

ARBITRATION AWARD

Panellist: INGRID DIMO
Case No.: GPBC118/2019
Date of Award: 27 SEPTEMBER 2019

In the ARBITRATION between:

PSA OBO E STEENBERG

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

Respondent

Applicant's representative: Ms Yolanda Rolawe – Trade Union Official
Union/Applicant's address: Public Servants Association (PSA)

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Respondent's representative: Mr David Thabo Chiloane – Employee
Respondent's address: Department of Correctional Services

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DETAILS OF HEARING AND REPRESENTATION

1. This is an arbitration award in the alleged unfair labour practice dispute relating to promotion in terms of section 186 (2) (a) of the Labour Relations Act 66 of 1995 (as amended) ("LRA"). Proceedings were conducted at the GPSSBC offices in Centurion on 2 August 2019.
2. The arbitration award in this matter was delayed due to the non-availability of the arbitrator, circumstances which were communicated to the Council. It is the arbitrator's wish to further extend the apology to both parties for the delays caused in this regard.
3. At the proceedings of this matter, the Applicant, Mr Ettienne Lawrence Steenberg, was present and represented by his trade union official, Ms Yolanda Rolawe. The Respondent was also present and represented by Mr David Thabo Chiloane, its employee.
4. The parties' submitted bundle of documents annexed A for the Applicant, comprising of 104 pages. The Respondent submitted bundle of documents annexed B comprising of 136 pages. There were no objections raised by parties on the bundle of documentation submitted on record.
5. Every step in the arbitration process and obligations of parties at each stage of the proceedings were explained to parties.
6. Interpretation services were not utilized by the Applicant as the Applicant opted to testify in English.
7. The Applicant testified in his own case. The Respondent called one witness to testify.
8. The proceedings were conducted in English and were digitally recorded, recordings of which were submitted to the Council's administration at the completion of the proceedings.

PRELIMINARY ISSUES

9. There were no preliminary issues raised by parties.

ISSUE TO BE DECIDED

10. I have to decide whether the Respondent committed an unfair act or omission involving unfair conduct relating to the promotion of the Applicant as contemplated in section 186 (2) (a) of the LRA. In the event that I find in the affirmative, I have to determine the appropriate relief the Applicant would be entitled to.

BACKGROUND TO THE DISPUTE

11. The Applicant was appointed as a Probationary Warden under stipulations of Act 8 of 1959 on 4 December 1978. At the time of instituting this action, the Applicant was remunerated at salary notch R592 947.00. The Applicant retired from his employment on 30 June 2019. It was common cause that the Applicant acted in the capacity of Deputy Director Area Coordinator during his service with the Respondent. It was further common cause that the Applicant was acting in this capacity at the time of his retirement from his employment with the Respondent and had applied for the position of Deputy Director Area Coordinator: Corrections (NCS 4), Modderbee ref: GP 2018/08/04 advertised on salary level R719 493 all inclusive package.
12. According to the Applicant he was appointed permanently and trained at an approved training college in terms of Act 8 of 1959. The Applicant averred that he never received a certificate of competency from the training college. After he applied for the position of Deputy Director Area Coordinator: Corrections, he was never shortlisted nor called to an interview while he met all the criteria and expertise for the position. Despite not being shortlisted, the Applicant continued to act in that capacity. In 2018, the position was again re-advertised for the third time. He was rejected three times due to his failure to submit a basic certificate as a prerequisite for the position. The Applicant stated that he acted in that capacity of Area Coordinator: Corrections since 2016 until his retirement in June 2019 and was never compensated for his acting capacity nor given a letter confirming his acting capacity. He seeks a relief of compensation and acting allowance for period 1 December 2018 until 30 June 2019.
13. On the other hand, the Respondent contends that acting in a position is not an entitlement. The Applicant did not meet all the set requirements for the advertised position due to his failure to attach proof of successful completion of correctional services learnership or basic

training, hence he was not considered for the position. The Respondent does not owe the Applicant any monies for his acting capacity. The Respondent sought as a remedy, that the matter be dismissed.

SURVEY OF EVIDENCE AND ARGUMENTS

14. All witnesses gave evidence under oath. This is a summary of their evidence as it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The Applicant testified in his own case. The Respondent led evidence of Mr Christiaan Rudolf de Bruin. Their respective evidence may be summarized as follows:

APPLICANT'S CASE

15. **Mr Ettienne Lawrence Steenberg** testified that at the time of his appointment as a Probationary Warden on 4 December 1978 he was subjected to basic training at a recognised training college. He explained his career path and promotional movement within the Department in line with Act 8 of 1959 per pages 29 to 34 of the Applicant's bundle. He stated that military ranks were utilized during the period of 1978 until 1996 when he was appointed as an Assistance Director. He stated that, amongst others, the person's performance, time in the position, PAS and qualifications were utilized to consider a person for promotional purposes. To become a Lieutenant, a certain criteria was utilized i.e. Diploma and a Degree.
16. He stated that on or before the closing date of 7 September 2018, he applied for the advertised position of Deputy Director Area Coordinator: Corrections, a position in which he had acted since 2009 see page 20 of the Applicant's bundle. He waited for the shortlisting to be done and was informed by a colleague who then requested his job description and informed him that he must enquire about the shortlisting process. He stated that he had the necessary knowledge, skills, training and competencies for the position and was qualified to be considered for promotion. He submitted that he acted in the capacity for a long period and fairness needed to have been applied in the shortlisting process. He also submitted that after he was not considered, he followed the internal Departmental procedure to determine the reasons for not being considered see page 12 -15 of the Applicant's bundle. He stated that he felt overlooked.

17. He stated that on 22 November 2018 he received a formal memorandum for the Chairperson of the Selection Panel per page 21 of the Applicant's bundle stating that "*.....Based on the advertisement one of the requirement was Correctional Learnership or Basic Training and the selection panel could not find your attached basic certificate....*". On 23 January 2019 he received feedback to his formal grievance signed by Mr T S Magagula, see page 18 – 19 of the Applicant's bundle.
18. He stated that when he was first appointed as a Departmental official, he was required to attend a recognised basis training college to acquire skills required for a Warden. This training was attended in 1979 and a certificate was not issued upon completion of the training. He stated that he was considered for promotional positions in different capacities given his acquisition of the training. The advertisement was misleading in that it did not state that the position was in line with the amended Act nor that learnership and basic training was a requirement for consideration, reference made to pages 92 – 104 of the Applicant's bundle.
19. The Applicant stated that he was considered for acting capacity as Deputy Director Area Coordinator: Corrections because of his skills, qualifications, expertise and referred to pages 38 – 51 of the Applicant's bundle. During this time, he oversaw a component comprising of staff compliment up to 64 employees as the manager of the component. He regards himself as a specialist in the field and believes that the Department could not have considered him for acting capacity unless he met the necessary criteria and skills for the position. The Applicant disputed that the Department followed its own corporate services policy in filling the vacant position and referred to pages 52 – 72 of the Applicant's bundle. He stated that he met the selection criteria per page 60 of the Applicant's bundle.
20. He retired from his employment because it was clear that he will never be considered for promotion. See pages 79 – 81 of the Applicant's bundle. He also stated that at the time when he retired, the position was still vacant. The Applicant stated that he was treated unfairly since he was never afforded fair or deprived the opportunity to compete for the vacant position with other candidates. His curriculum vitae outlined all his qualifications, including basic training attended, positions held, experience where he functioned and schools attended per pages 83 – 86.

21. Under **cross examination**, the Applicant stated that while promotion was not automatic he expected to be considered after he had applied for the position. He applied for the position as he met the minimum requirements and was qualified for the position per page 13 – 25 of the Respondent's bundle. He stated that the position was going to be a promotion since it paid in excess of R150 000.00 to what he was earning.
22. When asked whether he attached his basic training certificate to his application, the Applicant stated that he did not receive the certificate upon completion of training which he attended for six months and referred to pages 23 – 25 of the Respondent's bundle comprising of qualifications attached to his application and stated that the bundle is incomplete since two of his degrees attained were not attached in the bundle. He stated that the current training is offered by SASSETA and they were never subjected to such training as it is a learnership, however, he completed the training.
23. A question was posed to the Applicant on whether he had attached proof of completion of training to which he responded that he did not as all progress reports are filed on PERSAL file (G154), which he stated that he attempted to get access to without any success. He stated that he was familiar with the workplace representivity on equity status report contained in page 42 of the Respondent's bundle but was not conversant with the document.
24. He stated that he was not paid his acting allowance and after he raised the issue with the Area Commissioner an argument ensued.
25. Under **reexamination** the Applicant stated that the qualification's progress report is attached at the Departmental records for personal use by the Department and he did not have access to such record. He stated that he was unaware of the criteria used to shortlist candidates who had applied for the position.

RESPONDENT'S CASE

26. **Mr Christiaan Rudolf de Bruin** testified that he was employed as a Regional Coordinator – HRM in Gauteng Regional Office for 15 years. He was responsible for all Human Resources related matters in the Gauteng region that included placements, appointments and salaries etc. He stated that the process for filling the positions was determined through PERSAL advertisement where requirements are determined; position is then advertised on external

newspapers followed by a gross listing process the compilation of the panel for short listing and interview processes. He stated that the shortlisting is done in line with the OSD requirements where memorandum is submitted for approval. Following the shortlisting process, interviews will then be conducted for qualifying candidates and then verification exercise is conducted for criminal checks etc., and referred to page 35 of the Respondent's bundle.

27. He stated that the criteria used for filing the position of Deputy Director Area Coordinator: Corrections was in line with the advertisement and referred to item 2.6 of page 37 of the Respondent's bundle. He stated that the Applicant's application for the position was not accompanied by the corrections science learnership or basic training certificate required per job advertisement on page 12 of the Respondent's bundle and the Applicant would not have qualified for the position because he never attached his basic training certificate or learnership.
28. He stated that there was no proof attached to the Applicant's application for the position on pages 13 – 25 of the Respondent's bundle that the Applicant had completed the basic training or learnership. He further stated that in the olden days no certificates were issued to candidates upon completion of training, however, progress report were placed in the employees' SP file (personal file) and can be accessed on request.
29. He stated that for the person to be considered for acting there must be a vacant position and the Deputy Commissioner will appoint the person for a period of three months subject to extension being granted. He stated that when a person is correctly appointed, he normally receives acting allowance. He stated that he never received any query regarding non-payment of acting allowance from the Applicant and that payment is approved by the direct Supervisor for Corporate Services.
30. Under **cross examination** he stated that he was responsible for the gross listing of all the applications received for applicants for the position per pages 26 to 33 of the Respondent's bundle. The comments in the document consisting of gross listed candidates represent the reasons for shortlisting and that the person was shortlisted for the position. He stated that the Applicant was marked (✓) under number 69 of the gross listing and if he complied with the requirements he was supposed to have been shortlisted but the Applicant did not meet the requirements.

31. He stated that all candidates were females. He stated that the position does not make mention of equity requirements in every position that was advertised. It was put to him that the position did not target equity candidates and the Applicant was not afforded the opportunity to compete for the position after he was shortlisted to which he responded that the copy of the advertisement in the bundle was incomplete reference made to page 92 of the Applicant's bundle. He stated that the advertisement in the bundle was missing the full cover page placed in the newspaper which stipulated all the criteria to be met by the job applicants.
32. He stated that the Applicant was not shortlisted because he did not meet the equity criteria and he did not attach proof of his basic training to his application, but later stated that the correspondence to the Applicant on page 21 does not state reasons for non-consideration as relating to equity status. He stated that the Applicant was supposed to attach progress report of his completion of correctional service learnership or basic training he attended. The Applicant's application was incomplete hence he was never shortlisted for the position. He stated that the memorandum required that all candidates must comply with the criteria and those who did not comply were excluded.
33. He stated that item 2.6 of page 37 of the Respondent's bundle does not make reference to submission of a detailed report but successful completion of correctional service learnership of basic training. He stated that the Applicant complied with the basic requirements of the job hence he was appointed to act in the capacity as a Deputy Director Area Coordinator: Corrections. He stated that acting does not guarantee appointment.
34. Under **reexamination** he stated that a mark (✓) symbolized that a person is shortlisted for the position. He stated that equity is only mentioned in selected positions that were advertised.

Closing arguments

35. Both parties argued their respective cases and have submitted comprehensive closing arguments which I have taken into consideration in arriving at my decision. The submissions will not be repeated here, as the contents basically mirror what was put to parties during their

opening statements, leading of evidence and cross-examination in the arbitration hearing itself.

ANALYSIS OF EVIDENCE AND ARGUMENTS

36. I have considered all evidence presented by parties, however, because section 138 (7) of the LRA requires brief reasons, I have only referred the evidence that I regard as necessary to substantiate my findings and the determination of the dispute.
37. The Labour Relations Act 66 of 1995 as amended (LRA) under Section 186 (2) (a) defines unfair labour practice as meaning “any unfair act or omission that arises between an employer and an employee involving an unfair conduct by the employer relating to the promotion, demotion, probation.....”
38. The obligation in terms of section 186(2) of the LRA is to act fairly towards the employee in the selection and promotion process but taking into account that it is the prerogative of the employer to make appointments (see *Justice v CCMA & others* (2004) 25 ILJ 248 (LAC)). The exercise of that prerogative is nonetheless not immune from scrutiny, as instances of gross unreasonableness in its exercise may lead to drawing of inferences of bad faith. To that end, it is trite that central to disputes pertaining to appointments or promotion of employees is the principle that that courts and commissioners alike should be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in making such decisions (See *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC); *De Nysschen v General Public Service Sectoral Bargaining Council & Others* [2007] 5 BLLR 461 (LC). Any form of interference should be with the objective of dispensing fairness to both parties.
39. The onus to establish that conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA rests on the employee, see *City of Cape Town v SA Municipal Workers Union obo Sylvester and Others* (2013) 34 ILJ 1156 (LC). The employee must therefore be able to lay the evidentiary foundation for his or her claim of an unfair labour practice. Mere dissatisfaction with the outcome of a recruitment or selection process is not sufficient to sustain that claim. In order to succeed with claim related to promotions or failure to appoint, an employee must *inter alia*, demonstrate that as against the successful candidate:

- i. the/she met all inherent requirements of the position;
- ii. he/she was the best candidate for the position;
- iii. that not being promoted caused unfair prejudice to him/her;
- iv. and that there is a causal connection between the unfairness complained of and the prejudice suffered.

40. In *City of Cape Town v SA Municipal Workers Union obo Sylvester and Others supra* it was also emphasized that the overall test is one of fairness, and that in deciding whether or not the employer had acted unfairly in failing or refusing to promote the employee, relevant factors to consider include whether the failure or refusal to promote was motivated by unacceptable, irrelevant or invidious considerations on the part of the employer; or whether the employer's decision was motivated by bad faith, was arbitrary, capricious, unfair or discriminatory; whether there were insubstantial reasons for the employer's decision not to promote; whether the employer's decision not to promote was based upon a wrong principle or was taken in a biased manner; whether the employer failed to apply its mind to the promotion of the employee; or whether the employer failed to comply with applicable procedural requirements related to promotions. The list is not exhaustive.
41. The unfair conduct the Applicant alleges relates to unfair promotion in that he was not shortlisted to compete for a post of Deputy Director Area Coordinator: Corrections (NCS 4), Modderbee ref: GP 2018/08/04 advertised on salary level R719 493 all inclusive package.
42. The Applicant also claims benefits associated with the acting capacity in the said position for period 1 December 2018 until 30 June 2019.
43. It is common cause that the position was advertised, the Applicant applied and the selection process was instituted.

44. It is common cause that the candidates were shortlisted other than the Applicant.
45. It is common cause that the Applicant met the requirements of the screening process save for his omission to attach his successful completion of the correctional service basis training certificate to his application. The Applicant was then shortlisted out of the process based on a criterion that was established by the selection panel that candidates to be considered are those with, amongst others, successful completion of the correctional service basis training certificate to his application.
46. In the matter on hand, it is common cause that the Applicant was appointed to act in the said position for a protracted period.
47. While I note and accept that Mr Steenberg is highly qualified and experienced and was not granted a fair chance to compete for the post, there is insufficient evidence on record to hold that, but for the Department's unfair conduct, he would have been promoted. More so since he himself has accepted that acting in the position does not necessarily guarantee one to be appointed.
48. There is also no evidence on record about the merits or otherwise of the other candidates who applied for the post. All there is a gross list comprising the candidates who had applied and those who were shortlisted to proceed to the next stage of the recruitment process. In the end, as I have already alluded to above, it is the employer's prerogative to appoint lies its employees, for as long as the employer comply with the basic tenets of fairness, which is, adhere to the minimum requirements of the post, and, where appropriate, grant suitable candidates a fair opportunity to compete for the post.
49. The Applicant's failure to attach his basic training certificate to his application is the make or break of his case. The attachment of same was set as a minimum requirement for consideration for the position by the Respondent's selection panel. The Applicant argued that he had attained the said basic training certificate and had indicated such in his curriculum vitae but such was not attached to the resume and application which was a

requirement in terms of the advertisement. The Respondent's only witness, Mr De Bruin conceded under examination in chief that the issuance of certificates was never done upon completion of training in the olden days.

50. According to Mr De Bruin, the Applicant was supposed to obtain a detailed progress report from the Department, which if it were attached in his application, would have made the Applicant eligible for shortlisting and or to proceed to the next stages of the recruitment process. What I find difficult to understand is how did the Respondent notified the job Applicants of the requirement to attach a detailed progress report obtained from the training college and to attach same to their job applications in the absence of the relevant basic training certificate or a learnership. This I say because it would seem that this critical information only came to light at the current proceedings under the auspices of the GPSSBC. Perusal of the record submitted as per the Respondent's bundle under gross listing further does not state that the gross listed candidates had in fact attached to their resume attainment of the basic training certificate or learnership.
51. The Applicant has argued further that since there is a mark allocated next to his number on the gross listing report, that implied that he was supposed to have been shortlisted to compete for the position. The explanation proffered by Mr De Bruin on the markings in respect of candidates who had been gross listed is somewhat evasive and to this end, I will not accept it as reasonable. With this in mind, I am of the view that the other candidates who had similar markings were in the Applicant's same league when consideration was made on the elements of comparison with the job applicants in line with selection process developed by the selection panel and in the very least, the Applicant ought to have been shortlisted to compete with other prospective candidates for the position.
52. While I note Mr De Bruin's testimony regarding the equity measures that were considered in filling the position, it is important that I must mention that the affirmative action measures only apply when both candidates are suitably qualified for the post in question and because the job advertisement on record is silent on the notation of equity requirement to be applied when the position in question was publicized, I am inclined to reject the Respondent's argument.

53. On the question of acting capacity in the role of Deputy Director Area Coordinator: Corrections by the Applicant for period 1 December 2018 until 30 June 2019, I am satisfied that the Applicant has demonstrated that he had acted. This contention has also not been challenged by the Respondent that the Applicant acted for a protracted period and that following his non consideration for the position currently in dispute, he was still acting.
54. The documents on record further points to the fact that the Applicant's acting capacity was at all material times approved by the relevant official of the Department and where applicable, extended, and the period of acting per document in the Applicant's bundle indicates that the acting letters were only issued to him until 30 November 2018 and such were no longer forthcoming from the Respondent's side. It would therefore be disingenuous of me not consider this aspect, on the balance of probabilities, in favour of the Applicant.
55. In the premises, I find that the Applicant has demonstrated that the Respondent committed an unfair labour practice and that he is entitled to the relief sought.
56. The Respondent is ordered to compensate the Applicant to the maximum of six months his remuneration as at the date of his retirement calculated as follows: $R592\,947.00 \div 2 = R296\,473.50$ (Two hundred and ninety six thousand four hundred and seventy three rand and fifty cent).
57. Addition to the above, the Respondent is ordered to pay the Applicant his acting allowance calculated in line with the Respondent's acting policy for the period 1 December 2018 until 30 June 2019.

AWARD

58. I find that the Respondent, **the Department of Correctional Services**, has committed unfair labour practice against the Applicant, **Mr Etienne Lawrence Steenberg**.
59. The Respondent is ordered to compensate the Applicant R296 473.50 (Two hundred and ninety six thousand four hundred and seventy three rand and fifty cent) less any statutory deductions.

60. Addition to the above, the Respondent is ordered to pay the Applicant his acting allowance calculated in line with the Respondent's acting policy for the period 1 December 2018 until 30 June 2019.
61. The amounts mentioned in items 59 and 60 above must be paid directly to the Applicant's banking account already known to the Respondent by no later than 15 October 2019.

Thus signed and dated at Johannesburg on this 27th day of September 2019.

A handwritten signature in black ink, appearing to be 'IDIMO', with a large, stylized initial 'D'.

PANELLIST: INGRID DIMO
SECTOR: GPSSBC