



- (1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: A2025-076421

In the matter between:

ITEC AS (PTY) LTD

Appellant

and

JABULANI NGWANE N. O

First Respondent

THE CCMA

Second Respondent

SIYABULELA ELIAS MNGUNI

Third Respondent

Heard: 24 February 2026

Delivered: 07 September 2026

Coram: TOKOTA AJA; COLLIS AJA and MOSHOANA AJA

JUDGMENT

MOSHOANA AJA

Introduction

- [1] A sincere and unreserved apology is tendered to the parties for the delay in handing down this judgment. As I pen this judgment, I need to disclose to the parties that I was not the allocated scribe of this judgment. For reasons beyond my control, the scribe was unfortunately unable to pen this judgment timeously. Taking into account the interests of the parties involved herein, and as directed, I volunteered to pen this judgment on behalf of the Court.
- [2] That said, this is an appeal against the order of the Labour Court handed down on 09 July 2024, in terms of which, the Labour Court dismissed the appellant's review application. The appeal reached this Court with the leave of the Labour Court granted on 7 May 2025. The appeal is opposed by the third respondent, Mr Siyabulela Elias Mnguni.

Background facts pertinent to the present appeal

- [3] Mr Siyabulela Elias Mnguni (Mr Mnguni) was employed by the appellant, ITEC SA Pty Ltd (ITEC) as a Field Service Technician. On 30 October 2020, he was dismissed from the employ of ITEC after having been found guilty of the misconduct of theft, in that he had taken and or sold fuser roller scraps and or other scrap material without authorization and did not declare to his supervisor.
- [4] Aggrieved by his dismissal, Mr Mnguni approached the CCMA and alleged an unfair dismissal. The appointed arbitrator, Mr Jabulani Ngwane, after hearing the claim of unfair dismissal, found that the dismissal of Mr Mnguni was substantively unfair. Whereafter, the arbitrator awarded Mr Mnguni compensation equivalent to 8 months remuneration.
- [5] Aggrieved by the arbitration outcome, the appellant approached the Labour Court seeking to review and set aside the arbitration award. The application for review was dismissed by the Labour Court, hence the present appeal.

The arbitration award

- [6] At arbitration proceedings, in seeking to justify the dismissal of Mr Mnguni, ITEC tendered the evidence of three witnesses. In rebuttal, Mr Mnguni testified in his own case and also tendered the evidence of four other witnesses. After analysing the evidence before him the arbitrator found that the version of Mr Mnguni and his witnesses was more probable than that of ITEC's witnesses. ITEC in seeking to justify the dismissal had placed reliance on the outcomes of the polygraph test, however, the evidence of the Polygraph Examiner was not tendered at the arbitration. The evidence of the Service Manager was that had Mr Mnguni passed the polygraph test, he would not have been dismissed. Based on that evidence, the arbitrator found that the failure of the polygraph test was the *sine qua non* (an absolute requirement without which the dismissal was not possible) of the dismissal of Mr Mnguni.
- [7] The arbitrator was not satisfied that the evidence that one Mr Armand gave authority to dispose of the scrap metal was properly challenged by ITEC. The arbitrator was not satisfied that Mr Mnguni had pleaded guilty to the allegations, since the minutes of the disciplinary hearing indicated otherwise. On the evidence presented before him one Manyiki also took the scrap metal and sold it yet he was not disciplined.

The Labour Court Judgment

- [8] In its judgment, the Labour Court tabulated all the five grounds put forward by the appellant, in an attempt to set aside the arbitration award. Those grounds may be summarised as follows: (1) misdirection on the admission of guilt made by Mr Mnguni; (2) failure to find that the version of Mnguni was uncorroborated; (3) failure to identify the dispute and application of mind to such a dispute; (4) failure to make a finding on the probabilities; and; (5) findings are completely unreasonable.
- [9] The Labour Court rendered a very detailed judgment. In it, the Labour Court thoroughly evaluated the evidence that was tendered before the arbitrator.

Having done so, the Labour Court found that the arbitrator reasoned the arbitration award well and considered the relevant factors. The Labour Court found that the arbitrator arrived at a reasonable decision and did not commit the wrongs the appellant complained of. Ultimately, the Labour Court concluded that the appellant had not provided evidence of any reviewable irregularity committed by the arbitrator.

In the Labour Appeal Court

- [10] In this Court, the appellant contended that the Labour Court erred in dismissing the review application in the circumstances where the arbitration award was unreasonable. The appellant contended that the arbitrator ought to have accepted the confession made in the three minutes of the virtual meeting. Having failed to accept the form the oral admission took; the arbitrator arrived at an unreasonable conclusion. It was further contended that had the arbitrator accepted the confession in the form it took, then Mr Mnguni would have confessed to the misconduct and his dismissal would have been fair.
- [11] It was also contended that the Labour Court in applying the review test took a “soft touch approach” instead of a hard look at the arbitration award. Consequently, the Labour Court erred in not finding that Mr Mnguni and his witnesses failed to rebut the testimony of the appellant, so it was contended. The fact that he failed the polygraph test meant that a *prima facie* case was made. The appellant contended that it was the duty of Mr Mnguni to tender the evidence of his supervisor, who allegedly gave him authority, since in its view the supervisor was not authorised to give authority.
- [12] Counsel for the appellant placed reliance on the Labour Court case of *OK Bazaars (A Division of Shoprite Checkers) v CCMA and others (OK Bazaars)*¹ in advancing an argument that the alleged confession/admission ought to have been accepted by the arbitrator in order to find that Mr Mnguni admitted that he committed a misconduct. The appellant’s counsel was critical of the

¹ (2000) 21 ILJ 1188 (LC) at para 10.

Labour Court's finding that the appellant ought to have called Armand Nel as a witness. Effectively, before us, the appellant persisted with two bases upon which this Court must find that the Labour Court erred; namely (a) the finding that a form of admission was required; and (b) the failure to call Armand Nel as a witness.

Discussion

- [13] An arbitration award is reviewable only if it is one that a reasonable decision maker may not reach. Once an arbitration award falls within the bands of reasonableness, the Labour Court and this Court has no powers to set aside that arbitration award.

The issue of admission of misconduct

- [14] At arbitration, both Mr Kruger, the Service Manager and Ms Jessica Boutolas, the HR Manager testified that Mr Mnguni admitted having stolen the fuser rollers and selling them for his own account. It became common cause that the said admission was not recorded. Owing to that, the arbitrator was dissatisfied that the two witnesses were unable to produce a record of such an admission. The Labour Court nor this Court is unable to fault this dissatisfaction. Any reasonable trier of facts is entitled to express dissatisfaction if the evidence presented lacks sufficiency to proof a disputed fact.
- [15] This Court in *Brauns and Others v Wilkes N.O and Others*² found that an employer has the onus to prove that a confession was made and such a confession was valid. In terms of section 192 of the LRA, the onus to prove that a dismissal is fair lies with an employer. In other words, the onus was on ITEC to prove on the balance of probabilities that Mr Mnguni was guilty of theft. It is perspicuous that absent the undocumented admission and the failure of the polygraph test, ITEC could not prove on the balance of probabilities that Mr Mnguni was guilty of theft. Reliance on the *OK Bazaars*

² (2024) 45 ILJ 1183 (LAC) para 56.

case was misplaced. In there, the commissioner had applied the criminal requirements of a confession. In the present matter, the arbitrator was not satisfied that the confession/admission was ever made. The evidence of Mr Kruger and Ms Boutolas lacked probative value³, in not accepting it the arbitrator did not act unreasonably.

The issue of not calling Mr Armand Nel

[16] The allegation that was levelled against Mr Mnguni was that he committed a misconduct of theft. The known elements of the offence of theft are unlawful and intentional appropriation of the property belonging to someone without permission⁴. It remained the onus of ITEC to prove all those elements of the offence of theft. There was no onus on the part of Mr Mnguni to prove that he did not commit theft. It is incorrect to suggest that Mr Mnguni bore any evidentiary burden. Absent *prima facie* evidence, the evidentiary burden does not shift⁵. At arbitration, there was no *prima facie* evidence that Mr Mnguni committed the offence of theft. This is so because ITEC sought to place its hope on the alleged unrecorded admission and the polygraph test to justify the fairness of the dismissal. Polygraph evidence is inadmissible unless supported by other independent factors. Mr Mnguni was not duty bound to call Mr Nel, particularly in the circumstances where there was no *prima facie* evidence that the appropriation of the property was not with the permission of the owner. It was ITEC which alleged that Mr Mnguni did not declare to his supervisor. S/he who alleges must prove. There was no need to draw any negative inference. There was simply no *prima facie* evidence to rebut.

Conclusion

[17] On application of the approved review test, the Labour Court did not err in not reviewing and setting aside the arbitration award. The arbitration award is one

³ See *S v Ndlovu and Others* 2002 (6) 305 (SCA)

⁴ Snyman CR, Criminal Law 5th Ed, 483.

⁵ See *Ex Parte the Minister of Justice: In Re Rex v Jacobson & Levy* 1931 AD at 468.

that falls within the bands of reasonableness. Accordingly, the appeal falls to be dismissed.

[18] Because of all the above reasons, the following order is made.

Order

1. The appeal is dismissed with no order as to costs.

G N MOSHOANA

Acting Judge of the Labour Appeal Court of South Africa

Tokota AJA and Collis AJA concur

LABOUR APPEAL COURT

APPEARANCES:

For the Appellant: Mr A J Posthuma of Snyman Attorneys, Johannesburg.

For the Respondent: Mr D M Madiba of Motanya Madiba Inc, Johannesburg.