



Arbitration Award

Case Number: NWKD1205-20 / NWKD1223-20

Commissioner: Lenkwasi Collins Makama

Date of Award: 03 MAY 2021

In the ARBITRATION between

PSA obo MAKABANYANE IPELENG

(Union/Applicant)

And

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD (SITA)

(Respondent)

Union/Applicant's representative: Mr. KABELO MOALOSI

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Respondent's representative: Mr. JEFF MORIFI

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INTRODUCTION

- [1] This arbitration award is issued in terms of section 138 (7) (a)¹ of the Labour Relations Act 66 of 1995 as amended, the "LRAA". This is the arbitration award of the dispute referred by the Applicant as an alleged Unfair Dismissal Dispute in terms of section 186 (1) (a)² of the LRAA.

DETAILS OF HEARING AND REPRESENTATION

- [2] The arbitration hearings took place on 19 February 2021, and was adjourned and proceeded on 21, 22, and 23 April 2021 at the Garden View Guest Lodge in Mafikeng. At the conclusion of the arbitration hearing parties agreed to file with the CCMA their written heads of arguments by 16h00 on 30 April 2021.
- [3] The CCMA case management advised me that the Applicant party filed their written heads of arguments on 30 April 2021 as agreed, whilst the Respondent party did not do as agreed. At the writing of this award I did not have the benefit of the closing written heads of arguments of the Respondent party.
- [4] The Applicant, Ms. Ipeleng Makabanyane was at all material times in attendance at the proceedings. She was accompanied and represented by Mr. Kabelo Moalosi, the union official from the Public Servants Association of South Africa, the "PSA". Initially on 19 February 2021, the Respondent, SITA SOC LTD, was represented by Mr. Refilwe Khomola, the Employee Relations Officer. However, on 21, 22, and 23 April 2021, the Respondent was represented by Mr. Jeff Morifi, the Employee Relations Officer.
- [5] The Applicant party presented three bundles of documents as follows: Bundle A1 comprising 78 pages, Bundle A2 comprising 50 pages and Bundle A3 comprising 21 pages. The Respondent party presented a single bundle of documents marked Bundle R comprising of 86 pages. The Applicant party led the testimony of the Applicant and one witness.
- [6] The Respondent party led the testimony of three witnesses, one of which testified via video link using the MS Teams application. The proceedings were in English and there was no need for the services of an interpreter. The proceedings were recorded by means of a digital recorder and also hand written notes were taken.

BRIEF BACKGROUND TO THE DISPUTE

- [7] The Respondent is SITA SOC LTD³. The Applicant was employed by the Respondent in July 2008. At the time of dismissal, she was the Consultant: Lan and Desktop and was acting as Senior Manager Network

¹ "Within 14 days of the conclusion of the arbitration proceedings – (a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner"

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and Service Management. She earned R 67 241.00 per month or R 806 928 per annum. She was charged and was subsequently found guilty after the disciplinary hearing which later imposed a sanction of dismissal. Her date of dismissal was on 17 April 2020.

ISSUE(S) TO BE DECIDED

- [8] It is to be decided whether the dismissal of the Applicant was both substantively and procedurally fair, and;
8.1 If it is found that her dismissal was unfair, it is further to be decided whether she must be reinstated retrospective back into the position she held prior to her dismissal.

THE CHARGES AGAINST THE APPLICANT

- [9] The Applicant was charged, found guilty and dismissed on the following charges⁴:

4.1 CHARGE 1.1: Gross Dishonest: In that on or about or around July 2018 during the shortlisting of the position of Network Engineer (Wide Area Network) you relaxed the requirements of the minimum requirements for the filing of Network Engineer: Wide Area Network without approval in terms of SITA Talent sourcing and retention policy and or SITA Delegation of Authority. Your action was unacceptable as it disadvantaged other candidates who failed to apply for the position due to them not meeting the minimum requirements.

4.2 CHARGE 1.2: Misrepresentation or gross negligence: In that on or about the 25 July 2018 at Punda Maria 2SE: SITA Erasmuskloof Head Office, you recommended for the appointment of Ms. Cynthia Raphuti to the position of Network Engineering knowing very well that she does not meet the minimum requirements for appointment in the position.

6. CHARGE 4: Failing to comply with the SITA Talent Sourcing and retention policy paragraph (7 f) which stipulate that "the recruiting line manager and /or talent sourcing specialist / human capital business partner will base the selection process on the minimum requirements of the advertisement to conduct the preliminary screening and / or short-listing of candidates. This will then be shared and agreed to by the nominate selection panel members prior to the interviews". In that around July 2018 at Punda Maria 2SE Boardroom: SITA Erasmuskloof Head Office 2018 you failed to shortlist qualifying SITA employees who applied for the above mentioned position. Therefore, this action creates lack of confidence to the SITA processes to its employees and the community of South Africa at large.

7. CHARGE 5: Gross Dereliction of Duty: In that during the period between July and August 2018 you failed to shortlist candidates who met the minimum requirements for the position that Cynthia Raphuti was appointed"

² "Dismissal" means that – (a) an employer has terminated employment with or without notice"

³ SITA SOC LTD is a schedule 3A company which its purpose or business amongst others, is to offer information technology services to the government of the Republic of South Africa

⁴ Bundle R, page 1-2

SURVEY OF EVIDENCE AND ARGUMENT

[10] I am required to issue an award with brief reasons⁵. I do not propose to offer an exhaustive survey of all the evidence and argument led at this arbitration hearing. In view of the above mentioned section, what follows is not a verbatim account of the happenings at this arbitration hearing, but rather a concise summary of the evidence and arguments relevant to the issues in dispute, and my findings on those issues. Audio recordings of the arbitration hearings and the case file can be consulted in that regard. Furthermore, I have also taken into consideration and applied the published arbitration guidelines⁶.

[11] It is generally accepted in law that in the case of unfair dismissal disputes where the dismissal of the employee is not in dispute, the employer bears the onus to prove that the dismissal of the employee was fair⁷. In that regard the Respondent carries the duty to begin with leading evidence.

The concise and relevant evidence of the 1st witness of the Respondent: Ms. Malebo Mawela

[12] She is employed by the Respondent as Consultant: Forensic Auditor. She was tasked with the investigation. She explained that for an investigation to take place, there are two methods that triggers the investigations. The one method is via the ethics line where anonymous people call the hotline and raise whatever allegations or complaints they have.

[13] This will be in terms of the whistle blowing policies of the Respondent. The other method is via management request where management would have identified areas or activities to be investigated. The case of the Applicant was investigated from the ethics line. An anonymous complaint was made regarding the recruitment, selection and appointment of Ms. Raphuti.

[14] She did the investigation, authored and on 22 July 2019 signed the investigation report⁸. She was leading the investigation together with her team which comprised of Ofentse Molefe. Some employees were interviewed by her or in her presence whilst others were interviewed by Ofentse Molefe in her absence.

⁵ Section 138 (7) (a) of the LRAA

⁶ Section 138(6) of the LRAA states "the commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter being considered in the arbitration proceedings." On 17 March 2015, the CCMA governing body, acting in terms of section 115(2)(g) of the LRAA which states that "the commission may publish guidelines in relation to any matter dealt with in this Act", gazetted the CCMA Guidelines on Misconduct Arbitration (hereinafter referred to as "the guidelines") which became effective on 1 April 2015.

⁷ Section 192 (2) of the LRAA

⁸ Bundle R, page 62-73. Report entitled: Final Report Investigation into appointment process followed relating to the appointment of a Network Engineer – Wan (North West)

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- [15] One of the persons who was interviewed by Ofentse Molefe in her absence was Mr. Lenny Manyelo. She explained that despite interviewing a variety of persons, her report does not record such interviews as some of the interviews were to gather expert advice or guidance or opinion about the subject matter, and not that they were necessarily involved in the matter being investigated.
- [16] Her "Detailed Findings" as per paragraph 6 of the report were as follows:
"During April 2018, the position of a Network Engineer (Fixed term Contract – 36 Months) was advertised internally and externally on both intranet and internet, with a closing date of 4 May 2018. According to the advert, the following qualifications and experience were required for the vacancy: Minimum: National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, Bcom etc.). Experience: 3-5 years' experience in Wide Area Network, Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".
- [17] She explained her details findings as per paragraph 6 were informed by the minimum qualifications and experience as per the advert of Network Engineer (Wan)¹⁰. The minimum qualifications and experience as per the advertisement indicated as follows:
"Minimum: National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, Bcom etc.). Experience: 3-5 years' experience in Wide Area Network, Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".
- [18] She explained that the Applicant did the shortlisting of the candidates and the shortlisting of Ms. Raphuti was not in line with the qualifications and experience needed as per the advertisement. This was despite the Applicant and Mr. Coleman Rampagane confirming that the shortlisting criteria was based on the minimum qualifications and experience of the job advert.
- [19] In her report¹¹ she referenced the SITA Talent Sourcing and Retention Policy as approved in 2016 and in particular paragraph 7 F which reads as follows:
"The recruiting line manager and / or talent sourcing specialist / human capital business partner will base the selection process on the minimum requirements of the advertisement to conduct the preliminary screening and / or short-listing of candidates" She submitted that the Applicant considered an additional requirement which was not part of the minimum requirements as per the advertisement.

⁹ Bundle R, page 66

¹⁰ Bundle R, page 58

¹¹ Bundle R, page 67

- [20] In advancing that point she referred to her report regarding her interaction with the people she interviewed as per paragraph 6.1 of the report¹², which indicates as follows:
"However, it is evident that the CCNA qualification (Cisco Certified Network Associate) was added as part of the shortlisting criteria although it was not included as a requirement in the job advert. According to Ms. Makabanyane this was an error as they were shortlisting for two positions (i.e. Network Engineer: Unified Communications (UC) (for which a CCNA qualification was required) and Network Engineer: Wan)".
- [21] She maintained that a CCNA qualification was not a requirement as per the advert but the Applicant added it and considered it when shortlisting candidates. This kind of conduct lead to charge 1.1¹³, in that the Applicant changed or relaxed the minimum requirements of the advert when she shortlisted for the post of Network Engineer.
- [22] This was because Ms. Raphuti who was shortlisted by the Applicant and who was subsequently appointed by the Respondent did not possess an IT related qualification, but possessed a National Diploma in Electrical Engineering from Vaal University of Technology. According to the witness, the Electrical Engineering qualification was not relevant for the advertised position of IT and which required an IT related qualification.
- [23] When taken through the transcripts¹⁴ from Vaal University of Technology of the qualifications of Ms. Raphuti and an argument and proposition was made that the Diploma in Electrical Engineering has the same courses such as Computer skills, Electronics, Digital Systems, Software design, Television etcetera are applicable to IT environment and on that basis it can be regarded as an IT qualification or is good as an IT qualification, the response by the witness was that an Electrical Engineering qualification is not an Information Technology qualification and they are not related.
- [24] The witness submitted that the Applicant should have not shortlisted Ms. Raphuti. When confronted by the version that at the head office of the Respondent, there are persons who were employed or appointed into IT or Network Engineer's positions who possess the Electrical Engineering qualifications, and her response was that she became aware of that version at the disciplinary hearing of the Applicant. She stated that she did not encounter such in her investigations.

¹² Bundle R, page 67

¹³ Bundle R, page 1 **4.1 CHARGE 1.1: Gross Dishonest:** *In that on or about or around July 2018 during the shortlisting of the position of Network Engineer (Wide Area Network) you relaxed the requirements of the minimum requirements for the filling of Network Engineer: Wide Area Network without approval in terms of SITA Talent sourcing and retention policy and or SITA Delegation of Authority. Your action was unacceptable as it disadvantaged other candidates who failed to apply for the position due to them not meeting the minimum requirements".*

¹⁴ Bundle A2, pages 7-8

- [25] The witness could not dispute when she was referred to the invite by SITA to Ms. Raphuti for an interview at SITA Pietermaritzburg on 18 February 2019 for the position of Network Engineer, which is similar to the same position Ms. Raphuthi was shortlisted for by the Applicant and subsequently appointed into.
- [26] She could not dispute that Ms. Raphuti, apart from being shortlisted by the Applicant in the North West Province, Ms. Raphuti was also shortlisted by the Kwa Zulu Natal Pietermaritzburg SITA for the similar position. The witness indicated that she was not aware of other IT or Network Engineers who were employed or who were currently at the employment of the Respondent despite them possessing the Electrical Engineering qualification.
- [27] With reference to 4.2 CHARGE: 1.2¹⁵, which the Applicant was charged with and found guilty on, the witness maintained that the Applicant committed misrepresentation or an act of gross negligence by recommending that Ms. Raphuti be appointed instead of other suitable internal candidates who were not short listed.
- [28] With reference to her report¹⁶, she mentioned that internal suitable candidates such as Ms. Nokwazi Khoza, Mr. Holani Clifford Moruti, Mr. Patrick Hlongwani, and Mr. Lazarus Mpyana were not shortlisted.
- [29] In her report, she stated that when she interviewed both the Applicant and Mr. Rampagane about not shortlisting the above candidates, they stated as follows as per the report:
"stated that in respect of Ms. Nokwazi Khoza, it was an error not to include her in the shortlisting and for the other candidates that applied for the position, they indicated that they were permanent employees and that they could not offer them a fixed term contract position. We are not aware of any policy that covers this practice¹⁷". The witness maintained that it was not up to the Applicant to decide for the candidates whether they wanted to apply for a fixed term position despite being permanent employees of the Respondent.
- [30] With reference to charge 4¹⁸, the witness stated that the Applicant chose to do the shortlisting by herself and Mr. Rampagane without involving the other persons as required. And after having shortlisted the candidates,

¹⁵ Bundle R, page 2 **4.2 CHARGE 1.2: Misrepresentation or gross negligence:** In that on or about the 25 July 2018 at Punda Maria 2SE: SITA Erasmuskloof Head Office, you recommended for the appointment of Ms. Cynthia Raphuti to the position of Network Engineering knowing very well that she does not meet the minimum requirements for appointment in the position".

¹⁶ Bundle R, page 67

¹⁷ Bundle R, page 67

¹⁸ **CHARGE 4: Failing to comply with the SITA Talent Sourcing and retention policy paragraph (7 f) which stipulate that "the recruiting line manager and /or talent sourcing specialist / human capital business partner will base the selection process on the minimum requirements of the advertisement to conduct the preliminary screening and / or short-listing of candidates. This will then be shared and agreed to by the nominate selection panel members prior to the interviews".** In that around July 2018 at Punda Maria 2SE Boardroom: SITA Erasmuskloof Head Office 2018 you failed to shortlist qualifying SITA employees who applied for the above mentioned position. Therefore, this action creates lack of confidence to the SITA processes to its employees and the community of South Africa at large.

she failed to forward the shortlisting results to other panel members who were to be part of the interview process.

[31] With reference to her report¹⁹, she stated that the shortlisting panel was to comprise of the Applicant Ms. Ipeleng Makabanyane, Mr. Nhlanhla Msiza, Ms. Akhona Msindo and Mr. Coleman Rampagane.

[32] She recorded on the report as follows:

"It should be noted that Mr. Msiza was not interviewed as he had resigned from SITA on 30 September 2018. However, according to Ms. Makabanyane and Mr. Rampagane, both Ms. Akhona Msindo and Mr. Nhlanhla Msiza, were not part of the shortlisting. The shortlisting was conducted by Ms. Makabanyane alone and that he oversaw the process. Mr. Rampagane indicated verbally and in the interview report that he prepared, that the shortlisting was conducted by one person and the results would be presented to the other two panel members prior to the interviews. According to Ms. Akhona Msindo (Consultant: Network Engineer) she was not requested to assist with the shortlisting but only assisted with the interviews. Contrary to Mr. Rampagane's statement and interview report, Ms. Msindo confirmed that she was not requested to review the CV's shortlisted by Ms. Makabanyane²⁰".

[33] With reference to paragraph 7 (b), (d) and (e) of her report, which are her conclusions, the witness stated as follows in her report:

(b) We further noted that four internal candidates that complied with the minimum requirements were not shortlisted.

(d) Ms. Cynthia Raphuti did not meet the requirements in terms of the experience required for the position of Network Engineer: WAN, and should not have been shortlisted.

(e) SITA's talent sourcing and retention policy further requires that the relaxation of the minimum requirements for the filling of positions, needs to be approved by the Executive: Human Capital Management. However, in this particular case, we noted that Mr. Rampagane (who should have also provided procedural guidance in terms of the SITA talent sourcing and retention policy) and the shortlisting panel (Ms. Makabanyane) relaxed the minimum requirements of the position, without obtaining the appropriate approval".

[34] The witness disputed that she had an agenda against the Applicant. She disputed that she was part of the conspiracy to have the Applicant being dismissed. She also disputed the proposition that she had a pre-determined agenda against the Applicant to find her guilty so that she must be dismissed.

¹⁹ Bundle R, page 67

²⁰ Bundle R, page 67

The concise and relevant evidence of the 2nd witness of the Respondent: Ms. Lekgetho Jerminah Tshwale

- [35] She is employed by the Respondent and is the Consultant: Lan and Desktop and is acting as Senior Manager Network and Service Management. She is acting in the position that the Applicant used to hold. She stated that she gets paid an acting allowance on the basis that she was acting in this position. She denied to be harboring or aspiring to take over the position that the Applicant used to hold.
- [36] With reference to the advert²¹ of the post of the Network Engineer (WAN), she confirmed that the minimum requirements and experience for the post were as follows:
"Minimum: National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, Bcom etc.). Experience: 3-5 years' experience in Wide Area Network, Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".
- [37] According to her, taking into consideration the minimum requirements and the experience required by the advert, when shortlisting is done, whoever does the shortlisting will have to look at these requirements and shortlist someone who meet these requirements. If the candidate does not meet these requirements, then there will be no need to shortlist the candidate. Similarly, there will be no need to consider the experience of the candidate who does not meet the minimum requirements.
- [38] According to the witness, since the post that is advertised required an IT related qualification, then Ms. Raphuti who possessed a National Diploma in Electrical Engineering from Vaal University of Technology did not meet the criteria or the minimum requirements as per the advert. According to the witness, the recruitment, shortlisting and appointment of Ms. Raphuti will be contrary to what the advert had required. If the shortlisting and appointment was to be made, it will have been done after a deviation on the minimum requirements have been approved by the Respondent.
- [39] When taken through the transcripts²² from Vaal University of Technology of the qualifications of Ms. Raphuti and an argument and proposition was made that the Diploma in Electrical Engineering has the same courses such as Computer skills, Electronics, Digital Systems, Software design, Television etcetera are applicable to IT environment and on that basis it can be regarded as an IT qualification or is good as an IT qualification,

²¹ Bundle R, page 58

²² Bundle A2, pages 7-8

the response by the witness was that an Electrical Engineering qualification is not an Information Technology qualification and they are not related

[40] The witness alleged that she received reports of the poor work performance of Ms. Raphuti and had escalated those reports to her manager. She also alleged that Ms. Raphuti did not know most of the IT related activities and components. Also, the client, being the SAPS, did not want her to be on their account due to her poor work performance. She conceded though, that paragraph 8 of the letter from the Office of the Provincial Commissioner North West of the SAPS, did not mention anything about the performance of Ms. Raphuti.

[41] For ease of reference, the said paragraph reads as follows:

"It was also requested that the newly appointed WAN technician be removed from our account as she does not have any related qualification and / or experience. She only has electrical experience. A letter was also requested and received that she be removed from SAPS account²³"

[42] With reference to the Kwa Zulu Natal advert of Network Engineer²⁴, the witness confirmed the closing date of this advert as being 04 May 2018. She confirmed that it was a fixed term contract post of 36 months. The witness confirmed the advert refers to minimum qualification and experience as follows:

"Minimum: 3 year National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.). Experience: 3-5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".

[43] With reference to the invite to attend the interview²⁵, the witness confirmed that it was an email invitation from SITA KZN dated 14 February 2019 inviting Ms. Raphuti for an interview for the position of Network Engineer (WAN) on 18 February 2019.

[44] With reference to the SITA Centurion advert of Network Engineer: Network Operation Centre²⁶, the witness confirmed the reference number was RE-NE (NOC)_08_2018. She confirmed that the position was a permanent position. The witness confirmed the advert refers to minimum qualification and experience as follows:

"Minimum: National Diploma / Bachelor's degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.) and / or equivalent (NQF level and Credits). Certification in CCNA will

²³ Bundle R, page 78-79, paragraph 8

²⁴ Bundle A2, page 12

²⁵ Bundle A2, page 13

²⁶ Bundle A2, page 14

be an added advantage. **Experience:** 5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols²⁷.

- [45] With reference to the invite to attend the interview²⁸, the witness confirmed that it was an email invitation from SITA Centurion dated 03 October 2018 inviting Ms. Raphuti for an interview for the position of Network Engineer: NOC on 09 October 2018 at 09h30. She conceded that the adverts on the whole is similar to the one that Ms. Raphuti was shortlisted by the Applicant. She also conceded that Ms. Raphuti was shortlisted and invited to attend the interview by SITA Centurion even though she possessed a National Diploma in Electrical Engineering. The witness conceded that she was not involved in the recruitment, shortlisting and appointment of Ms. Raphuti.
- [46] The witness further indicated that she was not aware of other IT or Network Engineers who were employed or who were currently at the employment of the Respondent despite them possessing the Electrical Engineering qualification. The witness also indicated that she was not aware that the replacement of Ms. Raphuti in the North West province also possesses a qualification in Electrical Engineering. The witness did not dispute the version that Ms. Raphuti is still employed by the Respondent as a Network Engineer and that she was transferred from the North West province to Centurion due to the toxic environment in North West.

The concise and relevant evidence of the 3rd witness of the Respondent: Mr. Lenny Manyelo

- [47] He is employed by the Respondent as the Senior Manager, Talent Sourcing and Retention Management. He was not part of the recruitment, shortlisting, interviewing and ultimately appointment of Ms. Raphuti. He was interviewed by one of the investigators from the internal audit regarding this matter.

- [48] He testified with reference to charge 1.1²⁹ which reads as follows:

"1.1: Gross Dishonest: In that on or about or around July 2018 during the shortlisting of the position of Network Engineer (Wide Area Network) you relaxed the requirements of the minimum requirements for the filing of Network Engineer: Wide Area Network without approval in terms of SITA Talent sourcing and retention policy and or SITA Delegation of Authority. Your action was unacceptable as it disadvantaged other candidates who failed to apply for the position due to them not meeting the minimum requirements³⁰".

²⁷ Bundle A2, page 14

²⁸ Bundle A2, page 15

²⁹ Bundle A, page 1

³⁰ Bundle A, page 1

[49] He maintained that the SITA Talent Sourcing and Retention policy³¹ was not adhered to by the Applicant when she shortlisted Ms. Raphuti. The non-adherence was not in terms of that policy and in particular paragraph 7f, 7g, 7h, which reads as follows:

"The recruiting line manager and / or talent sourcing specialist / human capital business partner will base the selection process on the minimum requirements of the advertisement to conduct the preliminary screening and / or short-listing of candidates. This will then be shared and agreed to by the nominated selection panel members prior to the interviews³²". "The short-listing of candidates must be based on the information provided in the curriculum vitae and any information from other sources should be discounted, as it may unfairly benefit or disadvantage an applicant in relation to others³³". "The inherent requirements of the post (inclusive of an appropriate qualification and / or equivalent NQF level / credits and experience) to be filled must form the basis for short-listing and the departmental employment equity plan must be taken into consideration³⁴"

[50] The witness stated that the Applicant did not look or focus herself on the minimum requirements as per the advert. Instead she moved her focus from the requirements as per the advert and considered other factors which were not required.

[51] The advert³⁵ was specific in its minimum requirements for qualifications and experience as follows:
Minimum: National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.). **Experience:** 3-5 years' experience in Wide Area Network, Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".

[52] According to the witness, since the post that is advertised required an IT related qualification, then Ms. Raphuti who possessed a National Diploma in Electrical Engineering from Vaal University of Technology did not meet the criteria or the minimum requirements as per the advert. There was no match between the advert and its requirements and the CV and qualifications of Ms. Raphuti. The recruitment, shortlisting and appointment of Ms. Raphuti will be contrary to what the advert had required.

[53] When taken through the transcripts³⁶ from Vaal University of Technology of the qualifications of Ms. Raphuti and an argument and proposition was made that the Diploma in Electrical Engineering has the same courses such as Computer skills, Electronics, Digital Systems, Software design, Television etcetera are applicable to

³¹ Bundle A, pages 24-40

³² Bundle A, page 31, Talent Sourcing and Retention policy, paragraph 7f.

³³ Bundle A, page 31, Talent Sourcing and Retention policy, paragraph 7g.

³⁴ Bundle A, page 31, Talent Sourcing and Retention policy, paragraph 7h.

³⁵ Bundle R, page 58

³⁶ Bundle A2, pages 7-8

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IT environment and on that basis it can be regarded as an IT qualification or is good as an IT qualification, the response by the witness was that an Electrical Engineering qualification is not an Information Technology qualification and they are not related.

- [54] With respect to charge 4.2³⁷ the witness maintained that the Applicant either misrepresented the facts or committed a charge of gross negligence, in that she recommended Ms. Raphuti to the position of Network Engineer knowing very well that Ms. Raphuti did not meet the minimum requirements of the position. This was because the Applicant, apart to have been the one who shortlisted Ms. Raphuti, she was also part of the panel that recommended her for appointment, as per the interview report³⁸. In doing so, the Applicant acted contrary to the provisions of the Talent Sourcing and Retention policy.
- [55] With reference to the Kwa Zulu Natal advert of Network Engineer³⁹, the witness confirmed the closing date of this advert as being 04 May 2018. The witness confirmed that it was a fixed term contract post of 36 months. The witness confirmed the advert refers to minimum qualification and experience as follows:
"Minimum: 3 year National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.). Experience: 3-5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".
- [56] With reference to the invite to attend the interview⁴⁰, the witness confirmed that it was an email invitation from SITA KZN dated 14 February 2019 inviting Ms. Raphuti for an interview for the position of Network Engineer (WAN) on 18 February 2019.
- [57] With reference to the SITA Centurion advert of Network Engineer: Network Operation Centre⁴¹, the witness confirmed the reference number was RE-NE (NOC)_08_2018. The witness confirmed that the position was a permanent position. The witness confirmed the advert refers to minimum qualification and experience as follows:
"Minimum: National Diploma / Bachelor's degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.) and / or equivalent (NQF level and Credits). Certification in CCNA will

³⁷ Bundle R, page 2 **4.2 CHARGE 1.2: Misrepresentation or gross negligence:** *In that on or about the 25 July 2018 at Punda Maria 2SE: SITA Erasmuskloof Head Office, you recommended for the appointment of Ms. Cynthia Raphuti to the position of Network Engineering knowing very well that she does not meet the minimum requirements for appointment in the position".*

³⁸ Bundle R, page 47-52

³⁹ Bundle A2, page 12

⁴⁰ Bundle A2, page 13

⁴¹ Bundle A2, page 14

be an added advantage. **Experience:** 5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols⁴²".

- [58] With respect to the evidence or version by the Applicant regarding Ms. Raphuti that even though she possessed the Electrical Engineering qualification was being shortlisted and invited for the interviews for the positions of Network Engineer at SITA Kwa Zulu Natal and also at SITA Centurion, which are positions similar to the one she was shortlisted, interviewed and appointed for by the Applicant, Mr. Manyelo in his response submitted that he was not aware of the recruitments and shortlisting processes that had taken place at those respective offices.
- [59] The witness further indicated that he was not aware of other IT or Network Engineers who were employed or who were currently at the employment of the Respondent despite them possessing the Electrical Engineering qualification.
- [60] With reference to the SITA Erasmuskloof advert of Network Engineer⁴³, the witness confirmed the reference number was ISD / NE5 / 2015-01. The witness confirmed that the position was a permanent position. The witness confirmed the advert refers to minimum qualification and experience as follows: *"Minimum: National Diploma / Degree in IT related field (Computer Science, Information Systems, Technology / Engineering, BCom) and / or equivalent. Experience: 3-5 years' experience in the provision and support of ICT solutions, specifically within Wide Area Networking environment"*.
- [61] The witness confirmed the selection report⁴⁴ regarding the position of Network Engineer. Another report⁴⁵ bears reference, as it records the persons who recommended and approved the report and the appointments. The second paragraph of the report is entitled Short-listing⁴⁶, and states that "the short-listing took place on 18 April 2015 and 22 May 2015.
- [62] The witness did not dispute the report or its contents which makes reference to the shortlisting criteria as follows:
"National Diploma / Degree in ICT related field (Computer Science, Information Systems, Technology / Engineering, BCom) and / or equivalent. 3-5 years' experience in the provision and support of ICT solutions, specifically within Wide Area Networking environment".

⁴² Bundle A2, page 14

⁴³ Bundle A2, page 36

⁴⁴ Bundle A2, pages 37-48

⁴⁵ Bundle A2, pages 49-50

⁴⁶ Bundle A2, page 37

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[63] The witness who was not aware of the report could not comment on the report, and neither could deny or admit anything regarding the shortlisting, interview and appointment of the following candidates into the position of Network Engineer. According to the report the candidates possessed Electrical Engineering qualifications.

[64] According to the report, Mr. Phathutshedzo Magidi⁴⁷ possess a National Diploma in Electronics from Tshwane South College, Mr. Cloete Hlomela⁴⁸ possess a National Diploma in Electrical Engineering from the University of Johannesburg, Mr. Sihle Hlongwane⁴⁹ possess a National Diploma: Electrical Engineering from Durban University of Technology, Mr. Sibusiso Nkosi⁵⁰ possess a B. Tech Degree: Engineering Computer Systems from Tshwane University of Technology.

The concise and relevant evidence of the Applicant: Ms. Ipeleng Makabanyane

[65] She commenced her testimony by referencing her termination letter⁵¹ and indicate that she received her dismissal or termination letter on 17 April 2020. She was also paid her salary until 17 April 2020. She raised an issue that her dismissal took place whilst the country was under hard lockdown.

[66] In her view, the dismissal was contrary to the statement or speech⁵² by the State President of the Republic on 23 March 2020 declaring a national lockdown. She referenced part of the speech by the State President and argued that the Respondent was not exempted from the restriction of the lockdown as it did not provide essential services. The disaster management act also did not allow the Respondent to work.

[67] Basically, the Respondent was not operational or was working at home. For that reason, the disciplinary proceedings should have not taken place and her dismissal. She received her termination letter on 17 April 2020. According to the Applicant she believes there was an intention by the Respondent to have her dismissed. She based her reasons for having this believe on the basis that she had previously lodged a grievance against the Acting HOD of the province, and hence these charges.

[68] Her dismissal was such that her termination letter was sent to her via WhatsApp, and immediately she was removed from the system. With reference to the SAPS letter⁵³, the Applicant submitted that paragraph 8 of

⁴⁷ Bundle A2, page 40

⁴⁸ Bundle A2, page 41

⁴⁹ Bundle A2, page 44

⁵⁰ Bundle A2, page 45

⁵¹ Bundle R, page 80

⁵² Bundle A3, page 14-23

⁵³ Bundle R, page 78

the letter from the Office of the Provincial Commissioner North West of the SAPS, did not mention anything about the performance of Ms. Raphuti. Neither did anyone including Ms. Tshwale raise anything to her about the performance of Ms. Raphuti.

- [69] With reference to the advert of Network Engineer (Wan)⁵⁴. The minimum qualifications and experience as per the advertisement indicated as follows:

"Minimum: National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.). Experience: 3-5 years' experience in Wide Area Network, Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".

- [70] The Applicant admitted or conceded that she was part of the panel that did the shortlisting. An interview report⁵⁵ was subsequently generated after the appointment of the candidate into the position of Network Engineer (WAN).

- [71] The interview report is signed⁵⁶ by Mr. Coleman Rampagane the Consultant: Corporate Services, Ms. Ipeleng Makabanyane who recommended the appointment of Ms. Raphuti, Mr. Msiza who recommended the appointment of Ms. Raphuti, Ms. Msindo who recommended the appointment of Ms. Raphuti, Mr. Thuil Henderson, the Lead Consultant: Remuneration Services who supported the appointment of Ms. Raphuti, and Mr. Benjamin Seleke, the Head of Department: North West who approved the appointment of Ms. Raphuti.

- [72] The Applicant testified that together with Mr. Rampagane they shortlisted the candidates and there was an agreement that the two other panel members from Head Office (Ms. Akhona Msindo and Mr. Nhlanhla Msiza) be furnished with the shortlisted candidates' details prior to the interview in order for them to validate the selected candidates.

- [73] The same persons, being the Applicant, Mr. Rampagane, Ms. Akhona Msindo and Mr. Nhlanhla Msiza comprised of the interview panel⁵⁷ and they all participated in the interview of the candidates that have been shortlisted. There was no issue raised or an objection raised by both Mr. Msiza and Ms. Msindo about the manner the shortlisting and the interview took place.

⁵⁴ Bundle R, page 58

⁵⁵ Bundle R, page 47-52

⁵⁶ Bundle R, page 52

⁵⁷ Bundle R, page 49

- [74] She submitted that regarding the shortlisting, she had considered that the Electrical Engineering diploma contained components of IT in its course program, and the transcripts⁵⁸ from Vaal University of Technology of the qualifications of Ms. Raphuti and an argument and according to her, that the Diploma has the same courses such as Computer skills, Electronics, Digital Systems, Software design, Television etcetera are applicable to IT environment and on that basis it can be regarded as an IT qualification or is good as an IT qualification. She further testified that whilst she was based at SITA Centurion, she had come across colleagues who possessed Electrical Engineering qualifications even though they were performing or employed in IT as Network Engineers.
- [75] The Applicant stated that in terms of the interview report⁵⁹, five candidates were shortlisted as follows: Mr. Obakeng Motlhale, Ms. Patience Shandu, Mr. Alfred Madungwe, Ms. Cynthia Raphuti, and Mr. Patrick Mzelem.
- [76] However, out of the five shortlisted candidates, Mr. Obakeng Motlhale who is an external candidate declined and did not attend the interview, Ms. Patience Shandu who is an external candidate withdrew from the interview, Mr. Patrick Mzelem who is the external candidate did not pitch at the interview, only Mr. Alfred Madungwe and Ms. Cynthia Raphuti attended the interview and were interviewed.
- [77] When an appointment was done, Mr. Madungwe was not recommended for appointment on the basis that even though he had excellent qualifications, the vetting process identified him as a Zimbabwean national who has not relinquished his Zimbabwean citizenship and furthermore he did not meet the minimum security clearance in terms of the Minimum Information Security Standards.
- [78] The only candidate who remained was Ms. Raphuti who the panel recommended and was approved for appointment. Ms. Raphuti had also done CCNP and CCNA qualifications and was experienced on those areas, but nonetheless that was not considered as the determining factor.
- [79] The Applicant disputed most of the evidence of Ms. Mawela and her investigation report, more so, where it made reference to her having admitted to have made an error when she was shortlisting. She also disputed the parts of the investigation report which made references to four internal candidates who were not shortlisted such as Ms. Nokwazi Khoza, Mr. Holani Clifford Moruti, Mr. Patrick Hlongwani, and Mr. Lazarus Mpyana.

⁵⁸ Bundle A2, pages 7-8

⁵⁹ Bundle R, page 48

[80] She argued that these internal candidates were permanent employees of the Respondent who were in the same or similar positions to the one advertised. However, the advertised position was a 36 months fixed term position and there was no added benefit in terms of remuneration to those candidates to leave their permanent positions for the fixed term contract. She further argued that is the reason why most of the candidates who were shortlisted, withdrew or declined or failed to attend the interview.

[81] With reference to the SITA Centurion advert of Network Engineer⁶⁰, the Applicant confirmed the reference number was ISD / NE / 2016-09. She confirmed the closing date to be 29 September 2016. She confirmed that the position was a permanent position. She confirmed the advert refers to minimum qualification and experience as follows:

"Minimum: National Diploma / Bachelor's degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.) and / or equivalent (NQF level and Credits). Certification in CCNA will be an added advantage. Experience: 5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".

[82] The Applicant referred to the interview report⁶¹ about the appointment of the candidate into the position of Network Engineer with reference number ISD / NE / 2016-09. The Applicant was not involved in this report or appointment, but Ms. Akhona Msindo was, and she recommended the appointment into this position. The Applicant submitted that despite the advert indicating the minimum requirements, two candidates were appointed despite them possessing qualifications in Electrical Engineering.

[83] The two candidates who were appointed in this process are: Mr. Rammy Moorkey who hold a National Diploma in Electrical Engineering from Vaal University of Technology, and Mr. Ndumiso Tshamela who hold a National Diploma in Electrical Engineering Light Current from University of Johannesburg. According to the Applicant, both candidates were shortlisted, interviewed and appointed into the Network Engineer positions whilst possessing the Electrical Engineering qualifications in the same manner as the Applicant did with Ms. Raphuti.

The concise and relevant evidence of the witness of the Applicant: Mr. Coleman Rampagane

[84] He is employed by the Respondent as Consultant: Corporate Services. With reference to the policy⁶², he testified that they rely on it to source and employ people for the Respondent. He stated that when they shortlisted, interviewed and appointed Ms. Raphuti, they used this policy.

⁶⁰ Bundle A2, page 28

⁶¹ Bundle A2, page 29-35

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- [85] He stated that in his understanding of the policy, it was acceptable for the recruiting manager and another person to do the shortlisting. This kind of procedure is done to fast track the shortlisting process. He further stated that selection or shortlisting of candidates will be based on the information emanating from the CV as per paragraph 7g⁶³ of the policy.
- [86] Regarding the internal staff members who were not shortlisted, he had advised Ms. Makabanyane against shortlisting internal candidates who were permanent to a fixed term position of six months which was not going to be beneficial to those permanent candidates. To prove his point, even some of the candidates that were shortlisted, who were permanent employees, decided to withdraw or decline to participate on the interview process that was going to yield the results of a fixed term contract.
- [87] The witness confirmed the interview report⁶⁴ for the position of Network Engineer (WAN). According to the witness, he was the compiler of the report. This report was of the interview of the position of Network Engineer⁶⁵ which was advertised and its closing date being 04 May 2018. His role also during the shortlisting was to be a scribe. According to the witness, even though the CCNA qualification was mentioned, it did not play a decisive role in the shortlisting, interview and later appointment of Ms. Raphuti.
- [88] With reference to the Kwa Zulu Natal advert of Network Engineer⁶⁶, the witness confirmed the closing date of this advert as being 04 May 2018. The witness confirmed that it was a fixed term contract post of 36 months. The witness confirmed the advert refers to minimum qualification and experience as follows:
"Minimum: 3-year National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.). Experience: 3-5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".
- [89] With reference to the invite to attend the interview⁶⁷, the witness confirmed that it was an email invitation from SITA KZN dated 14 February 2019 inviting Ms. Raphuti for an interview for the position of Network Engineer (WAN) on 18 February 2019.
- [90] With reference to the SITA Centurion advert of Network Engineer: Network Operation Centre⁶⁸, the witness confirmed the reference number was RE-NE (NOC)_08_2018. The witness confirmed that the position was a

⁶² Bundle R pages 24-40. Talent Source and Retention policy

⁶³ Bundle A, page 31. *The short-listing of candidates must be based on the information provided in the curriculum vitae and any information from other sources should be discounted, as it may unfairly benefit or disadvantage an applicant in relation to others⁶³.*

⁶⁴ Bundle R, page 47-52

⁶⁵ Bundle R, page 58

⁶⁶ Bundle A2, page 12

⁶⁷ Bundle A2, page 13

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permanent position. The witness confirmed the advert refers to minimum qualification and experience as follows:

"Minimum: National Diploma / Bachelor's degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.) and / or equivalent (NQF level and Credits). Certification in CCNA will be an added advantage. Experience: 5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols⁶⁹".

[91] The witness did not dispute or reject the version by the Applicant regarding Ms. Raphuti that even though she possessed the Electrical Engineering qualification, she was being shortlisted and invited for the interviews for the positions of Network Engineer at SITA Kwa Zulu Natal and also at SITA Centurion, which are positions similar to the one she was shortlisted, interviewed and appointed for by the Applicant.

[92] With reference to the SITA Centurion advert of Network Engineer⁷⁰, the witness confirmed the reference number was ISD / NE / 2016-09. He confirmed the closing date to be 29 September 2016. He confirmed that the position was a permanent position. He confirmed the advert refers to minimum qualification and experience as follows:

"Minimum: National Diploma / Bachelor's degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.) and / or equivalent (NQF level and Credits). Certification in CCNA will be an added advantage. Experience: 5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".

[93] The witness was referred to the interview report⁷¹ about the appointment of the candidate into the position of Network Engineer with reference number ISD / NE / 2016-09. The witness was not involved in this report or appointment, but Ms. Akhona Msindo was, and she recommended the appointment into this position. The witness submitted that despite the advert indicating the minimum requirements, two candidates were appointed despite them possessing qualifications in Electrical Engineering.

[94] The witness indicated that in terms of the report, two candidates who were appointed in this process are: Mr. Rammy Moorkey who hold a National Diploma in Electrical Engineering from Vaal University of Technology, and Mr. Ndumiso Tshamela who hold a National Diploma in Electrical Engineering Light Current from University of Johannesburg. According to the witness, both candidates were shortlisted, interviewed and

⁶⁸ Bundle A2, page 14

⁶⁹ Bundle A2, page 14

⁷⁰ Bundle A2, page 28

⁷¹ Bundle A2, page 29-35

appointed into the Network Engineer positions whilst possessing the Electrical Engineering qualifications in the same manner as the Applicant did with Ms. Raphuti.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [95] I must point out that extensive evidence in the form of documentation was submitted in this arbitration hearing. I must also point out that I do not intend to offer a regurgitation of the entire happenings at the arbitration hearing. The case file and records can be consulted for that purpose.
- [96] I however intend to offer a brief analysis of the evidence presented and the reasons for my findings as per section 138 (7) (a) of the Labour Relations Act 66 of 1995, as amended, the "LRAA" which provides that, *"Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons"*.
- [97] In *Early Bird Farms (Pty) Ltd v Mlambo*⁷² the court held that the Respondent did not have to prove with absolute certainty that the Applicant is guilty of the alleged misconduct but that proof on a balance of probabilities was sufficient. In this particular case, the dismissal of the Applicant is not in dispute, but its fairness, therefore the Respondent bears the onus of proving on the balance of probabilities that the dismissal was fair.
- [98] According to Section 188 (1) of the LRAA, the dismissal of the Applicant by the Respondent will be unfair if the Respondent fails to prove that the Applicant's dismissal was for a fair reason related to the Applicant's conduct or capacity or based on the Respondent's operational requirements and that the dismissal was effected in accordance with a fair procedure.
- [99] In determining whether the Respondent has complied with the requirements for fairness, I must take into account the provisions of schedule 8 of the code of good practice: dismissal as per the LRAA⁷³. I am also duty bound to take into account the published guidelines on misconduct arbitration⁷⁴. The determination of

⁷² [1997] 5 BLLR 541 (LAC).

⁷³ Section 188 (2) of the LRA states "any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

⁷⁴ Section 138(6) of the LRA states "the commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter being considered in the arbitration proceedings." On 17 March 2015, the CCMA governing body, acting in terms of section 115(2)(g) of the

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whether or not the Applicant's dismissal by the Respondent was fair requires me to make "a moral or value judgment as to what is fair in all the circumstances"⁷⁵.

[100] In *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others*⁷⁶ the Constitutional Court held that what is fair depends upon the circumstances of a particular case and essentially involves a value judgment and consequently it is neither necessary nor desirable to define the concept of fairness. The court further held that fairness is not confined to workers only but comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment⁷⁷.

[101] The evidence at this arbitration hearing indicates that the Respondent has in previous times employed persons who possessed Electrical Engineering qualifications into the positions of Network Engineer. The advertisement for the position that the Applicant had shortlisted Ms. Raphuti on, is in all material respect similar or the same as most or all adverts where other candidates were appointed.

[102] For example, the advert at which Ms. Raphuti was shortlisted indicates the following:
"Minimum: National Diploma / Degree in IT related field (Computer Science, Information Technology / Engineering, Bcom etc.). Experience: 3-5 years' experience in Wide Area Network, Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".

[103] It is also in the same period and through the similar advert that Ms. Raphuti was also shortlisted and invited for interview in Pietermaritzburg⁷⁸ and also in Centurion⁷⁹, for the same position of Network Engineer. There is no evidence that both Pietermaritzburg SITA and Centurion SITA invoked the deviation process in terms of the Talent Sourcing and Retention policy regarding the shortlisting of Ms. Raphuti. In the absence of any evidence regarding any request for deviation, it is accepted that there was none.

[104] The position at either SITA Pietermaritzburg or Centurion or North West did not specifically require the qualification in Electrical Engineering. But nonetheless, all the three offices shortlisted Ms. Raphuti who possessed a qualification in Electrical Engineering. Similarly, if it is to be accepted that the Applicant was wrong by shortlisting and ultimately inviting Ms. Raphuti at the interview, surely, it must be accepted that

LRA which states that "the commission may publish guidelines in relation to any matter dealt with in this Act", gazetted the CCMA Guidelines on Misconduct Arbitration (hereinafter referred to as "the guidelines") which became effective on 1 April 2015.

⁷⁵ See in this regard *Metro Cash & Carry Ltd v Tshehla* [1997] 1 BLLR 35 (LAC) and *Numsa v Vetsak Co-Operative Ltd and Others* [1996] 3 All SA 311 (A).

⁷⁶ 2003 (2) BCLR 154 at para 38.

⁷⁷ At para 38.

⁷⁸ Bundle A2, page 13

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both SITA Pietermaritzburg and SITA Centurion were also wrong. Of course two wrongs do not make a right, but consistence must prevail.

- [105] The Applicant testified that what prompted her to shortlist the person who possessed a qualification in Electrical Engineering was on the basis of amongst others, the norm and information she had from Head Office of other persons who were occupying the same position of Network Engineer who had been employed through those qualifications. It was put to the witness of the Respondent and it was not disputed that the person who had replaced Ms. Raphuti in the North West in the position of Network Engineer also possessed a qualification in Electrical Engineering.
- [106] Evidence was presented about the shortlisting, the interview and the appointment of other persons also who possessed a qualification in Electrical Engineering into the position of Network Engineer. Evidence was also led to indicate that those persons were shortlisted, interviewed and appointed into those positions even though the requirements as per the advertisement saying something.
- [107] For example, the evidence indicated that there is an interview report⁸⁰ about the appointment of the candidate into the position of Network Engineer with reference number ISD / NE / 2016-09. Ms. Akhona Msindo who had also participated in the interview and subsequent appointment of Ms. Raphuti was also involved in this shortlisting, interview and appointment of this candidate.
- [108] As a matter of record, the evidence indicates that Ms. Msindo recommended the appointment of this candidate into this position. She also recommended the appointment of Ms. Raphuti into the position of Network Engineer. The evidence indicates that despite advert indicating the minimum requirements, two candidates were appointed despite them possessing qualifications in Electrical Engineering.
- [109] For ease of reference, the advert in question stated with reference to the SITA Centurion advert of Network Engineer⁸¹ as follows:
- "Minimum: National Diploma / Bachelor's degree in IT related field (Computer Science, Information Technology / Engineering, BCom etc.) and / or equivalent (NQF level and Credits). Certification in CCNA will be an added advantage. Experience: 5 years' experience in Wide Area Network (WAN), Troubleshooting Technology, Network topology, Network Design, Application Layer and routing protocols".*

⁷⁹ Bundle A2, page 15

⁸⁰ Bundle A2, page 29-35

⁸¹ Bundle A2, page 28

- [110] The evidence indicated that emanating from the shortlisting and interview of candidates, an interview report⁸² was drafted which was signed and in terms of the report, two candidates who were appointed in this process are: Mr. Rammy Moorkey who hold a National Diploma in Electrical Engineering from Vaal University of Technology, and Mr. Ndumiso Tshamela who hold a National Diploma in Electrical Engineering Light Current from University of Johannesburg.
- [111] Both candidates were shortlisted, interviewed and appointed into the Network Engineer positions whilst possessing the Electrical Engineering qualifications in the same manner as the Applicant did with Ms. Raphuti. There is no evidence that there were any processes of deviation which were invoked in the appointment of persons who possessed Electrical Engineering qualifications into these positions of Network Engineer. Also, there is no evidence that the persons who participated in the shortlisting, interview and appointment of these candidates were charged.
- [112] Another evidence was presented about the shortlisting, the interview and the appointment of other persons also who possessed a qualification in Electrical Engineering into the position of Network Engineer. Evidence was also led to indicate that those persons were shortlisted, interviewed and appointed into those positions even though the requirements as per the advertisement saying something. For example, the evidence indicated that there is an interview report⁸³ about the appointment of the candidate into the position of Network Engineer with reference number ISD / NE5 / 2015-01⁸⁴.
- [113] For ease of reference, the advert in question stated with reference to the SITA Erasmuskloof advert of Network Engineer as follows:
"Minimum: National Diploma / Degree in ICT related field (Computer Science, Information Technology / Engineering, BCom etc.) and / or equivalent (NQF level and Credits). Experience: 3-5 years' experience in the provision and support of ICT solutions, specifically within Wide Area Networking environment".
- [114] According to the selection report⁸⁵, the persons who possessed Electrical Engineering qualifications were appointed into the position of Network Engineer despite the advert indicating otherwise. The persons who were shortlisted, interviewed and subsequently appointed into the position of Network Engineer were: Mr. Phathutshedzo Magidi⁸⁶ who possess a National Diploma in Electronics from Tshwane South College, Mr. Cloete Hlomela⁸⁷ who possess a National Diploma in Electrical Engineering from the University of

⁸² Bundle A2, page 29-35

⁸³ Bundle A2, page 37-50

⁸⁴ Bundle A2, page 36

⁸⁵ Bundle A2, page 37-50

⁸⁶ Bundle A2, page 40

⁸⁷ Bundle A2, page 41

Johannesburg, Mr. Sihle Hlongwane⁸⁸ who possess a National Diploma: Electrical Engineering from Durban University of Technology, and Mr. Sibusiso Nkosi⁸⁹ who possess a B. Tech Degree: Engineering Computer Systems from Tshwane University of Technology.

- [115] The above candidates were shortlisted, interviewed and appointed into the Network Engineer positions whilst possessing the Electrical Engineering qualifications in the same manner as the Applicant did with Ms. Raphuti. There is no evidence that there were any processes of deviation which were invoked in the appointment of persons who possessed Electrical Engineering qualifications into these positions of Network Engineer. Also, there is no evidence that the persons who participated in the shortlisting, interview and appointment of these candidates were charged.
- [116] The evidence also indicated that subsequent to Ms. Raphuti being shortlisted, she was interviewed by a panel comprising Ms. Makabanyane, Mr. Rampagane, Ms. Msindo and Mr. Msiza. The evidence indicated that the interviewed panel made recommendations regarding the appointment of Ms. Raphuti. There is no evidence that there was an objection in the manner the process was followed. Also, there is no evidence indicating that either Ms. Msindo or Mr. Msiza had any qualms with the manner the process unfolded. Furthermore, there is no evidence suggesting that there were any objections by the Respondent to the appointment of Ms. Raphuti.
- [117] The evidence indicates that the interview report is also signed⁹⁰ by Mr. Coleman Rampagane the Consultant: Corporate Services, Ms. Ipeleng Makabanyane who recommended the appointment of Ms. Raphuti, Mr. Msiza who recommended the appointment of Ms. Raphuti, Ms. Msindo who recommended the appointment of Ms. Raphuti, Mr. Thuli Henderson, the Lead Consultant: Remuneration Services who supported the appointment of Ms. Raphuti, and Mr. Benjamin Seleke, the Head of Department: North West who approved the appointment of Ms. Raphuti. The evidence indicates that the appointment was valid. An offer of employment⁹¹ was issued to Ms. Raphuti, which she accepted. The evidence indicates that currently as the arbitration hearing was proceeding, Ms. Raphuti was still an employee of the Respondent, and she has been so since her appointment in 2018.
- [118] Taking into consideration the oral and documentary evidence presented before me, I am not satisfied that the Respondent has succeeded to show that the Applicant has committed the offences that she was charged for. There has been a pattern by the Respondent to employ persons into the positions of Network

⁸⁸ Bundle A2, page 44

⁸⁹ Bundle A2, page 45

⁹⁰ Bundle R, page 52

⁹¹ Bundle A1, page 73-76

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Engineer whilst those persons were possessing Electrical Engineering qualifications. It would appear that the Respondent had accepted that persons with Electrical Engineering qualifications were also suitable to work in the position of Network Engineer. If that was not the case, no one should have been appointed into the position of Network Engineer whilst possessing an Electrical Engineering qualifications.

[119] There was a discussion about whether Electrical Engineering qualification has the same components as the qualification in IT. I do not want to enter this debate as it does not assist me in my finding. Be that as may, it appears though that the Respondent by employing some persons with Electrical Engineering qualification suggests that those persons are capable or have the requisite knowledge to perform the tasks of a Network Engineer.

[120] It is my view that if the Respondent did not believe or accept that the persons with an Electrical Engineering qualification do not meet the requirements of the positions and its specifications, the Respondent would have not appointed anyone onto that position. Similarly, if the Respondent was of the view that Ms. Raphuti was a wrong appointment, who did not possess the requisite qualifications, surely, the Respondent and in this case, the Head of the Province being Mr. Seleke who in all respects would have read the interview report, would have not approved the appointment of Ms. Raphuti. Neither would he had accepted the recommendation by the interview panel. The fact that he accepted the recommendation and approved the appointment indicates that he was satisfied that the appointment of Ms. Raphuti was correct or suitable.

[121] In *Sidumo*⁹², the Court alluded to the fact that in terms of the LRA a commissioner has to determine whether a dismissal is fair or not. According to the judgement, a commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. I am therefore satisfied that, given the totality of the evidence presented, the voluminous documentation and the facts of this matter, the Applicant's dismissal was unfair.

[122] In *Cash Paymaster Services Northwest*⁹³ it was held that the commissioner must consider if the trust relationship was destroyed in evaluating the appropriateness of the sanction. In *Edcon Ltd v Pillemer*⁹⁴ the Court held the Commissioner must consider all facts and circumstances that emerged at arbitration and that evidence must be led on the breach of the trust relationship. In this arbitration hearing the Respondent did not present evidence that trust relations had broken down. Neither did the Respondent submit that trust is one of the fundamentals of the employment relationship that the Employer should be able to place trust in the Employee. The Respondent did not submit that a breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of

⁹² *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others* [2007] 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

⁹³ *Cash Paymaster Services Northwest (Pty) Ltd v Paul Shabangu NO & Others* [2009] 5 BLLR 415 (LC)

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the employment relationship. On that basis, I accept that there is no issue of trust relationship having broken down in this case.

The relief sought by the applicant

- [123] Having found that the Applicant's dismissal was unfair, Ms. Makabanyane has requested relief of reinstatement. Section 193 (2) of the Labour Relations Act 66 of 1995, as amended directs that if a dismissal is unfair, I must require the Respondent to reinstate or re-employ the Applicants unless (a) the Applicants do not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the Respondent did not follow a fair procedure.
- [124] Having considered the relief sought by the Applicant, I find that her reinstatement is the appropriate relief in the circumstances of this matter. In *Equity Aviation Services (Pty) Ltd v CCMA and Others*⁹⁵ the Constitutional Court explained the legal effect of a reinstatement order as follows:
- "The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal."*

As the language of section 193(1) (a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the arbitration award.

Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the

⁹⁴ *Edcon Ltd v Pillemer No & Others* [2008] 5 BLLR 391 (LAC)

⁹⁵ 2009 (1) SA 390 (CC).

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discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly."

[125] In *Coca Cola Sabco (Pty) Limited v Van Wyk*⁹⁶ the Labour Appeal Court held that the effect of a reinstatement order is to revive the contract of employment which was terminated by a dismissal. The Court further held⁹⁷ that "the money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and back-pay may only be granted in the alternative and are mutually exclusive. The back-pay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief."

[126] The Applicant has been unemployed and without a salary since 17 April 2020. She has been out of employment for a period of a year. It is my view and order that the reinstatement of the Applicant is an appropriate remedy in the circumstances of this matter. The reinstatement I have ordered will operate from the date of the dismissal. I exercise my discretion to order retrospective reinstatement in this matter. Simply put, the order of back pay is due to the Applicant.

THE AWARD

[127] I make the following award:

127.1 The Applicant Ms. Ipeleng Makabanyane was dismissed by the Respondent.

127.2 The dismissal of the Applicant by the Respondent was unfair.

127.3 I order the Respondent, SITA SOC LTD to reinstate the Applicant Ms. Ipeleng Makabanyane back into the position she held on the same terms and conditions of employment which prevailed immediately prior to the date of dismissal.

127.4 The reinstatement is retrospective from 17 April 2020 and effective on 17 May 2021.

127.5 The Respondent is ordered to pay the Applicant back-pay from 17 April 2020 until 16 May 2021.

127.6 The reinstatement and payment of back-pay must be effected to the Applicant on 17 May 2021.

127.7 The amount of back-pay due to the Applicant is equivalent to thirteen months (13) months' salary calculated at her rate of pay as at the time of dismissal.

127.8 The amount due to the Applicant Being R 67 241.00 X 13 months = R 874 133
(Eight hundred and seventy-four thousand, one hundred and thirty-three rand).

⁹⁶ [2015] 8 BLLR 774 (LAC) at para 16.

⁹⁷ At para 17.

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127.9 The Respondent must implement this award on 17 May 2021 and the Applicant must report for duty as normal on that date.

127.10 The back pay in paragraph [127.8] must be paid into the bank account that the Applicant will provided in writing to the Respondent or the bank account that the Respondent used to deposit the salary of the Applicant into.

Signature: _____



Commissioner: Collins Lenkwasi Makama

Sector: Public Service (General)

APPROVED