

ARBITRATION AWARD

PANELLIST/S : FUZILE MALOYI
CASE NO : GPBC 2303 / 2017
DATE OF AWARD : 3 OCTOBER 2019

In the ARBITRATION between:

PSA obo M.F. MUNYAI

Union / Applicant)

and: **DEPARTMENT OF HOME AFFAIRS**

(Respondent)

Union/Applicant's Representative Hendry Halli

Union/Applicant's Address: PSA

Telephone:

Telefax:

Respondent's Representative: Dieketseng Maloka

Respondent's Address: Department of Home affairs

Telefax:

**IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL
HELD IN CENTURION**

CASE NO : GPBC 2303 / 2017

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In the matter between:

PSA obo M.F. MUNYAI

Applicant

and:

DEPARTMENT OF HOME AFFAIRS

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND PRESENTATION

1. This matter came before at the offices of the respondent at OR TAMBO INTERNATIONAL AIRPORT.
2. Appearing before me was the Applicant and his representative from the PSA Mr. Hendry Hall.
3. The Respondent was represented by Ms. Dieketseng Maloka from the respondents Labour Relations Division.
4. Parties have agreed that this matter will be argued in writing. As per agreement I have received both parties written arguments.

ISSUE TO BE DECIDED

5. The Applicant referred a dispute to the GPSSBC in terms of Section 186(2) (a) of the Labour Relations Act No. 66 of 1995 (“the LRA”), as amended. Therefore I am required to determine whether the applicants exclusion from a short list compiled by the respondent amounts to an unfair Labour Practice as contemplated in the provision of section 186(2)(a) of the Labour Relations Act, No 66 of 1995 (as amended) (“ the LRA”).

BACKGROUND

6. It is submitted that the applicant applied for a advertised position of Assistant Director at the Department of Home Affairs at OR TAMBO INTERNATIONAL AIRPORT in 2017 Ref no: HRCM 19/17/1.
7. That the advertisement under section “REPRESENTATION” read: ***“Diversity is promoted. Female / Male African, Coloured, Indian and White candidates and People with Disabilities are encouraged to apply”***

EVIDENCE AND ARGUMENTS

The Applicant’s Submissions

8. It is further submitted that the applicant met all the requirements of the position and it is confirmed in the letter dated 3 October 2017 received from the Deputy Director People Acquisition.
9. As a result the applicant then submitted a grievance on 3 October 2017. The respondent on the same date acted on the grievance and respondent in writing to the applicant.
10. The respondent indicates in the letter to the applicant as follows: “In line with the role functions, experience and knowledge as set out in the advertisement, you do in fact

meet there requirements however, the selection panel placed emphasis on the Equity representation at Assistant Director level at this Port of Entry. Currently the office has eight (8) Assistant Directors of which seven (7) are African Males and one (1) is a white female.”

11. However it is submitted one need to consider the stipulation of the advertisement.

That read Diversity is promoted. Female / Male African. That if the respondent had no intention of shortlisting or considering the exclusion of black males for the advertised position, then why was the position advertise as such.

12. Further the manner in which the advertisement was written clearly showed that a black male would be considered regardless of the equity figures. That the exclusion of the applicant prevented him from fairly competing for the position that he qualified for.

13. Subsequent to the above this matter was referred to council as an unfair labour practice dispute. That at conciliation parties failed to reach an amicable solution and thus the matter was referred for arbitration.

14. The arbitration fist sitting was in December 2018 where the respondent requested a postponement in order to obtain a mandate to settle the matter. This mandate never came forward despite several request made by the applicant. The applicant then approached the council to sit the matter down for arbitration.

15. On 26 June 2019 the respondent attended the arbitration again and agreed that it would be a stated case with the necessary arguments. The responded on 15 July 2019 already emailed the draft stated case document and applicant submitted theirs on the 26 July 2019.

16. The applicant therefore requests the arbitrator to consider the arguments of unfair treatment by the respondent and make an award in favour of the applicant. The applicant was seriously compromised when he was excluded from the short-listing candidate in order to compete for this position that he duly qualifies for.

EVIDENCE AND ARGUMENTS

The Respondent's Submissions

17. The respondent submitted that the applicant lodged a grievance and the Department responded to the applicants grievance stating that the shortlisting was based on employment equity targets whereby currently employment equity demographics are reflecting that 08 (eight) of 07 (seven) assistant director positions at the designated workplace are Black African males and only one is a white female, thus females of all races, Indian, Coloured and white males were shortlisted for the interviews.
18. That according to the advert the wording diversity is promoted and that female / male African, coloured, Indian and white candidates and people with disability are encouraged to apply. That this is a standard statement regardless of the post being advertised, and aimed to enhance inclusivity at recruitment phase.
19. Further that it must be noted that the statement in the advert was crafted to reach all the citizens of the Republic of South Africa as the right to apply and to be considered in entrenchment in the Constitution of the Republic, in order to promote the issues of efficiency and effectiveness.
20. That the principle of the PSR, 2012, Part 11, which was underpinned by the Constitutional mandate to enhance inclusivity and fair treatment towards all the applicants was also considered.
21. Further the respondent submitted, according to the Departments employment equity targets. The respondents had shortlisted the position in question with a view to address the imbalances at the ORTIA: The law sets out four grounds on which discrimination is generally allowed and one of the grounds for fair discrimination is

Discrimination based on affirmative action, hence non shortlisting of the applicant.

22. The respondent further pray that the Commissioner rule on the following:

- That the relief sought is legally impossible
- That the applicant's application should be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

23. The respondent in their arguments submitted that the wording is a standard statement regardless of the post being advertised, and aimed to enhance inclusivity at recruitment phase. That further that it must be noted that the statement in the advert was crafted to reach all the citizens of the Republic of South Africa as the right to apply and to be considered in entrenchment in the Constitution of the Republic, in order to promote the issues of efficiency and effectiveness.
24. My take in this matter is not employment equity act, but the **wording** on the advertisement. My understanding is that all advertisement should be clear and direct as to whom they intended for.
25. I guess this sloppy work caused by the HR Officer and it is now affecting the department. I think the correct thing to do is to call the HR Officer in order and be told this kind of poor workmanship will not be tolerated by the department. That each advertisement should be directed to the persons it is targeting / inviting not generally invited everyone.
26. Because the reason the respondent is arguing employment equity, it is trying to cover up for the sloppy workmanship by those responsible for drafting adverts and so on.

Therefore I am of the view the inclusion of black African males in the advert does create some expectation in any Black African Male and in this matter, the applicant.

27. Further the applicant that alleges he is a victim of unfair labour practice and bears the onus to prove the claim on balance of probabilities. The employee must not only prove existence of the disputed labour practice, but also that it is unfair.
28. The applicant further submits that the Labour law jurisprudence requires of employers to act in a manner that is procedurally and substantively fair. Respondent in *casu* may have conducted itself in a procedurally fair manner because that has not been put into question in specific terms however sufficient and compelling argument has been raised to demonstrate that Respondent is not able to substantively justify its actions.
29. It is further submitted that the applicant was seriously compromised when he was excluded from the shortlisting process and was therefore robbed of the opportunity to compete for this position.
30. The applicant further submits that the respondent must appoint the applicant in a concomitant position of Assistant Director with effect of the 1 November 2019, because that is the same date that the position was filled by the successful candidate.
31. Further that the respondent must pay the applicant the amount of R 346 395.00 (R 28866.25 X 12) as compensation for failure to act fairly in the administrative procedure of filling the position.
32. Further the bargaining council / CCMA have on occasion declared that when an employer exercise its managerial prerogative in coming to a decision on who gets appointed, such employer has to be in a position to provide reasons for its decision. Further, the council will assess the reasons given by the employer to ensure that there

is a logical connection between the real reasons given and the decision taken during the recruitment and selection process.

33. Therefore I am of the view that the respondent has stringed the applicant along or raised the applicant's legitimate expectation through it being not clear on its advertisement. The words "Diversity is promoted. Female / Male African, Coloured, Indian and white candidates and people with disabilities are encouraged to apply" means just that and any applicant or potential candidate would assume that the advert it talking to him / her.
34. However in general our courts do not award substantial amount for non-patrimonial loss. Minister of Justice & Constitutional Development & another v Tshishonga [2009] 9 BLLR 862 (LAC) par 18 – 21 the Labour Appeal Court endorsed the principle that has been enforced by the civil courts for many years that compensation non patrimonial loss must be conservative. The LAC in this same case referred with approval to the fact that in Mogale and Others v Seima 2008(5) SA 637 (SCA) for serious defamation the Supreme Court of Appeal on appeal reduced an award of R70 000 to R 12 000.00.
35. In KwaDukuza Municipality v SALGBC KwaDukuza Municipality v SALGBC [2008] 11 BLLR 1057 (LC) where there was serious unfairness in an unfair labour practice relating to promotion, the Labour Court awarded R5000.00 as compensation; In Munsany v SSSBC and Others (D437/09) [2012] ZALCD 5 (25 May 2012) the Labour Court held that R10 000.00 for procedural unfairness in a promotion dispute, was fair compensation.
36. In SAPO Ltd v Janse Van Vuuren No & Others [2008] 8 BLLR 798 (LC) the Labour Court found that an award of compensation of more than R100 000 to be excessive

because the arbitrator failed to consider that the employee has suffered no actual financial loss. The Labour Court reduced the compensation to R 21 137, 88.

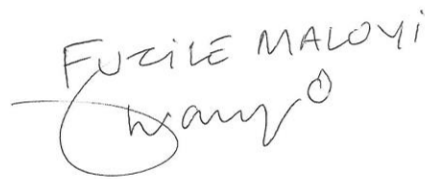
37. Now surely, the loss of applicant in this case is not nearly as severe as what a person who has been unfairly discriminated against has suffered. For example in *SAA v V* [2014] 8 BLLR 748 (LAC) the LAC reduced an amount of more than R 1000.000 awarded by the Labour Court for a unfair discrimination based on age to R 50 000.
38. Even where citizens are unlawfully arrested and detained (which is much more serious than what the applicant had suffered in this case). In the following cases the courts have awarded R 10 000 for unlawful arrest and detention: *Ndaba v Minister of Police* (48208/2012, 48209/2012 [2014] ZAGPPHC 180 (2 April 2014); *Mnyamezeli and Another v Mfiki* (57/10) [2010] ZAECMHC 25 (23 September 2010); *Minister of Police v Murray, Murray v Minister of Police* (A81/2016) [2016] ZAWCHC 152(2 November 2016).
39. In *Minister of Safety and Security v Tyulu* [2009] 4 All SA 38 (SCA) an amount of R15 000 was awarded for unlawful arrest and detention of a magistrate.
40. In *Aries v CCMA & others* (2006) 27 ILJ 2324 (LC) the Court held that “there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the

discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner”.

41. In the circumstances, and having carefully considered the arguments and submissions made, I hold the view that the respondent has failed to convince me otherwise, thus I am come to the conclusion that the respondent committed unfair labour practice as defined in Section 186 (2) (a) of the LRA, as amended.

AWARD

42. The respondent, Department of Home Affairs committed an unfair labour practice against the applicant when it excluded applicant in the recruitment process.
43. That the respondent is ordered to compensate the applicant with a (Three (3)) months salary
44. **The above compensation is calculated as follows: R 28 866. 25 X 3 = R 86 598,75**
Eighty six thousand rand five hundred and ninety eight rand and seventy five cents.
45. I make no order as to costs.

A handwritten signature in black ink, appearing to read 'Fuzile Maloyi' with a stylized flourish below it.

NAME : FUZILE MALOYI
GPSSBC (PANELLIST)
DATE : 3 October 2019