



Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 4/17

In the matter between:

**HOËRSKOOL MIDDLEBURG
GOVERNING BODY**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

1ST Respondent

COMMISSIONER SOLLY MASHEGO (NO)

2ND Respondent

KHOLEKILE CHRISTINA MAHLANGU

3RD Respondent

Heard: 21 November 2017

Delivered: 24 November 2017

Summary: (Review – dismissal – selective treatment of evidence by arbitrator – resulting in award no reasonable arbitrator could reach on the evidence – substitution of finding)

JUDGMENT

LAGRANGE J

Background

- [1] This application was enrolled as an unopposed review application of an arbitration award in which the arbitrator found that the third respondent's dismissal was substantively unfair. The arbitrator ordered the reinstatement of the third respondent. The third respondent, Ms K Mahlangu ('Mahlangu'), did not file opposing papers but did attend court and made submissions in support of upholding the award.

Narration & Review

- [2] The dismissal arose out of an altercation which took place between the third respondent and another employee, Ms R Maseko ('Maseko'), in the kitchen of the applicant's boarding school.
- [3] Maseko was also disciplined and issued with a final written warning but the third respondent was dismissed on account of threatening Maseko with a knife. It was common cause that the third respondent was holding a large knife in her hand in the course of the altercation. She maintained that she had grabbed a knife in order to defend herself against Maseko who also had a knife.
- [4] The review is essentially based on a critique of the arbitrator's handling of the evidence before him.
- [5] In essence, the arbitrator concluded that Maseko's denial that she had a knife in her hand was unconvincing as it amounted to a bare denial. The arbitrator also discounted the evidence of other witnesses on the basis of their credibility and decided that Maseko had been the aggressor in the incident. In this regard, the arbitrator relied in particular on the written statement of the third respondent. He gave no explanation for why Mahlangu was regarded as credible and failed to consider the inherent probabilities of the respective versions.
- [6] He felt that it did not matter if one of the parties had a small knife and the other a big knife during the incident. They were both brandishing knives and therefore both constituted a potential threat to the learners at the school. It was inconsistent to dismiss the third respondent but to allow Maseko to continue working with a final written warning.

- [7] It appears to be common cause that the altercation between the two employees started outside the kitchen area but continued when they were both in the kitchen.
- [8] There was evidence to the effect that Maseko also briefly had a small knife in her hand but that she put the knife down and picked up a packet of (uncooked) macaroni, which she said she intended to throw at the third respondent to defend herself. Mahlangu herself also confirmed Maseko had the macaroni in her hand. The arbitrator decided that there was a possibility that Maseko had grabbed a knife first. Having decided this, the arbitrator in his reasoning converted this possibility into a near certainty and in so doing ignored not only the third respondent's own statement, which indicated that she had been the first to grab a knife, but also the evidence of other witnesses.
- [9] There was no dispute that the knife wielded by the third respondent was a substantial knife used for cutting pumpkin and large pieces of meat. There was also no dispute on the evidence that the other persons who sought to intervene in the altercation were mainly concerned with restraining the third respondent who retained possession of the large knife even after Maseko was only defending herself with a packet of macaroni.
- [10] I agree with the applicant that the Commissioner did not attempt to determine the most plausible or natural version of events but effectively contrived to adopt the least plausible interpretation of the events. Moreover, the Commissioner ignored the evidence of events preceding the confrontation which pointed to the third respondent as the aggrieved party who was in an excited emotional state when she approached Maseko. He further bolstered his argument by speculative reasoning about the credibility of the witnesses, which was never put to those witnesses. In addition, the arbitrator concluded that Maseko was the aggressor based wholly on averments in Mahlangu's written statement which were never put to Maseko when she testified at the arbitration hearing. The arbitrator's approach in evaluating the evidence was so selective and skewed that it is difficult to view it as a *bona fide* attempt to assess the evidence in a neutral and balanced fashion.

- [11] Had the arbitrator not been so selective and slanted in his evaluation of the evidence, he could not reasonably have concluded that Maseko was the aggressor rather than acting defensively, or that the seriousness of Mahlangu's conduct was indistinguishable from Maseko's.
- [12] In the circumstances, I am satisfied that the arbitrator's finding that the dismissal of the third respondent was substantively unfair should be substituted with a finding that her dismissal was substantively fair, given that she had to be restrained by others, her emotional state, the danger the knife she was wielding posed and the fact that this took place in a learning institution where children boarded.

Order

- [1] The arbitration award of the second respondent dated 21 November 2016 issued in case number MP 8080-16 is reviewed and set aside insofar as the arbitrator found that the third respondent's dismissal was substantively unfair and in ordering relief.
- [2] The arbitrator's finding that the third respondent's dismissal was substantively unfair is substituted with a finding that her dismissal was substantively fair.
- [3] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

G Jordaan of the Applicant

THIRD RESPONDENT:

In person

LABOUR COURT