



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA16/2019

In the matter between:

T. D. RAMABELE

Appellant

and

**HEAD OF DEPARTMENT: FREE STATE PROVINCIAL
DEPARTMENT OF EDUCATION**

First Respondent

S. M. OSMAN N.O.

Second Respondent

THE EDUCATION LABOUR RELATIONS COUNCIL

Third Respondent

Heard: 18 March 2021

Delivered: 03 August 2021

Summary: MAJORITY *Dismissal---Dishonesty---Principal failed to account for monies received from the school during investigation and disciplinary hearing failed to provide documentation despite numerous requests---Documents however provided at arbitration to justify expenditure---record incomplete so unable to decide . Matter referred back for Arbitration anew*

DISSENTING *Dismissal---Dishonesty---Principal failed to account for monies received from school during investigation and disciplinary hearing---Documents submitted at arbitration raising suspicion as principal had the requested documents at all time---Principal's conduct not reconciled with that of an accounting officer. Principal guilty of dishonesty.*

Coram: Waglay JP, Coppin JA and Savage AJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of the Labour Court, is against the judgment and orders of Prinsloo J delivered on 4 July 2019 in terms of which the findings of the second respondent ('the arbitrator') that the appellant, Mr T. D. Ramabele, had committed various counts of financial misconduct was confirmed, with the matter remitted to the third respondent, the Education Labour Relations Council ("the ELRC"), for a determination only of the issue of sanction.
- [2] The appellant was employed by the first respondent, the Free State Department of Education ('the Department'), in January 1988. At the time of his dismissal on 28 November 2012, he served as Principal of Leratong Senior Secondary School in Botshabelo, Free State Province ('the school'). He was given notice to appear before a disciplinary hearing on 7 May 2012 at which he faced eight counts of financial misconduct. He was found to have committed seven of these counts and was dismissed from his employment with the Department.
- [3] Dissatisfied with his dismissal, the appellant referred a dispute to the ELRC. At arbitration, the Department relied on the evidence of its investigator, Mr Patrick Buffel. He had received a complaint relating to the mismanagement of school funds and went to the school to investigate. There he met with the appellant, the School Management Team ("SMT") and the School Governing Body ("SGB"). He was given access to various documents and interviewed staff members. He found that some supporting documents were not attached to cheque requisition forms and that in certain instances the appellant alone had authorised cheque payments to himself. The appellant indicated that the documents were supposed to be on file and referred Mr Buffel to the school's financial clerk, Ms Irene Teno, to obtain these. However, many of the documents were not with Ms Teno and were found to be missing.

- [4] Ms Teno told Mr Buffel that if she had received the documents from the appellant, she would have filed these as she took instructions from him. The appellant explained that he had a poor relationship with Ms Teno, who at his instance faced disciplinary action in 2011 and in 2012 received a final written warning and was suspended for two months for taking money from the school without providing a receipt. In 2008, Ms Teno had also agreed to refund money she had taken for her personal use. In the appellant's view, Ms Teno, had intentionally and unfairly attempted to implicate him.
- [5] Since the Department did not proceed with the first charge against the appellant, the arbitrator was tasked with determining the fairness of his dismissal for the misconduct set out in charges 2 to 8. Save for charges 5 and 6, which related to the procurement of textbooks for the school, the remainder of the charges against the appellant concerned cheque payments made to him to pay various school expenses in cash. Both the school cheque requisition form and the face of the cheque required two signatures, with the appellant and Ms Teno among the authorised signatories. The evidence of the SGB members called by the appellant to testify was that payments authorised were recorded in the SGB minutes.
- [6] At the arbitration hearing, the appellant produced a number of documents which had not been available to Mr Buffel during his investigation and which were not presented during the disciplinary hearing. The appellant's explanation was that, on advice, he had made efforts to obtain the missing documents directly from suppliers or recipients to prove that he had not committed the misconduct alleged. The arbitrator noted that Mr Buffel in his evidence had stated that he would have been satisfied had he received these documents produced by the appellant at arbitration.

Charge 2

- [7] The Department alleged that during April 2010 the appellant committed an act of dishonesty in being reimbursed R5000,00 in cheque number 2078 when he had only paid out R190,00, with the remaining amount of R4810,00

“embezzled or could not be accounted for”. In the alternative, he was said to have wilfully or negligently mismanaged the finances of the school.

- [8] The evidence at arbitration showed that a cheque for R5000,00 was issued in favour of the appellant, with the cheque requisition signed by the appellant alone, while Ms Teno the second signatory on the cheque. The only supporting document found by Mr Buffel during his investigation was a R190,00 receipt for petrol. The cheque requisition produced by the appellant at arbitration reconciled the R5000,00 advanced. It recorded that R3010,00 was paid to twelve teachers for school holiday tuition undertaken from 6 – 9 April 2010, all of whom had signed receipt of the funds in a supporting document. The arbitrator accepted the evidence of Ms Lebogang Nape of the SGB that had the teachers not been paid for this work they would have complained. R1000,00 was paid for a workshop in Kroonstad, which the appellant testified was related to the work of the school, with R190,00 paid for petrol. R50,00 was paid for transport on 7 April 2010. R236,00 for stroke 2 oil. R50,00 was paid for welding rods purchased on 18 March 2010 and R50,00 was paid to a soccer referee on 17 and 19 April 2010. The appellant testified that all payments were required by and related to the business of the school. The total amount spent was R4586,00, with the reconciliation recording that a balance of R414,00 remained.
- [9] The appellant explained that the balance of R414,00 reflected on the reconciliation he would have given to Ms Teno for safekeeping and to deposit in the school's account as she held the keys for the strong room and the safe. In his view the fact that the school received a qualified audit from the auditors supported a conclusion that all relevant documents were available when the auditors visited but that, when sought by Mr Buffel from Ms Teno during his investigation, they had inexplicably gone missing.
- [10] The appellant accepted that the ideal situation would be that expenses were refunded by the school after they had been incurred, but stated that practically it did not occur that way. Although the arbitrator accepted that Mr Buffel indicated in cross-examination that had he been provided with the document put up by the appellant at arbitration he would have been satisfied, the

arbitrator took issue with the fact that the document was not made available by the appellant at the disciplinary hearing and with the fact that although the appellant referred Mr Buffel to Ms Teno during the investigation, she did not have the missing documents. In addition, the arbitrator did not accept the appellant's failure to explain why there was no receipt for the refund of R414,00. The arbitrator also rejected the blame attributed by the appellant to Ms Teno and found however that as a subordinate Ms Teno was accountable to him and that the appellant had not explained why he had not submitted his expense book to Mr Buffel. In relation to the authorisation of the cheque, the arbitrator was not persuaded why there were not two signatories on the requisition as required. He found the appellant not to be a credible witness and concluded that he was guilty of charge 2.

Charge 3

- [11] The appellant was alleged in charge 3 to have acted dishonestly in being given an amount of R8000,00, of which only R275,48 was explained, with R7724,52 being "*embezzled or not accounted for*". In the alternative, the appellant was charged with wilfully or negligently mismanaging the finances of the school.
- [12] The cheque authorisation document signed by both the appellant and Ms Teno recorded payments of R5500,00 for the school feeding scheme; R1500,00 for transport to the conference; R1000,00 for a principals' conference in Lesotho; and R314,04 for "Ms Medupi's attire", which it transpired from the document put up by the appellant at arbitration was in respect of dust masks, gloves, gumboots and other cleaning products required by the school cleaner. In his evidence Mr Buffel indicated that the only supporting document he had received from Ms Teno was for the amount of R275,48. Ms Teno stated that she was aware only of the purchase of R314,04 for cleaning products. At arbitration the appellant put up a handwritten document dated 29 July 2010 in which payments in the total amount of R5500,00 to nine named individuals, who signed receipt of such monies, were recorded. These payments related to the payment of cooks involved with the school's feeding scheme. In addition, he produced an

invitation to a principals' conference from 1 – 6 August 2010, together with an invoice from the Maseru Sun in respect of his stay from 1 – 8 August 2010. The nightly rate recorded on the invoice was R780,00. The appellant's evidence was that he was required to remain for the night of 6 August 2010 due to unfinished conference business, for which he claimed R1000,00. This amount consisted of R780,00 for the room and the R220,00 remainder for food.

- [13] The arbitrator noted that Mr Buffel had conceded in cross-examination that had the documentation produced by the appellant at arbitration been given to him during his investigation he would have been satisfied. While the arbitrator took note of the documents put up by the appellant, he took issue with his failure to provide these during the course of the investigation or disciplinary hearing. It was accepted that the appellant had attended the conference in Lesotho but issue was taken with the fact that R1000,00 was claimed for the extra night when it was not clear that this was permissible given that there was no supporting documentation for meals.
- [14] Ms Nape of the SGB insisted in her evidence that the expenses claimed by the appellant in respect of the conference were authorised by the SGB and that the correct procedure was followed, although she said she would not have authorised the extra day in Maseru. The evidence of Ms Moopela of the SGB was that the appellant's claim of R8000 was authorised and minuted by the SGB, although in evidence she indicated that there was no account for the extra R1000,00 for the conference.
- [15] The arbitrator found that the SGB minutes should have been made available by the appellant but were not and that the appellant had failed to provide sufficient proof of payments in the amount of R7724,52, with no proof of his invitation to Lesotho and with the invoice put up not reflecting the claim for R1000. It was found that the document put up by the appellant to prove payment of R5500,00 to the cooks involved in the feeding scheme raised suspicion, more so when Ms Teno was not aware of this payment. This led the arbitrator to find the appellant guilty of charge 3.

Charge 4

- [16] The appellant was charged with committing an act of dishonesty during October 2010 in receiving R4300,00 but only paying out R4010,01 with the remaining R290,00 having been "*embezzled or could not be accounted for*". In the alternative, the appellant was charged with wilfully or negligently mismanaging the finances of the school.
- [17] The appellant and Ms Teno approved the cheque authorisation request for R4300,00 on 15 October 2010. Receipts for catering in the amount of R3318,00 and R692,00 were annexed to the cheque request. Under the explanation for payment reference was made to a prize-giving ceremony, with it recorded by the appellant that R290,00 was for transport to this ceremony. Mr Buffel stated that while the receipts attached to the requisition were for refreshments, the receipt for R290,00 for transport was not included.
- [18] The appellant testified that the amount of R290,00 was paid out to local taxi drivers, who do not issue receipts and that he had informed Mr Buffel of this. The arbitrator was not persuaded by the appellant's explanation and took issue with the appellant's failure to put this version to the Department's witnesses. He questioned why Mr Buffel was sent to Ms Teno to find documents if they were not available. The arbitrator found that the requisition for R4300,00 based on quotations received was not plausible and that "*since taxis did not issue receipts, they would not issue tender quotations as well*". The arbitrator also took issue with the fact that all cheques received by the appellant were issued in round figures and that in this regard the probabilities did not favour the appellant. The arbitrator rejected Ms Nape's "*implausible suggestion*" that she was satisfied with the payments made even when the cheque requisition belatedly indicated that R290,00 was for transport. Ms Moopela too insisted that the amount of R4300,00 was approved and that she was present when this occurred. The arbitrator found that the appellant had failed to account for the payment of R290,00 and that he had therefore mismanaged R290,00 "*which was in all probability the change from the purchases of goods*". The appellant was therefore found guilty of charge 4.

Charges 5 and 6

- [19] The appellant was charged with wilfully or negligently mismanaging the finances of the school during May 2010 when he could not account for amounts of R70 000,00 and R202 550,29 which he authorised, alternatively performing poorly or inadequately for reasons other than incapacity.
- [20] The evidence showed that on 11 May 2010, a request for payment to Mowbray Stationery and Books ('Mowbray') for textbooks in the amount of R70 000,00 was approved by the appellant and one other signatory. On 28 May 2010, an amount of R202 550,29 for the balance of textbooks was approved by the same two individuals, as well as Ms Teno. Ms Teno stated that the delivery notes produced by the appellant at arbitration indicated fewer textbooks were delivered than had been ordered, that delivery notes had been tampered with and that the delivery note produced at arbitration was not the original which was at the school.
- [21] At arbitration the appellant produced an invoice which he had obtained directly from Mowbray, stamped by the school on 22 April 2013 for the total amount of R272 550,29. In addition, receipts from Mowbray dated 11 May 2010 and 28 May 2010 were produced confirming payment of the amounts of R70 000,00 and R202 550,29 respectively received by Mowbray, together with handwritten notes dated 20 May 2010, 28 May 2010 and 3 June 2010 in which the number of textbooks and the subjects for which they were supplied were listed. Mr Buffel testified that during his investigation he found all supporting documentation was missing.
- [22] The appellant's evidence was that the number of textbooks required and the quotation received from Mowbray were both considered by the SGB after an advertisement on community radio had called for bids for textbooks. Bids were received from five companies which were taken by Ms Teno to the SGB, with the bids opened at a meeting of the SGB. The SGB decided to purchase the textbooks from Mowbray. The appellant testified that Ms Teno gave the cheques to Mowbray and that when the goods arrived she was responsible for confirming what has been delivered and stamping the relevant proof of

delivery. The evidence indicated that Ms Teno signed in confirmation of the deliveries made on 20 May 2010 and 3 June 2010, which deliveries she confirmed in evidence. The appellant stated that he obtained a copy from Mowbray of the relevant documents after they were found to be missing at the school but that he was puzzled by the variation in the documents presented and insisted the document he had produced was correct since it had a signature on it.

- [23] It was put to the appellant that he deliberately and intentionally altered the quantities of books ordered to conceal his ill intentions with regards to the R70 000,00 transaction which was why there was no receipt. The appellant expressly denied that this was so, stating he had no reason to do so. He stated that the books ordered had been delivered and the delivery notes he put up indicated some of the deliveries were made but that the remainder of the documents should have been held by Ms Teno.
- [24] The arbitrator noted that Mr Buffel had indicated that if he had the documentation supporting the payments in the amount of R202 550,29 he would have accepted this. Yet, the arbitrator stated that since the delivery notes differed, with the quantities of books differing, this showed that the appellant had submitted suspect and falsified documents. The arbitrator took issue with the appellant's failure to put it to Mr Buffel that he had explained the payments and his failure to put the contents of his personal notebook in which he had recorded some deliveries to Mr Buffel. This, the arbitrator found, indicated that the appellant was "*attempting to cover up his mismanagement of funds*". The appellant's conduct was found to be dishonest, more so since he had only procured the documents at the beginning of the arbitration. Although the appellant blamed Ms Teno for removing the documents and the arbitrator accepted that the appellant had disciplined Ms Teno for negligence, he was found at arbitration to have tendered no explanation as to how he would have known that she had removed the documents. The appellant was therefore found the appellant guilty of both charges.

Charges 7 and 8

- [25] The arbitrator found the appellant not guilty of charges 7 and 8 which related to the wilful or negligent mismanagement of school finances in not being able to accounts for the amount of R810,00 and R3000,00 in two separate cheques. The arbitrator accepted the appellant's evidence, without documentation, that R400,00 was a normal travel claim for travel between Botshabelo and Bloemfontein. A printed receipt was found to have recorded the purchase by the appellant of a switch in the amount of R210,00, in spite of Ms Teno's evidence that the switch purchased had not been received and the appellant's contention that in saying as much Ms Teno had been dishonest. The arbitrator accepted that the remaining amount of R3000,00 had been paid for teacher's holiday transport, with handwritten confirmation of payments to ten teachers accepted as proof of payment which had been authorised by the SGB. The arbitrator also accepted that the appellant had paid in R20,00 of his own money and, without any receipt, it was found that he had paid R200,00 for catering. Nevertheless, having been found guilty of charges 2 to 6, the arbitrator proceeded to find the dismissal of the appellant substantively fair.

Judgment of the Labour Court

- [26] The record of the arbitration proceedings placed before the Labour Court was incomplete, with significant portions of the evidence missing. This included no record of Mr Buffel's evidence in cross-examination. The evidence of other witnesses was similarly missing from the record, as were portions of the appellant's cross-examination.
- [27] The Court found in relation to the substantive fairness of the dismissal that the appellant was in possession of certain documents at the time of the investigation and did not explain why he had not provided these to Mr Buffel. Given the inexplicable contradictions in the some of the documents, the appellant's complaint that the arbitrator acted unreasonably by doubting the correctness of documents produced was found to be misplaced and disconnected from the real reasons why the arbitrator did not accept the documents.

- [28] The Court found that having regard to the totality of the evidence presented the award was not reviewable on the basis that the arbitrator had ignored concessions made by Mr Buffel that if he had had knowledge of the supporting documentation he would not have proposed disciplinary action be taken against the appellant. The Court found that the appellant remained unable to provide supporting documents in some instances, for example in respect of the trip to Kroonstad and the R1000 spent in Lesotho, in respect of which only proof of the room cost of R780 was provided. Having regard to the applicable test on review, the Court stated that a piecemeal review of an arbitration award was improper and that on a totality of the evidence the arbitrator's findings on charges 2 to 6 fell within the bounds of reasonableness required and were not reviewable.
- [29] As to the appropriateness of the sanction of dismissal, the Court accepted that the issue was not decided by the arbitrator. As a result, the review application on this aspect succeeded with the matter remitted to the ELRC for a determination on the issue of sanction. No order of costs was made.

On appeal

- [30] The appellant took issue on appeal with the Labour Court's findings in relation to the substantive fairness of his dismissal. It was contended for the appellant that the evidence of SGB members was that all relevant expenditure had been approved by the SGB and that there was no evidence that funds had been misappropriated. The appellant conceded that record-keeping may have been lacking but denied that misconduct in the form of dishonesty or misappropriation had been proved against him. Although issue was taken with whether he was the accounting officer of the school, with reference to decisions such as *Zuma v Pillay NO and Others*¹ (*Zuma*), in argument on appeal it was accepted that the issue did not require determination in the current matter. The appellant sought that the appeal be upheld, that his dismissal be found substantively unfair and that he be reinstated with retrospective effect.

¹ [2014] ZALCD 46 at paras 33 – 34.

[31] The Department opposed the appeal on the basis that the appellant was, unlike in the case of *Zuma*, the accounting officer by virtue of the provisions of the Minimum Requirements of Financial Records, Statements and School Funds of Public Schools (Provincial Notice 154 of 2001) ('the Measures Notice'), with his core duties and responsibilities further set out in the Personnel Administrative Measures document. The Department contended that the appellant therefore had a responsibility in respect of financial matters of the school. Since the decision of the arbitrator on the evidence before him was reasonable the Labour Court correctly found that the arbitration award was not susceptible to review. The Department therefore sought that the appeal be dismissed with costs, with the Labour Court's order that the matter be remitted back to the ELRC for a determination on sanction to stand.

Evaluation

[32] A court on review is required to determine, as was set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo)*,² whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.³ In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*, it was made clear that –

'For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that made a reasonable arbitrator could not reach on all the material that was before the arbitrator.'⁴

² [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

³ At para 110.

⁴ At para 25.

- [33] An arbitration under the auspices of the CCMA or a bargaining council is a hearing *de novo*,⁵ with –

...nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator...'.⁶

- [34] In the consideration of the fairness of the dismissal, the arbitrator was required to have regard to the totality of the circumstances.⁷ This required the arbitrator to have regard to the allegations raised, the evidence put up, to resolve factual disputes in the manner detailed in *SFW Group Ltd and Another v Martell et Cie and Others*⁸ and determine whether the allegations against the appellant had been proved on a balance of probabilities.
- [35] The evidence indicated that the appellant, on advice, somewhat belatedly took steps to secure documentation missing from the school's records directly from suppliers to enable him to present this information at arbitration. It was a relevant consideration that Mr Buffel, as the investigator, indicated in his evidence at arbitration that he would have been satisfied had he received this documentation during his investigation. The full extent of this concession is difficult to determine given that the record of the arbitration proceedings is incomplete, with the evidence given by Mr Buffel in cross-examination not available. Yet, the fact that the appellant had not produced relevant documentation during the investigation or the disciplinary hearing, when Ms Teno was responsible for record-keeping, is not itself sufficient to reject the veracity of the documents ultimately produced. This is all the more so given the evidence of the strained relationship between Ms Teno and the appellant and when the arbitration constituted a hearing *de novo*.

⁵ *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* [1999] 11 BLLR 1117 (LAC); (1999) 20 ILJ 1701 (LAC) at para 11.

⁶ At para 61.

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 78.

⁸ 2003 (1) SA 11 (SCA) at para 5.

- [36] In relation to each of the charges 2 to 4, the arbitrator took issue with the fact that all cheques received by the appellant were issued in round figures. This finding was made without regard to the fact that the evidence was that the appellant received cash advances to make payments on behalf of the school and that the appellant had put up a reconciliation at arbitration in respect of the funds utilised. This included, in relation to charge 2, a document signed by teachers of funds received in the amount of R3010,00 and, in charge 3, a similar document signed by cooks working in the school feeding scheme for R5500,00. Although the arbitrator rejected the veracity of these documents, in respect of payments made in charge 8 a similar document signed by recipients was accepted by the arbitrator to be truthful and was relied upon by him in finding the appellant not guilty of that charge. In the different treatment of similar documents, the arbitrator failed to explain why one document "*raised suspicion*", while another constituted valid and acceptable proof of expenditure incurred. Here the complete record of the arbitration might have shed some light on the issue.
- [37] In addition, in spite of finding the appellant's evidence in relation to charges 2 to 6 not to be credible, without explanation the arbitrator accepted the appellant's explanation regarding similar payments made in relation to charges 7 and 8. This was despite the absence of receipts for certain of these payments and their similarity to payments in other charges in respect of which the appellant was found guilty.
- [38] Furthermore, the arbitrator appears to have failed to have had regard to the fact that receipts in respect of a number of payments which although missing at the disciplinary hearing were ultimately produced by the appellant at arbitration. Nor does it appear that regard given by the arbitrator to the direct evidence that the SGB had accepted and authorised certain of the disputed payments. Also perplexing is that despite the Department's witness, Ms Teno, accepting that the appellant had bought items such as welding rods for the school and spent R314,04 on cleaning supplies, the arbitrator found the appellant to have acted dishonestly in respect of these payments. In addition, the arbitrator failed to explain how he concluded that the appellant had

mismanaged certain payments such as R290,00 which was found, without any basis provided, to be “*the change from the purchases of goods*”, or why he rejected both the appellant’s evidence and Ms Nape’s “*implausible suggestion*” that she was satisfied that the payment of R290,00 was made to taxi drivers for transport. This was despite the fact that it was not in dispute that a school function had been held and that taxi drivers do not provide receipts.

[39] In rejecting the appellant’s evidence that R414,00 had been refunded to the school, the arbitrator relied on the absence of a receipt recording this transaction without any regard to why the appellant would have testified to a refund if his intention had been dishonest. And, despite his findings as to his lack of credibility as a witness, somewhat inexplicably, the arbitrator, in concluding that the appellant was not guilty of charge 8, accepted the appellant’s explanation for payment and notably did not reject the appellant’s evidence that Ms Teno was dishonest when she said the switch purchased by the appellant had not been received.

[40] As to the issue of the Lesotho conference, clear evidence in the form of the invitation was put up by the appellant at arbitration which indicated that he had been invited to attend the conference, with the undisputed evidence of SGB members that the SGB had approved his attendance and authorised the use of funds for this purpose. No evidence was put up to contradict the appellant’s claim that he had stayed an extra night at the Maseru Sun on conference business, with the cost of the room shown by way of an invoice to be R780,00 and his evidence that the R220,00 remaining was spent on food similarly not refuted. It followed therefore that the arbitrator’s finding that R1000,00 had not been explained was simply not a finding supported by the documentary and other evidence placed before him.

[41] Turning to charges 5 and 6, it was a relevant consideration that Ms Teno as the school’s financial clerk was not in possession of any of the documents relating to the delivery of textbooks which the appellant obtained from the supplier directly. There was no explanation as to why this was, or why the documentation missing had been available to the auditors but not to the

investigator. This issue clearly required some consideration by the arbitrator given the evidence of her prior financial misconduct and her poor working relationship with the appellant. Furthermore, there was no evidence that an audit of textbooks delivered had been undertaken by the Department. The documents produced by the appellant at arbitration indicated that Mowbray had received the funds and delivered books to the school, with the undisputed evidence being that it was Ms Teno who was responsible for the receipt of deliveries to the school. There was no evidence that the textbooks procured from Mowbray were not received by the school. The SGB members confirmed that the payments to Mowbray for books had been authorised and that the books had been delivered. It followed that having regard to the evidence before the arbitrator, the finding that the appellant could not account for amounts paid to Mowbray was not one related to the evidence before the arbitrator.

[42] Whilst the appellant may have been naïve in his approach to both the investigation and the disciplinary hearing in not actively securing documentation to reconcile payments timeously, the delay in doing so does not in itself permit a finding of misconduct. The failure to have regard to clear facts placed before him, the inconsistent approaches taken to the treatment of similar evidence and the failure to resolve factual disputes in the manner required, creates an impression that the findings arrived at by the arbitrator, having regard to a conspectus of the evidence before him, may have been unreasonable. However, such a conclusion cannot be drawn in the absence of a full and complete record.

[43] The Labour Court correctly referred the issue of sanction for a re-hearing to the ELRC since this was not canvassed at the arbitration. However, in my view, the entire matter should properly have been remitted for a re-hearing to the ELRC. This is so given that the complete and full record of the arbitration was not before the Labour Court which constrained a determination of the reasonableness of the arbitrator's award, compounded by the fact that the decision arrived at by the arbitrator was largely based on his credibility finding made against the appellant. Remitting the matter for re-hearing will allow the

evidence to be carefully considered against the evidence of allegations of misconduct raised. The appellant sought that this Court substitute the decision of the arbitrator. However, as stated above, given the shortcomings in the record and the factual disputes which exist, in spite the time which has elapsed, this Court has not been placed in a position to do so and a substitution of the arbitrator's decision would consequently be inappropriate in the circumstances.

[44] For these reasons, the appeal must succeed. There is no reason in law or fairness why an order of costs should be made in this matter.

Order

[45] For these reasons, the following order is made:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and substituted as follows:
 - i. The review application succeeds.
 - ii. The award of the second respondent is reviewed and set aside and the matter is remitted back to the third respondent, the Education Labour Relations Council, for re-hearing before an arbitrator other than the second respondent without delay."

SAVAGE AJA

Coppin JA agrees.

WAGLAY JP

- [46] I have had the benefit of reading the judgment of Savage AJA and have some difficulties with it. The Judgment refers the matter back to the Bargaining Council for a hearing *de novo* on the basis that the record was incomplete and the existence of some factual disputes. I accept that it is not possible to determine a review application in the absence of a complete record, especially when the grounds for the review is that the arbitrator arrived at a decision that is neither reasonable nor rational on a conspectus of the evidence before him/her.
- [47] In this matter, the entire cross-examination of Mr. Buffel, the investigator for the employer is absent. Additionally, a lot of bits and pieces of the appellant's evidence is also not before this court nor was the full record before the Labour Court. Savage AJA was thus unable to determine the matter one way or the other. A court of review cannot decide the reasonableness of the arbitrator's decision in the absence of a full and complete record of the arbitration. Where the review is not based on reasonableness but on other grounds for example where one of the parties did not understand the language in which evidence was tendered and the arbitrator refused to allow the evidence to be interpreted then the complete record is not necessary.
- [48] The above notwithstanding, Savage AJA properly records the facts that can be ascertained from the limited record that was available. It is also not disputed that all the complaints raised by the investigator, Mr Buffel was properly recorded by the arbitrator. Though the cross-examination of Mr Buffel is absent both parties appear to say that nothing turns on this as the only testimony of any significance was Mr Buffel's concession that had the appellant presented the documents to him in the course of his investigation rather than the arbitration, he would have been satisfied with the explanation provided in respect of certain of the complaints he had raised. As far as I am concerned this is irrelevant. The appellant was charged in essence for failure

to account properly or at all for the monies he had been given by the school, after obtaining authority to utilise the monies for particular purposes. The appellant thus had a duty to provide satisfactory documentation and explanation that the monies he received were utilised for the purposes intended. I differ with Savage AJA in that I am satisfied from the evidence before me that he has not done so nor does he allege that he has provided the necessary documents and explanations. Thus for example, my view is that he failed to prove that R 1000,00 paid to him in addition to his expenses being paid for the original duration of the conference he attended in Lesotho was not borne out by proper documents which he should have been able to secure. His explanation that he was required to stay an extra night at the hotel and the subsistence amounted to R1000,00 may well be true but he is unable to provide any documentary evidence to that effect that he was authorised to stay in Lesotho for an extra night.

[49] Likewise, I find myself in agreement with the arbitrator's scepticisms on documents that he presented at the arbitration, but failed to provide them to Mr. Buffel despite repeatedly being request to do so. The appellant's retort that all the necessary documents were filed and were with Mrs Teno is at best lame, particularly when one has regard to the fact that he was of the view that Mrs Teno was deliberately attempting to get him into trouble. Worse still is the fact that a number of the documents he produced at the arbitration were in his possession all the time.

[50] The charges that were put to the appellant were put to him before his disciplinary hearing yet he did not find the need to produce the documents he had or look for the documents he did not have. For someone in authority and who was entrusted with monies from the school funds for particular purposes, he should provide the particulars of the use of the funds.

[51] As I said earlier, I share the scepticisms of some of the documents that the appellant presented purportedly to prove how he spent the monies given to him, for instance the top half of page 623 of the record shows payment to 10 individuals amounting to R 1500,00; this half has a school stamp of 25 March 2011 and the signature of the appellant on the stamp. On the bottom half of

the same page another 10 names appear to whom R 3020,00 were disbursed by the appellant: this half of the page is stamped 1 April 2011 and signed by the appellant on the stamp. This is rather curious, did the appellant go back and collect the stamped page and add the further 10 names and handed it in on 1 April. This does not make sense as both the top half and bottom half with different names and purposes was apparently prepared on the same day (23 March 2011) and as stated earlier both are stamped and signed by the appellant on two different dates. I would think if both halves were written on the same day as it purports to indicate why then did the appellant sign the top half on a date different to the bottom half, especially when he had himself drafted the document.

[52] Furthermore, he authorised payment of over R 270 000,00 for books from Mowbray Stationary and Books: in this instance, it was his responsibility to manage this purchase yet the quotation, payments, delivery notes and invoices that were made available by the appellant simply do not add up.

[53] In any event, the appellant was at all times in possession of the expense book which he refused to make available to Mr Buffel who was investigating the monies paid to him, nor was the book presented at the disciplinary hearing. It only “became available” at the arbitration. The arbitrator was in the circumstances, correct to view its contents with some trepidation, especially when the appellant had adopted the attitude when Mr Buffel enquired about the documents or notes in support of the monies paid to him on at least four separate occasions only to be told “if it was not in the file then I don’t know, it must be in the file”.

[54] I do not propose to go through all the charges in view of the fact that the matter is referred back to arbitration *anew*. Suffice to say that in my view the decision arrived by the arbitrator is not an unreasonable decision based on the record that was presented at the appeal.

[55] Finally, it needs to be said that a school principal has a responsibility not only to manage and teach the staff and the learners of his school but he has the

responsibility to ensure that monies that is held by the school, raised through blood and sweat of parents, is not abused or mismanaged.

[56] Based on my reasons above, I would make the following order:

“Appeal is dismissed”

Waglay JP

APPEARANCES:

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