policies. In respect of the duties and functions of the principal, policy documents indicate that the principal is responsible for the upkeep of the school accounts and records for the benefit of the learners.
- [22] The Respondents argued that during his tenure as principal, the Appellant was subjected to training workshops at which relevant training documents on financial management were provided to him. Over and above the workshops, quarterly meetings would be held with the principals and the respective circuit manager who acted as the direct supervisor of the principals and the go-between the schools and the Department in terms of communication and problem-solving. During these quarterly meetings, the Appellant, along with the other principals and the circuit manager, would discuss issues relating to *inter alia* the management of their respective schools, HR matters, school governance and financial management matters.

- [23] In 2003, the Appellant on behalf of the school and the SGB, made an application for the school to be given section 21⁴ status and in its application, he confirmed that he had the relevant financial training and that the school had the capacity to administer its own finances. The school obtained section 21 status and in the circumstances, the Appellant and the SGB would have been familiar with the financial policies, procedures and regulations relating to the financial management of the school and particularly, the school funds. School funds are allocated to specific activities or functions relating to the functioning of the school and can only be used for the specific activity for which they are allocated.
- [24] The Respondents conceded that it is possible that educators may not be paid on time, however, when this occurs, the principal of the school does not have the authority to use school funds to provide loans or salary advances to unpaid educators, particularly where such unpaid educators were employed by the SGB and not the Department. School funds are not allocated for the purpose of rectifying the non-payment of SGB-appointed educators, but rather the responsibility falls on the SGB to resolve the issue internally. Where Department-appointed educators are not paid, the Department must be approached to rectify the issue. Further, as circuit managers act as the communicators between the principals and the Department, principals have always been encouraged to raise any issue or complaint during the quarterly meetings to seek the advice of the circuit manager and where a matter is urgent, the principal need not wait for the next quarterly meeting to raise an issue but can approach the circuit manager to arrange an urgent meeting to resolve any issues facing the school.
- [25] Also, the Respondents said that as the principal of each school is the accounting manager of the school, the principal is provided with a document entitled the 'school fund departmental instructions' and other documents relevant to the financial management of the school in order for the principal to

⁴ Section 21 of the SASA provides that a school's governing body may apply to the Head of Department to become responsible for specific functions relating to the school including but not limited to, maintaining and improving the school's property; purchasing of textbooks, education materials or equipment for the school; paying for services to the school or any other function consistent with the South African Schools Act and any applicable provincial law.

carry out their duties accordingly. Due to the nature of the work done by principals, a principal occupies a position of trust in respect of the governance and financial management of the school and charges relating to mismanagement of school funds can only result in the dismissal of such a principal who has failed in his duties.

[26] Evidence was also led to the effect that cash cheques were issued amounting to about R40 000.00 despite the school fund departmental instruction stating that no cash cheques may be issued by a school. When questioned on this during the investigation, the Appellant repeated the mantra that the cash cheques had been issued because certain suppliers or service providers did not have bank accounts or had requested that payment for services be made by way of cash cheques.

[27] Finally, and in respect of charge 4, the evidence was that where learners made payments to the school for school fees, such payments were collected by Mr Zwelihle Ngcobo (Mr Ngcobo), a member of the SGB and signatory of the cheques issued by the school, who would then give the money to the Appellant in order for same to be deposited into the school's bank account. It was discovered that the Appellant did not always issue receipts to Mr Ngcobo as proof of receipt of the payments but rather that the Appellant recorded the collection and depositing of the money in a book which was subsequently and conveniently stolen in the burglary. It was also discovered that there was a shortfall in the amount of money deposited between 2004 and 2005 and the Appellant again repeated his mantra that, where learners pay their school fees in cash, such cash would be used to defray any expenses incurred by the school such as to service providers who did not have bank accounts, or for the use of hosting celebratory events at the school and that the records proving payment to the service providers using the cash received had been stolen.

[28] The arbitrator found that the Appellant had not taken steps to prevent the mismanagement of the school's finances and failed to act in accordance with the Department's policies and regulations to ensure that the correct financial procedures and policies were followed and accordingly, the Appellant's dismissal was substantively fair. In respect of procedural fairness, the arbitrator

found that due to the complexity of the matter and the Appellant's lack of knowledge in respect of the Department's policies, the refusal to allow the Appellant legal representation at the disciplinary hearing was procedurally unfair, accordingly in this respect, the Appellant was awarded compensation equal to two months' salary.

[29] The Appellant launched a review application against the arbitration award that the dismissal was substantively fair and the Respondents launched a cross-review application on the findings relating to procedural unfairness. The cross-review was filed late and the Respondents sought condonation, which was refused.

[30] On the Appellant's review application, the Labour Court was not satisfied that the arbitrator could have found that the Appellant had committed misconduct as alleged in the first two charges, on the evidence presented at the arbitration and as such, set aside the arbitrator's finding of the Appellant's guilt on the first two charges of misconduct. Since no appeal lies in respect of this finding by the Labour Court, I shall refrain from making any comment thereon save to say that the basis upon which the court *a quo* failed to sustain those misconduct charges were:

30.1 In considering the charge of misappropriating school funds, the court *a quo* found that the Appellant's version regarding the stolen invoices was implausible however it held that it was clear from the report prepared by the Department that some of the cheques issued were made out to legitimate vendors of the school and therefore the amount of about R410 000 is an overestimation of what amounts were actually misappropriated and for which the Appellant was responsible for. The court further held that missing invoices is not sufficient evidence of misappropriation and accordingly, the evidence did not support a conviction on charge 1.

30.2 In respect of charge 2, the court *a quo* found that the Appellant was not merely an intermediary between the educators seeking the loans and the SGB who would ultimately issue the loan, rather the Appellant had acted as the gatekeeper to the loans, determining which request was

deserving of receipt of the loans and when the issue of repayment of the loans was canvassed during the investigation, the Appellant took it upon himself to recover the outstanding loans, disallowing the investigators from interacting with the educators who had received the loans in order to pay back the money. Accordingly, the court *a quo* found him to have acknowledged that he was accountable for making the loans and that he was instrumental in the issuing of the loans. However, the court *a quo* found that this did not justify the conviction on this charge where the charge categorised the loans as a “money lending scheme” and giving its ordinary meaning, the issuing of loans did not constitute a money lending scheme. Further, the evidence did not establish that the Appellant had derived any benefit from the loans in accordance with the provisions of section 18(1)(w) of the EEA.

- [31] While I find the setting aside of the “convictions” on the first two charges rather curious, there is no cross-appeal before this Court and as such, the decision of the Labour Court in that respect stands.
- [32] In respect of the other two charges, the Labour Court was satisfied that on the evidence presented at the arbitration, the findings of the arbitrator were within the band of reasonableness and also that dismissal was an appropriate sanction.
- [33] In the result, the Labour Court dismissed the application for review.
- [34] The Appellant appeals the decision of the Labour Court and essentially, his grounds of appeal can be summarised as follows:
 - 34.1 the court *a quo* failed to consider the Appellant's argument that the misconduct charges relating to the period of 2004 – 2005 fell within the responsibility of the SGB and not the Appellant as the principal;
 - 34.2 the court *a quo* miscategorised charges 3 and 4 as wasteful expenditure charges and the charges related to the failure to abide by the procedures and policies of the Department;

- 34.3 The court erred in finding that the Appellant did not deny receiving training in respect of his duties;
- 34.4 The court erred in its interpretation and application of the principles of inconsistency; and
- 34.5 the court erred in finding that the trust relationship had become intolerable.

Responsibility for the financial management of schools

- [35] The Appellant led evidence that the responsibility of managing a school's finances, prior to the 2007 amendments to the SASA⁵, fell exclusively on the SGB and not on him as the principal.
- [36] The SASA is intended to provide a uniform system for the organisation, governance and funding of schools, this includes regulating the governance and management of public schools, setting out the functions and duties of a school's governing body and regulating the funding of public schools.
- [37] In terms of section 16 of the SASA, the governance of a public school is vested in its governing body which may perform only the functions and obligations as set out in the Act. Section 16(3) of the Act provides that the professional management of a public school "*must be undertaken by the principal under the authority of the Head of Department*".
- [38] Section 23 of the SASA provides that the membership of an SGB comprises the elected members, the principal in their official capacity and co-opted members.
- [39] The functions of a governing body where such a school has been given section 21 status may include the purchasing of textbooks and educational materials

⁵ In 2007, an amendment to section 16 of the SASA was introduced in which the functions and responsibilities of a principal of a public school were set out. In terms of section 16A, the principal represents the Head of Department in the governing body when acting in an official capacity and must, *inter alia*, manage educators and support staff; implement policy and legislation and inform the SGB of same; and keep safe all school records.

for the school, paying for the services provided to the school and such other functions consistent with the SASA and any applicable provincial law.

- [40] It is the argument of the Appellant that, at the time of the commencement of the alleged misconduct, the financial management of the school vested solely in the SGB and that, in accordance with the SASA, his responsibility was limited to guiding the SGB in its role, functions and responsibilities. This argument flows from the judgment of *Schoonbee and others v MEC for Education, Mpumalanga & another*⁶ where the court held that –

‘...On a careful look at the provisions of the Act, which are by no means replete or comprehensive, no specific duties relating to assets, liabilities, property, financial management are entrusted to or vested in the principal. In my view, the proper interpretation is to regard the principal as having a duty to facilitate, support and assist the SGB in the execution of its statutory functions relating to assets, liabilities, property, financial management of the public school and also as a person upon whom specified parts of the SGB's duties can properly be delegated. On any of these interpretations the principal would be accountable to the SGB. It is the SGB that would hold the principal accountable for financial and property matters which are not specifically entrusted upon the principal by the statute.’

- [41] What the Appellant fails to consider is that the evidence establishes that the Appellant, as principal of the school, was delegated specific functions relating to the financial management of the school in addition to his statutory duties of professional management as set out in section 16(3) of the SASA. Further and in some instances, the Appellant even made himself responsible for certain financial duties such as his decision to act as the custodian of the school's financial documentation following the alleged burglary, his acting as the point of communication and motivator between the SGB and the educators in order to secure the loans and their subsequent repayment or his decision to use school funds to pay service providers in cash or to pay for celebratory events for learners.

⁶ (2002) 23 ILJ 1359 (T) at 1365C-E.

- [42] In respect of his delegated financial responsibilities, where the school was required to make payment to its service providers, payments would be made by way of cheque and prior to the issuing of the cheque, a payment advice would be prepared setting out the relevant details of the proposed payment. This payment advice would be approved by the Appellant as the principal, thereafter the cheque would be signed by the chairman of the SGB and one other member of the SGB, Mr Ngcobo. Accordingly, although the Appellant was not the ultimate signatory of the cheques, his approval was required before cheques could be issued and without his approval, no cheque could be issued.
- [43] Further, when learners made payments to the school by way of cash, the Appellant would be responsible for the recording and subsequent deposit of the funds into the school accounts.
- [44] Based on the evidence presented, it cannot be said that the Appellant was in no way responsible for the financial management of the school, at least in certain aspects, it is clear that during 2004 – 2005, he had made decisions (and in some instances alone) relating to the finances of the school, including causing the issuing of a cash cheque in order to purchase computers to the school and causing the issuing of loans to educators and then taking responsibility for the repayment of such loans following the institution of the investigation. These duties go beyond 'professional management' as envisioned by section 16 of the Act and accordingly, it can be said that the Appellant was most certainly responsible for the financial management of the school.

Miscategorisation of charges 3 and 4 as wasteful expenditure charges by the court *a quo*

- [45] Charge 3 relates to the issuing of cash cheques by the Appellant despite the regulations stating that no cash cheques could be issued, while charge 4 relates to the failure to deposit school funds into the school's bank account.
- [46] More specifically, charge 3 relates to the issuing of cash cheques and in one instance, a cash cheque for the purchase of computers for the school. It was the Appellant's evidence that a cash cheque had been issued because the

supplier of the computers was unable to receive the funds in its bank account. The court *a quo* noted that in the Respondents' investigative report, the purchased computers could not be found on the school's premises and on questioning, the Appellant informed the investigator that the computers had been sent away to be upgraded, although these computers have still not materialised. The court referred to the purchase of these computers as an instance of 'wasteful expenditure'.

- [47] Similarly, charge 4, which relates to the Appellant using cash received from learners to pay service providers and/or pay for celebratory events at the school, was referred by the court *a quo* as an instance of wasteful expenditure.
- [48] The court did not find the Appellant guilty of wasteful expenditure in respect of charges 3 and 4, rather the court had referred to the evidence led relating to the charges as amounting to instances of wasteful expenditure on the part of the Appellant, particularly where computers, which were purchased for the benefit of the school, had to be sent offsite to be upgraded thus could not be used by the learners until the upgrade process was completed, or school fees received were used to pay for celebratory events for learners or given to a Mr Makhanya to pay for a family member's funeral.
- [49] Clear and specific rules existed concerning the issuing of cash cheques and the depositing of school fees into the school's banking account, the Appellant had failed to apply these rules and procedures, had admitted to not following the rules in respect of these charges and even sought to justify his actions. Accordingly, he was found guilty of the charges. Referring to the instances which gave rise to the charges as 'wasteful expenditure' cannot be said to be a miscategorisation or change in the charges that the Appellant was found guilty of. In any event, what should be evident is that what the Court categorised as wasteful expenditure is not what is generally understood to constitute wasteful expenditure.

Training of appellant in his duties

- [50] The court *a quo* acknowledged the Appellant's defence that he was not aware of the Department's rules and policies due to a lack of training during his tenure

as principal of the school. The cumulative evidence of the Respondents was that newly appointed principals would be provided with induction training, that documentation referred to as the “green and red” books which contained the Respondents’ regulations and rules would be provided to the principals and that the documentation was self-explanatory and further training on its content was not necessary. Further, quarterly meetings with the circuit manager were held to discuss school governance, financial and operational matters and workshops would be arranged where principals would receive further training on aspects relevant to their position.

- [51] Even if it can be accepted that the Appellant did not at any point receive induction training, receive the green and red books or was informed that specific rules and procedures existed in the governance and management of schools, it is difficult to accept that the Appellant, who had experience in the Department for 23 years and was employed at the school as the principal since 1998 until his termination in 2008, did not have *any* knowledge of the rules and policies which govern schools. Further, it is not disputed that quarterly meetings were held with the circuit manager and thus if the Appellant felt at odds with his preparedness to act as principal of the school, this would have been an opportunity for him to raise his concerns. The Appellant also conveniently forgot that in both his application to be principal and in his application to have the school declared a section 21 school, he represented that he was well aware of the requirements in respect of the financial duties he had to carry out.

Inconsistency in the application of discipline

- [52] The Appellant argues that the Respondents were inconsistent in the application of discipline, specifically between himself and Mr Ngcobo and further that the court erred in concluding that the test for inconsistency is based on the employer’s prerogative to impose discipline.

- [53] The parity principle in its simplest terms relates to the equal treatment of employees who commit the same misconduct and that it would be unfair to discipline an employee for an infraction which in the past was condoned by the employer.

[54] In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)*⁷, this Court was faced with the argument by a senior employee who alleged inconsistency in the discipline meted out between himself and his subordinates. This Court held that –

‘As regards the dereliction of duties by his subordinates, if any acts of misconduct were to be proven against any particular individual, it remains plain that they had no managerial role and it is illogical to draw a comparison as contemplated by the factor of inconsistency. Moreover, it would be a paradox if the appellant could legitimately invoke the failure of the very subordinates he was accountable to manage effectively to exonerate or mitigate his managerial neglect by managing them ineffectively. There is no room to contemplate the factor of inconsistency of discipline by invoking the probability that no subordinates were disciplined (or that it is unknown whether they were disciplined) for their infractions. The reason for this is that if it is assumed that a cogent concrete basis could be put up to identify which persons acted irresponsibly in relation to their specific functions and responsibilities, it would still not be a failure by them to manage the fitment programme and be conduct comparable to the misconduct committed by the appellant.’

[55] The Appellant, as principal of the school was vested with the duty of the professional management of the school and as set out in *Schoonbe*, had a duty to “*facilitate, support and assist the SGB in the execution of its statutory functions relating to assets, liabilities, property, financial management of the public school*”. Mr Ngcobo, as the Appellant’s subordinate and fellow SGB member, did not have a managerial role in the school comparable to that of the Appellant and accordingly, he took instruction and guidance from the Appellant in the completion of his duties. He was told by the Appellant when to sign cheques and when to prepare payment advices. It cannot be said that the Respondents’ failure to discipline Mr Ngcobo constituted an inconsistent application of discipline as the Appellant occupied a managerial role within the school and ultimately instructed and guided Mr Ngcobo in the (incorrect) completion of his financial duties.

⁷ (2014) 35 ILJ 2406 (LAC) at para 28.

Breakdown in trust relationship

[56] The Appellant's final ground for appeal is the Respondents' alleged failure to argue a breakdown in the trust relationship to justify the dismissal of the Appellant. It is clear from a reading of the transcript of the arbitration proceedings that the Respondents considered the failure of a principal to abide by the Department's policies and rules to be a serious offence especially where such principal used school funds for purposes for which they were not designated. Further, the court *a quo* was correct in saying that the Appellant showed no contrition for his actions considering the seriousness of the charges he faced. If it said that the school principal has a duty of professional management towards the school and is tasked with guiding and facilitating the SGB in its duties, then it is clear that the Appellant has failed on both counts and accordingly, he cannot be trusted to continue to act as the principal of the school.

[57] The above notwithstanding, the conduct of the Appellant during the investigation was not what is expected of the leader of the school. Also, his evidence at the arbitration was correctly rejected as a consequence of the inherent improbabilities in his version. It is clear from the evidence that the Appellant was the final authority who approved the authorised payments. It was also clear that he made decisions without the intervention of the SGB hence the convenient absence of the minutes of the SGB which would have exculpated him. He had a duty to ensure the safety of school records and failed to do so. His poor explanation, that such records were stolen or conveniently damaged, must be rejected as fabrications.

[58] In all the circumstances it cannot be said that the award by the arbitrator that the dismissal was substantively fair is open to be set aside; it is demonstrably based on the evidence presented at the arbitration and is an award which is within the band of reasonableness.

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

The appeal is dismissed with no order as to costs.

Waglay JP

Musi JA and Gqamana AJA concur.

APPEARANCES

For the Appellant

A Naidoo of Angeni Naidoo Law Firm

For the First and Second Respondents:

Adv Deshin Pillay

Instructed by the State Attorney