



Council Name

# ARBITRATION AWARD

Panellist/s: Seretse Masete  
Case No.: GPBC1284 /2019

Date of Award: 03/10/2019

In the ARBITRATION between:

**PSA obo ELMARIE VENTER**

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(Union / Applicant)

and

**DEPARTMENT OF E-GOVERNMENT**

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(Respondent)

**Union/Applicant's representative:** Genevieve Simelane  
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**Respondent's representative:** Elroy Tenteni  
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### **Particulars of proceedings and representation**

1. The matter was held on 03 October 2019 at the GPSSBC Lyttelton offices based in Centurion Pretoria in Gauteng Province at 9h00.
2. The Applicant, **Elmarie Venter (employee)** was represented by Genevieve Simelane from PSA and the respondent, **E-Government (employer)**, was represented by Elroy Tenteni, the employer's Labour relations officer.
3. The proceedings were in English and digitally recorded.

### **Issues to be decided**

4. I have to decide whether or not the employer by not having shortlisted the employee for the position of a director committed an unfair labour practice.
5. I further have to determine an appropriate remedy should I find that the employee was unfairly treated by the employer during the shortlisting process.

### **Background to the dispute**

6. The **employee** was employed by the employer on 25 January 1988 and was in the subsequent years promoted to a position of a deputy director. She was earning R59 448-36 per month at the time of the dispute.
7. The employer advertised a post of a director in June 2018 which she applied but was not shortlisted.
8. She challenged the procedure used by the employer to shortlist the candidates and believed that she was unfairly left out. She wanted the employer to compensate her.
9. The employer rejected the employee's version citing that she did not meet the minimum requirement at the time of the advertisement of the post. She also did not attach the qualifications mentioned in her CV and further misrepresented herself.
10. The employee testified as a witness and the employer called one witness, Benjamin Ngidi (Ngidi). Parties submitted one joined bundle of documents.

## Survey of evidence and arguments

### The Employee's version

The employee, Elmarie Venter, testified under oath as follows:

11. The employer advertised a post in June 2018 with the minimum requirements of Matric, NQF level 7 qualification and five years' experience, in the main, as seen on page A1 of the bundle. She applied and was not shortlisted. The employer failed to follow its own policy of providing equal employment opportunity for all as seen on page R7 of the bundle. The employer also failed to make sure that the elimination of candidates must be done in a justifiable manner as indicated on its policy on paragraph 4.2 of page R15 of the bundle. The employer further failed to comply with the resolution taken in a meeting with the HoD where it was resolved that officials within the branches should be shortlisted based on their experience and not qualifications. The minutes are found on page D7 of the bundle.
12. She further argued that she could not access her Diploma certificate because the employer failed to pay for her fees regardless of the fact that she was given a bursary by the same employer. She mentioned in her CV that she has a Diploma at NQF level 8 and a certificate at NQF level 7. She, nevertheless, admitted that the NQF level 7 certificate was not recognised by the South African Qualification authority. She completed her Diploma with Milpark Education in August 2018 as seen on page C4 in the bundle. She however conceded that she did not attach proof of qualifications when submitting her application.
13. **The employee challenged the consistent application of the shortlisting criteria by the employer.** The minimum requirement for the said post was Matric, NQF level 7, five years' experience etc. Some employees like Ms **Kagisano Sefurutsi** and Ms **Puleng Namane** as seen on pages E2, E3, F2 and F3 of the bundle were shortlisted without having attached matric certificates. She felt she could have been treated the same way with them by being shortlisted and be allowed to produce the proof of qualification thereafter, like during the interviews. This did not happen to her but to the two employees above.
14. She acknowledged that she did not attach qualifications in her application, she acknowledged that her NQF level 7 certificate was not recognised and further acknowledged that the resolution by the HoD was against the standing prescripts of the DPSA.

## **The employer's version**

### **The employer's witness, Benjamin Ngidi, testified under oath as follows:**

15. He is the Chief director overseeing amongst others, HRM matters. He knew the employee but she was not reporting under his chief directorate. When conducting the recruitment processes, HR do the administrative work, compile a schedule of the sifting results and submit to the panel which does the shortlisting. There are different stages used during the shortlisting. The certificate of the employee on page B1 is not a qualification. The employee mentioned in her CV that she had completed a NQF level 8 diploma and a NQF level 7 certificate which was not true. At the time of the advert, the employee did not have a NQF levels 7 & 8. She did not attach them in her application. She actually misrepresented herself by indicating that she had relevant qualifications when she did not have.
16. Regarding paragraph (VII) on page D7 of the bundle, the resolution taken in a meeting with the HoD that candidates could be shortlisted even if they did not meet the minimum qualification requirement is a breach of the DPSA prescripts. He did not know of any employee who was employed in terms of paragraph (VII) on page D7 of the bundle. It was put to him that the employee engaged with the management verbally and electronically, he did not agree. The criteria for shortlisting are embedded in the minimum requirement of the advert. It was put to him that the employee lodged a grievance and the response did not mention any misrepresentation. He said the letter of response was not signed by the HoD. It was further put to him that the document on page G4 was signed by the HoD and it was linked to the response letter on page G5. He said, that was during the first level of the processes.
17. The employer closed by arguing that the employee did not attach any proof of certificates mentioned in her CV. The bursary could not be used as an excuse for her misrepresentation. It was her responsibility to make sure that she attached relevant documents in her application. Had she attached the letter of completion as seen on page C3 of the bundle, she could have been short listed. There was no evidence that some people were employed without meeting the minimum qualification requirement. The employee admitted that the NQF level 7 certificate was not a qualification. He further said it was acceptable to apply without attaching a matric certificate as long as it would be submitted later. No Diploma can be obtained without having a

matric. The two candidates mentioned above, were allowed to go through because they attached tertiary certificates. The employee failed to put a case before the commissioner.

### **Analysis of the evidence and arguments**

18. **Section 138(7)(a)** of the **Act** requires me to issue an award with “brief reasons”. I therefore will only concentrate on the summary of the evidence relevant to my findings.
19. In ***Buffallo City Public Fet College v CCMA and Others (P372/12) [2016] ZALCPE 18***, it was held that in unfair labour practice disputes, particularly those relating to promotion, the onus is on the employee to prove that he / she is a suitable and better candidate for the position in question.
20. In ***City of Capetown v SA Municipal workers Union on behalf of Sylvester & Others (2013) 34 ILJ 1156 (LC); {2013} 3 BLLR267 (LC)***, it was held that in deciding whether the employer acted fairly in failing or refusing to promote the employee it is relevant to consider:
  - a) Whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious consideration on the part of the employer; or
  - b) Whether the employer’s decision was arbitrary, or capricious, or unfair; or
  - c) Whether the employer failed to apply its mind to the promotion of the employees; or
  - d) Whether the employer’s decision not to promote was motivated by bad faith;
  - e) Whether the employer’s decision not to promote was discriminatory;
  - f) Whether there was insubstantial reason by the employer not to promote;
  - g) Whether the employer’s decision not promote was based upon a wrong principle;
  - h) Whether the employer’s decision not to promote was taken in a biased manner.
21. The employer advertised a post of a senior manager in June 2018 and the employee applied but was not shortlisted. The requirements of the post were in the main, matric certificate, NQF level 7 qualification and five years’ experience. The employee attached NQF level 7 certificate, **see page B1** of the bundle, which from her own confession was not recognised by the South African Qualification Authority. She further mentioned in her CV that she completed a **NQF level 8** Diploma with Milpark Education. She, from her own confession, did not attach that **NQF level 8** Diploma to her application. She however believed that the employer should have shortlisted her and tell her to bring a proof of her qualifications during the interview.
22. The employee did not meet the minimum requirements of the post. She also on her own confirmed that she did not attach the NQF level 8 certificate which she mentioned in the CV. She further confirmed that the NQF level 7 certificate which she attached to her application was not

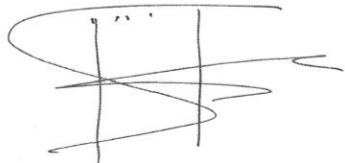
recognised by the South African Qualification Authority. The refusal by the employer to promote the employee was not caused by unacceptable consideration. The employer's decision was not motivated by bad faith and it was not arbitrary. The reasons by the employer not to promote was based on the employee's failure to attach the certificates which she mentioned in her CV. The employer's decision was therefore not based on insubstantial reasons and its action was not discriminatory and or biased. I agree with the employer that the employee did not meet the minimum requirements as it was indicated on the advert at the time of the shortlisting processes which the employee did not necessarily deny.

23. The employee further **challenged the consistent application** of the shortlisting rule and or criteria. Two candidates, **Kagisano Sefurutsi and Ms Puleng Namane**, did not attach matric certificates to their application but they were shortlisted. The employer argued that one cannot obtain a tertiary Diploma and or degree without having obtained matric qualification. The employer further argued that it was allowed to shortlist a candidate who did not attach matric certificate to his/her application because he/she would produce it during the interviews.
24. The issue of consistency is dealt with in **Paragraph 7 of the Code of good practice, Schedule 8 of the Act (the code)**. Although this paragraph deals with guidelines in cases of dismissal for misconduct, consistency is not only limited to misconduct cases, it may also be applied in cases of unfair labour practice. Generally speaking, it would be unfair to treat people who have committed similar acts differently, or treat them by a different standard than the standard that was applied to others who have committed the same act. If there are requirement for an advert, every employee who applies for that post should satisfy those requirements. The employer used its rule selectively and there was no evidence led to proof that candidates who did not attach matric certificates could be shortlisted **but** those who did not attach Diploma and or degree. No policy was produced to this effect. The employer further argued that the employee misrepresented herself, which I agree, but that does not mean candidates should be treated differently. The two candidates were also not supposed to have been shortlisted and if the employee misrepresented herself, she should have been dealt with accordingly. I therefore agree with the employee on this point of inconsistency, the other two candidates were given a preferential treatment.
25. **S194(4) of the Act** provides that; 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 months' remuneration. I therefore find it just and equitable that the employer should pay compensation equivalent to three months' salary as a relief to the employee. In awarding this compensation, I considered that the employee was still employed

at the time of the hearing. I further considered that the reason for the employee not to be shortlisted was because she did not meet the minimum requirements and not that the employer was at wrong. The employee was not totally innocent, I am awarding this compensation only on the bases that the employer used its standard / criteria / rule **selectively** in favour of the other two candidates, **Kagisano Sefurutsi and Ms Puleng Namane**.

### **Award**

26. The employee, **Elmarie Venter** was unfairly treated by the employer, **E-Government**, in as far as consistent application of the shortlisting rule/standard/criteria was concerned.
27. The employer is ordered to pay the employee an amount of **R178,345-08** which is equivalent to three months' salary.
28. The money must be paid to the employee on or before the **15<sup>th</sup> of December 2019**.
29. I do not have any reason to make an order on cost.



Seretse Masete

Date 13/10/2019

**GPSSBC Panellist**