

ARBITRATION AWARD

Panelist: KATLHOLO WABILE
Case No.: GPBC 79/2020
Date of Award: 12 SEPTEMBER 2020

In the ARBITRATION between:

PSA obo GAYNOR C. MARSHALL-SIMONS
(Employee Party)

and

DEPARTMENT OF GOVERNMENT COMMUNICATION AND INFORMATION SYSTEM
(Employer Party)

Employee's representative: MR H. HALL
Union/Applicant's address: _____

Telephone: _____
Telefax: _____

Employer's representative: MS L. MAKUBE
Respondent's address: _____

Telephone: _____
Telefax: _____

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 This matter was initially scheduled to be heard virtually through the Zoom platform on 19 August 2020. However, parties could not proceed on the day due to problems experienced with discovery of documents and other reasons. Suffice to state that the matter was postponed to 28 August 2020 whereupon it proceeded, again virtually, through the Zoom platform. I recorded the proceedings on the Zoom program in my laptop and on the instances where I forgot to record, I would summarise the evidence and the parties would confirm that the summary was a fair reflection of the missed recording. I also recorded the proceedings on my digital voice recorder as back-up albeit I may have missed the introduction section of the proceedings. I also took notes in shorthand. The proceedings were conducted in English throughout and neither party requested the services of an interpreter. At the end of the proceedings, the parties requested to submit closing arguments in writing. I gave the parties seven (7) days to do this, meaning that the closing arguments were due by 04 September 2020. The parties duly complied with this deadline.
- 1.2 The employee, Ms Marshall-Simons, was represented by Mr Henry Hall, an Official of the PSA, a registered union. The employer was represented by Ms Lerato Makobe, its Deputy Director: Labour Relations. The parties all joined the meeting via the numerous links that were provided to them as a result of the forty (40) minute time limit on the Zoom program.

2. ISSUE TO BE DECIDED

- 2.1 Whether or not the employer committed an unfair labour practice against the employee as contemplated in Section 186(2)(a) of the Labour Relations Act 66 of 1995, as amended (the Act) in that it failed to shortlist the employee for an interview.
- 2.2 The appropriate relief, if any.

3. BACKGROUND TO THE ISSUE

- 3.1 The employee has seventeen years of service with the employer, having commenced employment as a Senior Communications Officer in Cape Town. She was later appointed to the position of an Assistant Director. She currently occupies the position of a Deputy Director in Gauteng. In February 2018, the position of Deputy Director became vacant in the Western Cape. The employee requested to be transferred to the post but the Chief Director informed her that she would have to apply. The employee applied for the post as, for personal reasons, she wished to return to the Western Cape. She was shortlisted and interviewed but no appointment was made. The post was re-advertised a few more times and the employee was, ultimately, not shortlisted. She tried to address the issue internally through grievances and correspondence. The final answer given was that she was not considered for the shortlist as she had failed to include her matric certificate in her application. It is the contention of the employee that she had made numerous applications in the past and these were accepted and she was appointed three times without ever having attached her matric certificate to the applications. Her union then referred an unfair labour practice dispute to the GPSSBC.
- 3.2 On the contrary, the employer contends that the employee's claim of an unfair labour practice is unfounded. Its case is briefly that the employee failed to attach the matric certificate to her application and her application was disqualified in consequence thereof. The matric certificate was one of the minimum requirements in terms of the instructions contained in the advertisement. As such, there was no unfair labour practice.

3.3 It is common cause that the dispute was unresolved at the conciliation stage, hence these arbitration proceedings and award.

4. SURVEY OF EVIDENCE AND ARGUMENT

4.1 THE EMPLOYEE'S EVIDENCE AND ARGUMENT

- 4.1.1 In summary, the employee ("**Marshall-Simons**") testified under oath that she had seventeen years of service with the employer, which she joined in Cape Town as a Senior Communications Officer. After five years she rose to the position of Assistant Director and, after approximately another five years, she applied for a Deputy Director position in Gauteng. She was appointed and has been thus engaged for seven years.
- 4.1.2 All in all, she had made seven applications at the employer and had been shortlisted six times. She was appointed three times. In all these applications, she had used the same bundle of documents, which excluded a matric certificate. She had never been asked to include a matric certificate in the applications.
- 4.1.3 The Deputy Director position in the Western Cape became vacant in February 2018 and she requested to be transferred to the position. It is exactly the same position as she currently occupies. However, the Chief Director, declined the request and told her that she would have to apply for the post. He said she would get the post as she was a strong candidate.
- 4.1.4 The post in the Western Cape was advertised in April and she applied, using her usual pack and was shortlisted. There were interviews but no one was appointed as there were some objections.
- 4.1.5 The post was re-advertised. She applied again and was shortlisted again. She was interviewed but all was quiet thereafter. She made inquiries and was informed she had to write a test. She wrote the test but received no outcome.
- 4.1.6 She has been submitting grievances ever since but has never been called to address the grievances. In April 2019 a moratorium was placed on all posts. Near the end of 2019 the post was advertised again and she applied. She heard nothing thereafter.
- 4.1.7 When she inquired, she was told a complaint had been lodged against the advertisement. The post was re-advertised again and she applied in November 2019. She heard nothing thereafter.
- 4.1.8 She heard through the grapevine that there was a shortlist but she was neither called to tell her she was not shortlisted, nor given any reasons why she was not shortlisted. When she inquired, she was informed that there was a technical issue.
- 4.1.9 She was informed that the nature of the technical issue was that she had not attached her matric certificate to her application. The interviews went on without her to finality.
- 4.1.10 After this, she procured her matric certificate from the Department of Education. She also has a degree in public administration and several other qualifications. If she did not have a matric, she would not have been admitted to these other studies. Again, if she did not have a matric certificate, she would not have been appointed as a Senior Communications Officer all of those seventeen years ago.

- 4.1.11 She needed to go to Cape Town as her contact to her parents, a sister in law, left after her (Marshall-Simons') brother passed away. Her husband and child were also in Cape Town as her husband had been appointed to a post in Parliament.
- 4.1.12 Finally, she testified that she kept applying and also wrote letters to explain her circumstances but was never called to a face to face meeting to have a discussion. She wished for a ruling that would enable her to be transferred to Cape Town. The employer was very unfair not to shortlist her.
- 4.1.13 Marshall-Simons was both cross-examined and reexamined on her version. To set these out would make for a cumbersome award so I shall refer to the same to the extent necessary in the circumstances.
- 4.1.14 Mr Hall submitted a closing argument. I shall not focus on his rehash of the evidence. In summary, he argued that it should be a given that access to the further studies would not have been granted to the employee in the absence of a matric certificate. It is also contended that a higher qualification such as a degree supersedes the requirement to submit a lower grade certificate such as a matric certificate. It made no sense to penalize the employee for the absence of a matric certificate when this had not been done with the previous applications. The employer was unfair and deprived the employee of the opportunity to compete for the post. The employee should be appointed to the position of Deputy Director Western Cape using the vacant position of Deputy Director Parliamentary Services.

4.2 THE EMPLOYER'S EVIDENCE AND ARGUMENT

- 4.2.1 Mrs Zanele Ngwenya ("**Ngwenya**") testified on behalf of the employer. She is the Director: Human Resources Management at the employer. In summary, her evidence under oath is that in her role she is responsible for, among others, Recruitment and selection and conditions of service.
- 4.2.2 Each advertisement comes with its instructions. Marshall-Simons had not attached her matric certificate to her application thus leading to disqualification. This was in line with policy.
- 4.2.3 Clause 9.2.6 of the Recruitment and Selection Policy stipulated that "shortlisted candidates must be in line with the job content and appointment, as well as advertised requirements". Marshall-Simons had not complied with this clause as she did not attach her matric certificate. This was part of the minimum requirements. Qualifications were taken to SAQA for verification.
- 4.2.4 She could not comment on Marshall-Simons version that she had applied without attaching a matric certificate several times before. Each application was dealt with according to its merits.
- 4.2.5 Finally, she testified that she did not know what the details of the previous advertisements were and what the instructions were, hence, she could not comment.
- 4.2.6 Ngwenya was both cross-examined and reexamined on her version. To set these out would make for a cumbersome award so I shall refer to the same to the extent necessary in the circumstances.

4.2.7 Ms Makobe submitted a closing argument. I shall not focus on her rehash of the evidence. In summary, she argues that it is common cause that Marshall-Simons failed to attach a copy of her matric certificate to her application and, in failing to do so, she did not satisfy all the requirements in terms of the advertised post. The onus was on her to attach the certificate. She cited the decision in *Aries v CCMA* (2006) 27 ILJ 2324 to argue that there are limited grounds on which an arbitrator may interfere with the discretion which had been exercised by a party competent to exercise that discretion. Only if a discretion had not been properly exercised would interference be warranted. She contends further that there is a successful candidate in the post for which the applicant had applied and this candidate was not joined. It is trite that this candidate should have been joined and Ms Makobe cited the decision in *Du Preez and Another v Truth and Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A) and *Traub and Others v Administrator, Transvaal* 1989 (1) SA 397 (W) wherein the LAC found that joining the successful appointees was not solely dependent upon the question of relief. The relief sought by Marshall-Simons was outside the commissioner's powers. Finally, she referred to the decision in *Apollo Tyres South Africa (Pty) v CCMA and Others*⁴ (2013 34 ILJ 1120 (LAC) where it was held that an employee alleging an unfair labour practice relating to promotion need not prove that he has a right to promotion.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

- 5.1 Section 191(5)(a)(iv) of the Act provides for the arbitration of a dispute wherein an employee alleges that an employer's conduct was unfair to the extent that it amounted to an unfair labour practice. This is the allegation which served before these proceedings. The GPSSBC thus has the requisite jurisdiction to arbitrate this dispute.
- 5.2 It is necessary to point out that whilst I considered all the evidence led and arguments presented, I shall, for the purposes of this award, focus only on the evidence and arguments which I found to be relevant in relation to the determination of the issues in dispute.
- 5.3 Section 186(2) of the Act states that an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-
- (a) *unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.*
 - (b) *the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.*
 - (c) *a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and*
 - (d) *an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of an employee having made a protected disclosure defined in that Act.*
- 5.4 What appears in the paragraph above is, therefore, what has come to be statutorily proscribed as impermissible employer actions. It seems to me that Bargaining Councils and the CCMA do not have a general unfairness jurisdiction. An employee who alleges an unfair labour practice must prove that his or her claim falls within this section of the Act.

- 5.5 The factual matrix is not complex. Marshall-Simons applied for the post of Deputy Director in the employer's Western Cape office seemingly four times. This is a function of the fact that, after the post was initially advertised, it was re-advertised a further three times. Marshall-Simon's contention is that, in each of these applications, she did not include a copy of her matric certificate. She included a copy of her degree qualification, as well as several other qualifications obtained at various institutions of learning including Harvard, which I presume to be the celebrated Ivy League college in the United States of America. If I am wrong in the presumption, it is immaterial.
- 5.6 Marshall-Simon's further undisputed evidence is that she was shortlisted at the time of the initial advertisement, and again when the post was re-advertised for the first time. When the post was re-advertised for the second time, it appears from her uncontested evidence that no shortlist was done as there was a complaint against the advertisement. In any event, she did not testify that there was a shortlist at this time. The post was re-advertised for the third time and this time she heard only through the grapevine that there was a shortlist. When she inquired, she was told that she had not been shortlisted as a technical issue was identified in that she had not attached her matric certificate to her application.
- 5.7 Ngwenya was brief in her testimony. She is guided by policy and works according to the instructions contained in the advertisement. A matric certificate was one of the minimum requirements for the post and Marshall-Simons had not complied with this requirement, hence the disqualification of her application. She could not comment on Marshall-Simons' previous applications wherein she claimed she had not attached her matric certificate but was shortlisted as she was not privy to the details of those advertisements. Each application was dealt with on its merits, so her testimony went
- 5.8 It is necessary at this point to single out two anomalies regarding the subject matter of these arbitration proceedings. The first is that, while the dispute was referred as a promotion dispute (the employee party ticked the promotion block in section 3 of the dispute referral form) and was captured as such by the GPSSBC's Case Management Officer, the dispute has nothing to do with promotion. On Marshall-Simons' own version, this would have been a lateral transfer into an equivalent position. If anything, in section 5 of the referral form, specifically subsection 5.2, the employee party summarised the facts of the dispute as follows:

"The employer failed to short list the member while she qualified for the position"

It is, therefore, plain to see that the dispute concerns more a grievance over a step in the recruitment, selection and appointment process than a promotion. This fact will become of importance later in this award.

- 5.9 The second anomaly is that, even though the employee party did not make out a case of unfairness relating to a refusal to transfer Marshall-Simons, it nevertheless seeks a transfer as relief. Although the employee party does not use the word "transfer" in referring to relief, the relief sought boils down to a transfer by virtue of the fact that it seeks that Marshall-Simons be appointed into a position in a province other than the province where she is stationed. Again, this fact will assume significance later in the award.
- 5.10 In a nutshell, this matter deals with the exercise of a managerial discretion. Ms Makobe does well to cite the authorities in this regard in her argument. The employer took a decision to disqualify Marshall-Simons' application on the basis that she had not included her matric certificate in her application. As a result, she never made it to the shortlist. The central question is whether the employer's conduct in the exercise of its discretion was fair. I think not.

- 5.11 Marshall-Simons' evidence, which was not disputed to any significant degree, is that she applied seven times without attaching a copy of her matric certificate to the applications and she was shortlisted six times. This appears to be in reference to applications from the first time she went to work at the respondent up to the application at the center of this dispute. The arithmetic does not quite add up given the fact that I have already found that, in relation to the last advertisement, she was shortlisted twice out of four applications. However, the incorrect arithmetic is of no consequence.
- 5.12 What is of consequence is this. If the employer's contention that Marshall-Simons' application was disqualified on the basis that she had not attached her matric certificate is accepted, then a question that cries out for an answer is on what basis was she shortlisted on the two occasions that she was shortlisted for the position. In my view, the employer sits on the horns of a dilemma. It seems to me that it could be said that the two times that Marshall-Simons was shortlisted, she must have attached her matric certificate. However, this cannot be because Marshall-Simons' unscathed version is that she did not attach her matric certificate. It was certainly not the employer's evidence that Marshall-Simons had attached her matric certificate on the two occasions she was shortlisted for the post. In my view, there is a very strong probability that Marshall-Simons had not attached her matric certificate when she was shortlisted on the two occasions. That being so, it does not stand to reason that the non-attachment of the certificate could serve as a reasonable basis for disqualifying her last application.
- 5.13 I am not persuaded by Ngwenya's evidence at all. Her assertion that she could not comment on Marshall-Simons' previous seven applications as she was not privy to the instructions contained in those advertisements rings hollow for two reasons. The first is that this assertion flies in the face of her own version that, in her role as Director of Human Resource Management she was responsible for, among others, recruitment and selection. Accordingly, I hold that she would have been privy to the details of those advertisements and applications. Secondly, even if it can be accepted that she perhaps deals with a flood of applications, it seems to me that it would have been very easy for her to make herself privy at least to the instructions of the two advertisements where Marshall-Simons was shortlisted, as I have found, without having attached her matric certificate to her applications. It is fair to assume that Ngwenya could reasonably have done this at the time Marshall-Simons lodged an internal grievance and, who knows, perhaps these arbitration proceedings could have been obviated by an internal solution.
- 5.14 I found Ngwenya's demeanor to be blasé and nonchalant in the face of what has been so plainly a capricious exercise of managerial discretion. In my view, her attempt to justify the employer's decision on the basis of the instructions of the advertisement and policy must fail. There is nothing in the instructions of the advertisement that sets out a matric certificate as the minimum requirement for the post as she testified. I find this to be a mere assumption from someone who reputedly eschews assumptions. If her assumption is to be accepted, I find that it would be equally fair to accept Marshall-Simons' assumption that she would not have been admitted to further and or higher studies without a matric certificate or that she would not have been employed as a Senior Communications Officer all of those seventeen years ago. Of course, both assumptions are wrong but I do not wish to digress. As regards policy, the two clauses (9.2.2 and 9.2.6) of the employer's Recruitment and Selection Policy I was referred to equally do not assist the employer's case. In fact, clause 9.2.2 is irrelevant for purposes of the dispute at hand. Clause 9.2.6 makes reference to advertisements. I have already made a finding regarding the advertisement and will not repeat it. It is plain to see from the reasons given by the employer to justify its decision not to shortlist Marshall-Simons that the exercise of its discretion was arbitrary and very questionable.

5.15 In *Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani and Others* (2002) 23 ILJ 761 (LC) at paras 29-30 stated this principle as follows:

'There is considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process.

So too in *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) the Industrial Court held that an employer has a prerogative or wide discretion as to whom he or she will promote or transfer to another position. Courts should be careful not to intervene too readily in disputes regarding promotion and should regard this an area where managerial prerogatives should be respected unless bad faith or improper motive such as discrimination are present.'

5.16 In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) the Constitutional Court, in dealing with the challenge of discretions in general, decided that a discretion would be open to successful challenge if the discretion was not judicially exercised and, in particular:

"...had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles".

5.17 In *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1120 (LAC), the Court applied these general principles applicable to the challenge of the exercise of discretion on the basis of being unfair as follows:

"...unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended".

5.18 The employer's conduct, in addition to being arbitrary and capricious, has also been blatantly inconsistent. It makes no sense to accept two applications made without a matric certificate and then disqualify a final application on the basis that there was no matric certificate. The employer opened itself to a challenge of the exercise of its discretion and, given the totality of evidence, it is my view that the challenge should succeed.

5.19 I now revert to the two anomalies I mentioned earlier in this award. Ms Makobe argued that it is trite that the successful candidate should be joined in a promotion dispute as such candidate may be adversely affected by the proceedings. This is, of course, an accurate reflection of the law. However, I have made the point that this was not a promotion dispute per se and it is certainly not the employee party's case that Marshall-Simons was a more suitable candidate than the successful candidate. This case can, therefore, be distinguished from the authorities requiring joinder of the successful candidate on that basis alone. The successful candidate is not in any danger of being upstaged and I find that there was, as such, no necessity to join him or her to the dispute.

5.20 The second anomaly relates to the relief sought by the employee party. Again, Ms Makobe correctly argues that such a relief would be outside the scope of my powers. Whilst it is clear from the authorities that interference with the discretion of the employer is warranted under certain circumstances, I find that such interference can never extend to usurping the role of the employer in the employment relationship. In any event, I have already found that the employee party has not made out a case concerning a refusal to transfer. Of course, there is no provision for unfair conduct concerning a transfer in the unfair labour practice as defined. Such a "dispute" would,

consequently, fall outside the ambit of the Act, even though there is still latitude to arbitrate such a dispute provided that its impact translates into an unfair labour practice as defined. I do not wish to digress and will leave this issue at this point. Suffice to state that I cannot accede to the employee party's relief as that would be *ultra vires*. In fact, the relief sought also flies very close to a *mandamus*. Even though I am not permitted gratuitous remarks in writing an award, I am inclined in that direction more by the evidence of Marshall-Simons. The reasons she wishes to be transferred to the Western Cape are both cogent and urgent. It would thus be easy to label the employer's conduct morally reprehensible in the light of that evidence. However, what is morally reprehensible has nothing to do with the inquiry into the fairness of an employer's conduct. The unfairness is established with reference to the cold facts of the case. This I believe I have done. However, the central issue is that I am not bound to follow the relief sought as I am constrained in that regard by the provisions of statute.

5.21 Section 193(4) of the Act provides the following as regards relief:

"An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation".

5.22 Section 194 of the Act, which deals with limits to compensation, provides as follows, in subsection (4) thereof:

"The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 month's remuneration"

5.23 I have no hesitation coming to the conclusion that the employee is entitled to compensation. I find that an award of compensation offers the most reasonable terms upon which the dispute may be determined given the particular circumstances of this case. In my view, compensation equivalent to two (2) months of Marshall-Simons' monthly remuneration at the date of the unfair labour practice is just and equitable in all the circumstances for the following reasons. Firstly, Marshall-Simons satisfied the requirements to be shortlisted and even wrote and passed a test. Secondly, the employer's conduct is made even more gross by the fact that its reasons for not shortlisting Marshall-Simons are without any basis whatsoever. Thirdly, there has been no argument that Marshall-Simons was, in any event, not suitable for the post. In the circumstances, she has been deprived of an opportunity to compete fairly for the post by nothing more than the arbitrary, capricious and inconsistent conduct of the employer.

5.24 Finally, I calculate the compensation due to Marshall-Simons on the basis of the remuneration she earned at the date of the unfair labour practice. This is as follows:

5.24.1 R53 987.68 per month x 2 months = R107 975.36

5.25 In the main, I find that the employer committed the unfair labour practice as alleged.

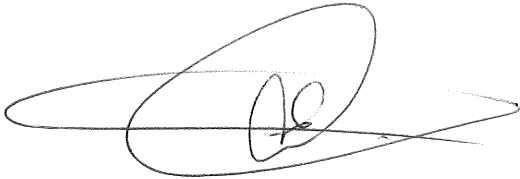
6. AWARD

6.1 The employer, Department of Government Communication and Information System, committed an unfair labour practice against the employee, Gaynor C. Marshall-Simons.

6.2 I order the employer, Department of Government Communication and Information System, to pay the employee, Gaynor C. Marshall-Simons, compensation in the amount of R107 975.36 by no later than 16 October 2020. This amount of compensation is subject to statutory deductions and any other deductions which the employer is by law obliged to make.

6.3 The compensation awarded in paragraph 6.2 above earns interest at the prescribed rate of interest immediately after the date it becomes due and payable.

6.4 I make no order as to costs.

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a cursive 'W' and 'A', enclosed within a large, loopy oval shape.

Panelist: KATLHOLO WABILE
Sector: PUBLIC SECTOR