



GENERAL PUBLIC SERVICE  
SECTOR BARGAINING COUNCIL



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Panellist/s:  
Case No.:  
Date of Award:

Caroline Hlongwane  
GPBC2342/2016  
14 December 2022

**In the ARBITRATION between:**

PSA obo Emmanuel Jeats Tshidiso  
Morolo

(Applicant)

and

Department of Justice & Constitutional Development

First Respondent

Hendrick Maseko

Second Respondent

Malose J Seko

Third Respondent

**Arbitration Award**

**Details of hearing and representation:**

1. This is an arbitration award in terms of section 138(7) of the Labour Relations Act 66 of 1995 ("the LRA"), as amended. The applicant, Mr Emmanuel Jeats Tshidiso Morolo referred an unfair labour practice dispute related to promotion in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995 ("LRA") to the General Public Service Sector Bargaining Council ("the Council") on 10 January 2017.
2. The dispute was scheduled for arbitration before me on the following dates: 09 September 2022, 17 and 18 November 2022. Unfortunately, it did not proceed 09 September 2022 because the parties submitted that it had a long history and that it was a part heard matter which was started by Commissioner Dimo. While they did not mind starting the hearing afresh, they wanted the joined respondents to be part of the proceedings.

3. I then wrote an outcome report which was sent to the Council outlining what happened and I was advised that Commissioner Dimo was no longer working for the Council therefore, the matter was started afresh. Due to the lapsed period, the respondent submitted that one of the key witnesses passed away and the only available witness was already on retirement.
4. The applicant was part of the proceedings and was represented by Mr Joel Ntwampe, PSA union official. Whilst, the respondent was represented by Advocate Nthabiseng Thokoane, instructed by the State Attorney, Johannesburg. The two joined respondents were not part of the proceedings, to avoid further delays, the matter continued as scheduled and it was placed on record that the first respondent must share the arbitration award with them.
5. The applicant's evidence was presented in Sepedi and interpreted to English by Mr Daniel Machitela and the hearing was digitally recorded; the recordings were sent to the parties and the Council. The parties also submitted bundle of documents respectively marked as the applicant's bundle and respondent's bundle. The agreement was that both parties would submit their written closing of arguments by 29 November 2022 and both parties duly complied.

**Issue to be decided:**

6. I am required to determine whether the respondent committed an unfair labour practice related to promotion when it did not shortlist the applicant.
7. If I find in favour of the applicant, he sought retrospective promotion with back pay.

**Background to the matter:**

8. The applicant is employed by the respondent as the Principal Messenger at salary level 4, he has been working for the respondent since 01 August 2000. On 30 March 2016, the respondent advertised a position of Administration Clerk: with reference number: 2016/73/GP which the applicant had applied but he was not shortlisted. This dispute turns on the applicant's non-shortlisting.

**Survey of evidence and argument:**

**Applicant's case**

9. The applicant only relied on his own evidence, and he testified under oath that he is currently employed as a Principal Messenger and his duties includes taking documents from the Public Prosecutor's office, record them on the book and take them to the DPP. He also goes to the post office to post ordinary post and fast mail. He also frank, that is, he uses a franking machine, he put a letter on it, and it stamps the letter and after that, he balance the calculations.
10. He has 22 years of service. His case is about an unfair labour practice related to promotion, there was a post advertised which he qualified, and he applied. He was surprised when the respondent did not shortlist him. The requirements of the post were grade 12 or equivalent qualification and no previous experience. He has a matric senior certificate.
11. Under skills and competencies, he stated that for computer literacy he has a certificate in introduction to PCs and Windows. He also has a certificate in MS Excel XP introduction and intermediate as well as the certificate in Public Sector Applied Computer Literacy and Office Management (PACLOM). He has computer skills and uses computer daily.
12. For good communication skills (verbal and written), he stated that he has good communication skills and has a certificate of attendance on Clerks of the Family Court. He also has a certificate of attendance for Frontline Staff Training. The purpose of the course was to train officials to work with people, assist him or her and transfer him/her to the relevant office and a good employee.
13. In respect of problem solving, he did a course in service excellence course. The purpose of the course was that if one is working with the public, one must put themselves in the shoes of the public and the public must leave the department happy.
14. Regarding good interpersonal relations, he stated that because he has worked with the public for more than 20 years and he knows how the public is.
15. He stated that he does not have a problem with the duties listed on the advertisement because he is performing them. If the respondent can place on maintenance he can work there, although he has never worked there before. Dealing with correspondence, he can take correspondence from one office to another. Maintaining records is like statistics, what was done for that month from 01 to 30/31.
16. His main job function is being a principal messenger, drive and write down what comes in and out since 2000 to 2015. He believes that he qualified for the job, and he has experience. He works with documents and if one works with documents, he/she needs to write, read, and understand. He used to work at Section 29 at Small Claims Court, and he has a certificate of attendance for Small Claims Court Clerks training. He was trained to work at the Small Claims Court but did not get a chance to work there. He also worked as an interpreter and

spoke different languages. He also has a certificate of attendance for Equality Court course for clerks. This means that if there was a position vacant; he would qualify to work at the Equality Court.

17. Mr Maseko was the successful candidate, and he knows Mr Maseko because he was a security in the office but now, he is a clerk. According to Mr Maseko's CV under work experience, he stated that he worked at Multiserve and the Department of Justice and Constitutional Development; no further qualifications were listed. According to his CV, Mr Maseko does not have previous experience and did not qualify.
18. The advertisement was for one post, and he was surprised when they appointed two people, according to his knowledge only the national office can change from one post to two posts.
19. The panel does have the powers to change the criteria, even the policy does not allow it.
20. He has experience and if they had shortlisted him, he would have proven himself because he has worked for the department for a very long time. He was not given a chance to prove what kind of candidate he is; hence he lodged a grievance.
21. During cross-examination, he stated that since he has been appointed in August 2000, he has been a messenger/driver. He has never resigned from his employment and came back to another position. He confirmed that as part of his duties, he records what he receives and what he delivers. He disagreed that his normal duties are not administrative duties. He confirmed that he has never been given a chance to do administrative duties although he was trained. He, however, disputed that he does not have the experience.
22. When it was put to him that there will be a witness who would testify that he was given opportunities to do administrative work or clerk duties, but he refused; he stated that the version would be incorrect. He disputed that he was given an opportunity to do administrative clerk and he refused because if he did, he would have been charged for misconduct. He also disputed that he misled the respondent by stating that his job function was also administrative clerk.
23. If he was given a chance to attend interviews, he would have been the highest scoring candidate. He insisted that he has experience and that he was just not given an opportunity to do the job. When he was referred to his qualifications, he stated that the requirements said, 'no experience'.
24. He further stated that the second respondent was also a messenger and disputed that the second respondent was doing clerical job because according to him there was no time to do clerical job. He disputed that he did not give evidence on how he handles routine work done at the office. He confirmed that he worked or maintained messenger records.

25. When he was referred to the recruitment policy, clause which stated that the first respondent could appoint another person from the candidates who applied for the advertised post as long as it is within six months; he disagreed with the clause and stated that the post was for one person, but the respondent decided to appoint two people.
26. He insisted that he has good communication skills (verbal and written).
27. During re-examination, he stated that he is of the view that Mr Maseko, the second respondent was not even supposed to be shortlisted.

### **Respondent's case**

28. Advocate Thokoane on behalf of the respondent called one witness, that is, Mr Brian Andrews to support the respondent's case.
29. Mr Andrews testified under oath that he has retired from the first respondent and went to pension on 31 March 2020. Before retirement, he was the Human Resources Manager in the office of Magistrate: Pretoria and he was responsible for drafting the advertisement and submitting it to the Regional Office for placing. He also served on the recruiting panel specifically for the position in question, and they received a total number of 531 applications.
30. The qualifications were grade 12 or equivalent qualifications and previous experience would be an advantage and all the 531 applicants met the requirements. The panel took a decision that they would place additional requirements, one was locality of the applicant and also to improve the competent officials currently on lower levels serving on the establishment. The intention was to uplift officials and improve the advancement in the department.
31. After the advertisement had been placed, a second position became vacant and in terms of the HR policies of the department, the respondent is entitled to appoint a candidate based on the same advertisement. The applicant at that stage had met the requirements of the post but he had no previous administrative work experience. He has known the applicant since July/August 2000 when he was appointed as a messenger/driver.
32. He stated that the applicant performed only the duties of messenger/driver. During the 2010 world cup, the Court Manager, Mr Ndzulwana (now deceased) and him on numerous occasions tried to have a discussion with the applicant enticing him to avail himself for other functions and he bluntly refused and told them that he

would not do those functions. This was despite them explaining to him that it was for his advantage for in case administration positions became available. He would become abrupt and rude telling them that they would not tell him what to do; he accused them that they were corrupt and became aggressive. He does not know why the applicant would act that way, but he came to the conclusion that the applicant considered himself to be a law unto himself because he did not take any instructions from his seniors.

33. He confirmed that the applicant attended several courses presented by the Department of Justice and even computer courses. However, it serves no purpose in doing these courses but refusing to perform the duties related to the courses in order to gain practical experience.
34. In respect of the two successful candidates, he stated that Mr Maseko was a security officer after the death of the then senior security, he has been appointed to manage in-house security personnel which comprised of about thirteen (13) individuals. He was also responsible for the outsourced security component, managing that section; he was also responsible for their performance, leave, overtime payments and other related HR issues. This was post 2010 world cup.
35. The other candidate, Mr Seko was also appointed as a messenger/driver and out of his own accord, he volunteered his services to the office of the clerk of the criminal court where he first performed his duties at archives. He also assisted in asset verification in the office as well as in the Clerk of the Small Claims Court office. He was responsible for the collection and delivering of documents to the offices of DPP, NDPP Magistrates Commission, Head office, and Regional office and responsible for transporting personnel to and from meetings, events, etc. He used to perform the administrative duties after he has performed his normal duties.
36. Personally, he does not believe that the applicant would have met the standard if he had been appointed but because he is not the only member of the panel, and he does not know how other panel members would have viewed it. This is because the applicant does not have previous experience in terms of administration.
37. He disputed that he uttered the words that the applicant would never be shortlisted or appointed as long as he was working at the Magistrate's Court. He stated that the applicant was shortlisted before for an administration position he has previously applied, and he was a member of the panel, this was around 2013/2014. When he was asked about the kind of a relationship he had with the applicant, he stated that he had a difficult working relationship with the applicant.
38. He stated that the shortlisting is done by a panel consisting of three individuals where the Court Manager is the Chairperson; it is never an individual decision. The applications are scrutinised after the sifting process; it is a collective decision, and the process is overseen by an Human Resources official from the relevant Regional office (Provincial Office); there is nothing the panel can do to manipulate the process.

39. During cross-examination, when he was asked whether people were appointed because the panel knew them on a personal level, he stated that naturally, there are certain individuals they know because they work for the department. However, once the criterion for shortlisting is set, whether he knows the individual or not, if they meet the requirements, they are sifted. He admitted that the successful candidates were known to him, but they were not appointed because he knew them.
40. He stated that Mr Maseko was shortlisted because he had the relevant administrative experience. He disagreed that Mr Maseko was not supposed to be shortlisted because he knew him. He confirmed that the applicant was also on the lower level, and he is also local but disputed that Mr Maseko was not supposed to be shortlisted because he knows that he had the experience.
41. He further stated that during the shortlisting process, they needed to uplift the staff on the lower level and knowing the candidate became helpful. He confirmed that the panel disregarded the policy and added requirements because there was no way, they could interview 531 applicants. He agreed that the advert and the requirements on page 29 of the respondent's bundle are not similar.
42. He disagreed that using the information not supplied in the CV was an irregularity and stated that once the panel decided to add additional criteria, the information not supplied in the CV became relevant. He disputed that the applicant approached him to do extra work and he refused to allow him. He further disputed that he disliked the applicant.
43. During re-examination, he stated that even after discarding the applications that did not meet the requirements; depending on the number of applications, the panel would have still added a criterion. What distinguished the applicant, and the two successful candidates is the experience in the administrative clerk duties.

#### **Analysis of evidence and argument:**

44. Section 138(7) of the LRA provides that the commissioner must issue an award with brief reasons. It is therefore not my intention to provide a detailed record of all the submissions that was placed before me. Even though all submissions were considered, I have only referred to the salient points that I found to be the most pertinent to deciding this matter. However, it should not be construed that I overlooked some of the submissions as I have considered all the submissions as well as the closing arguments submitted by both parties.
45. Section 185 of the LRA states that every employee has the right not to be subjected to unfair labour practice. Section 186(2) of the LRA goes further to explain what conduct by the employer constitutes as an unfair

labour practice. The applicant referred an unfair labour practice dispute as envisaged in Section 186(2) (a) of the LRA. I am therefore required to determine whether the respondent's conduct in not shortlisting the applicant, amounted to unfair labour practice. The applicant bears the onus to prove the unfair conduct complained of on a balance of probabilities.

46. It is common cause that the applicant applied for a position of Administration Clerk: Magistrate Pretoria. It is also common cause that the applicant was not shortlisted. It is further common cause that the advertisement outlined the required requirements as follows:

- Grade 12 or equivalent qualification
- No previous experience

47. The applicant's qualification was listed in his CV, and he also attached all the certificates acquired as annexures to his application. The panel added requirements when sifting the applications because they allegedly received 531 applications and all the applicants met the requirements. According to the internal Memo dated 29 July 2016, paragraph 3.4, the requirements were:

- Grade 12 or equivalent qualification.
- Previous experience will serve as an advantage

48. Paragraph 3.6 refers to panel criteria which were:

- Improvement of competent officials currently on lower levels serving on this establishment, and
- Locality

49. In the present case, the applicant challenged substantive fairness on the basis that he met the requirements as per the advertisement and met the requirements as per the panel criteria. The applicant's case is that the second respondent did not have clerical certificate and that he did not mention that he had administration experience in his CV, yet he was shortlisted, interviewed, and appointed. The first respondent on the other hand, submitted that the applicant was excluded from the short-listing process based on rational grounds, e.g., he did not have administration experience. Therefore, the applicant's dispute falls squarely within the ambit of section 186(2) (a) of the LRA – promotion.

50. The first respondent submitted that the decision not to shortlist and promote the applicant was not based on arbitrary conduct, which constituted an unfair labour practice towards the applicant. They further submitted that even if the applicant was shortlisted, he would not have been appointed on the basis that he did not have administration experience.



51. According to the first respondent's recruitment policy, clause 4.4.2, shortlisting shall only be done on the basis of information provided in application form and CV of the candidates. In considering the applicant's and the second respondent's CV, both the applicant and the second respondent met the requirements in terms of qualification and no previous experience. However, the applicant's CV further listed that he has administration experience, while the second respondent's CV did not mention any administration experience. The first respondent's only witness testified that the second respondent has administration experience although he did not mention it on his CV and the panel relied on the personal knowledge, they had to shortlist him. The second respondent was not called as a witness to explain by himself the administration experience, he had at the time when he applied. Had he attended the hearing even on his capacity as the second respondent, it would have been helpful as he would have clarified this dispute of fact.
52. While it became clear during the hearing that although the applicant mentioned that he had administration experience, he had no experience at all but only qualifications; I find that the panel's decision to rely on their personal knowledge about a candidate's experience and not the information contained in the CV when it came to the second respondent to be unfair and that they did not comply with clause 3.4 of the recruitment policy as mentioned above. Had the panel focused only on the information contained on the candidates' CVs after the added criterion, there is a high possibility that the applicant would have been shortlisted and not the second respondent. I am therefore of the view that the first respondent's explanation for overlooking the applicant in the short-listing process to be unsatisfactory.
53. In the case of *Noonan v Safety and Security Sectoral Bargaining Council & Others* (2012) 33 ILJ 2597 (LAC) the court held that there is no right to promotion, but only a right to be given a fair opportunity to compete for a post. Any conduct that denies an employee an opportunity to compete for a post constitutes an unfair labour practice. The only justification, otherwise, for scrutinizing the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason. As long as the decision can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint.
54. In consideration of the above case law, I am of the view that the first respondent's decision not to give the applicant an opportunity to compete while he met the requirements constituted an unfair

labour practice. However, it does not end there, the court in **Swarts v National Commissioner South African Police Services and others (D 915/13) 2015 ZALCD 7** (handed down on 20 January 2015) the Court held that when considering an unfair labour practice dispute concerning promotion is not enough for the candidate to meet the minimum requirements required for the job. The question is whether the candidate meets the inherent requirements of the post.

55. In **Sun International Management (Pty) Ltd v CCMA and others (JR 939/14) [2016] ZALCJHB 433**

(handed down on 18 November 2016) it was held that a finding that a failure to promote was unfair must be a rational one i.e. it must be supported by facts. It is a determination that can only be made after a holistic assessment of evidence relating to the Employee's qualifications and/or suitability for the position in question, against that of other candidates. The Court held that in promotion disputes it is not enough to merely show that there is a breach of protocol or procedures in the recruitment process. It is also necessary for an Employee to show that the breach of the procedure had unfairly prejudiced him. This means that the Employee must not merely show that he was the suitable candidate for consideration, but that he was the best candidate.

56. Furthermore, in **Buffalo City Public FET College v CCMA and others (P 372/12) [2016] ZALCPE 18**

(handed down on 4 November 2016) the court held that in unfair labour practice disputes, such as those relating to promotions, the *onus* is on the Employee to prove that he/she is a suitable and better candidate for the position in question. In the present case, the applicant testified that had he been given an opportunity to be interviewed, he would have attained the highest score, I found this evidence to be very bold and speculative since the applicant did not know the capabilities of the other candidates. Moreover, as already indicated above that during the hearing it became clear that although the applicant mentioned that he had administration experience, he had no administrative experience at all but only qualifications or certificates and he did not seem to understand what the administration job entailed, I based this observation on the answers given by the applicant when he was asked if he understood the duties of an administrator during cross-examination. For these reasons, I find that the applicant failed to discharge the onus that he was a suitable and better candidate; however, this does not take away the fact that the first respondent's decision not to shortlist him was unfair.

57. For the reasons stated above, and in view of the above judgments, I find that the decision of the first respondent to exclude the applicant in the short-listing process was unfair. I further find that the applicant discharged his onus to prove on a balance of probabilities that the respondent has subjected him to an unfair labour practice related to non-shortlisting.

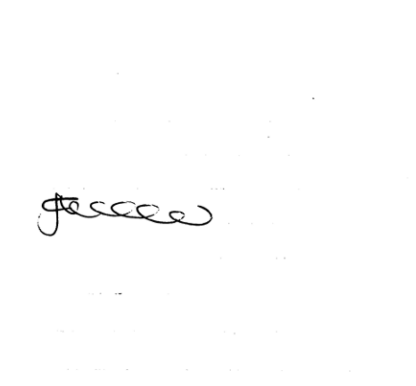
## Relief

58. Section 193(4) of the Labour Relations Act determines that an arbitrator appointed to determine an unfair labour practice dispute may order reinstatement, re-employment or compensation on terms that the arbitrator deems reasonable. The decision must be that of a reasonable decision-maker and the type of relief granted will depend on the facts of each case that is brought before the commissioner.
59. In the present case, the applicant sought retrospective promotion with backpay should I find in his favour. Although I am of the view that the applicant was subjected to an unfair labour practice because he was not shortlisted, based on the evidence that he failed to demonstrate that he would have been appointed if he had been shortlisted, I deem it appropriate to award the applicant the difference of the amount between his salary (salary 4) and the contested position at salary level 5 in 2016 (that is the year the post was advertised) at six months.
60. The contested position was at salary level 5, which was R142 461.00 per annum / 12 = R11 871.75 as per the internal memo less the applicant's salary at level 4, that is, R110 739.00 per annum / 12 = R9 228.25 calculated as follows:
- (a)  $R11\,871.75 - R9\,228.25 = R2\,643.50 \times 6 (\text{number of months}) = R15\,861.00$

**Award:**

I therefore make the following award:

61. The first respondent, Department of Justice & Constitutional Development has committed an unfair labour practice in terms of section 186(2) of the Labour Relations Act 66 of 1995 by not short listing the applicant, Emmanuel Jeats Tshidiso Morolo.
62. The first respondent, Department of Justice & Constitutional Development is ordered to pay the applicant, Emmanuel Jeats Tshidiso Morolo an amount of R15 861.00 (Fifteen Thousand Eight Hundred and Sixty-One Rand) as compensation by no later than 31 January 2023.



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**Name: Caroline Hlongwane**  
**(Council name) Arbitrator**