



ARBITRATION AWARD

Case Number: GATW7494-15

Commissioner: MP SHAI

Date of Award: 28/02/2017

In the ARBITRATION between

PSA obo Hadebe, M

And

SITA (Pty) Ltd

(Employer)

Employee's representative: Joel Ntwampe

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Acardia

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DETAILS OF HEARING AND REPRESENTATION

1. The matter was heard on the 8th June 2016, 17th and 18th October 2016, 22-23rd November 2016 and 9th February 2017, at 2nd Floor, CCMA Towers, 345 Pretorius Street, Pretoria.
2. Both parties were present. The employee was represented by Mr Joel Ntwampe, an official of PSA, whereas the employer was represented by Advocate Verveen. Both parties submitted closing arguments at the end of the proceedings and same were taken into account in arriving at the conclusions herein.

ISSUES TO BE DECIDED

3. I'm called upon to determine whether the employer has committed unfair Labour Practise in respect of the non-appointment and non- short listing of the employee Mr Martin Hadebe.
4. In the event I find in favour of the employee, I will determine an appropriate remedy for him.

BACKGROUND TO THE ISSUE

5. The dispute relates to alleged unfair Labour practise relating to promotion.
6. The employee is employed as a Security Consultant. The employee applied for two Senior Manager positions viz Security Policy, Governance and Compliance and Risk Management during 2013.
7. The employee was not short listed for Senior Manager (Risk Management) but was short listed and interviewed for a Senior Manager position of Security Policy, Governance and Compliance. On the 26 September 2016, the employee submitted an objection after he felt overlooked for the two positions although he thought he met the requirements.
8. After the matter remained unresolved the employee referred an unfair Labour Practise dispute to the CCMA on the 22 June 2015.
9. In his referral the employee contested two positions for which he had applied as outlined above. The one position related to the employee not being shortlisted for which he prayed for short listing and the other one where he was shortlisted but not appointed and for which he prayed for appointment to the position.
10. The employer on the other hand denied committing any unfair Labour Practise in respect of his non short listing and non-appointment.

SURVEY OF EVIDENCE FOR THE EMPLOYEE

Mr. Martin Hadebe testified under oath briefly as follows:

11. He is the employee in the matter and that he referred an alleged unfair Labour Practise dispute to the CCMA involving two Senior Manager Positions viz Security, Governance and Compliance which he felt that he should have been appointed in and secondly, Senior Manager Risk management and was of the view that he should have been shortlisted as he met all requirements for both.

12. He testified that he was not appointed to the position of the Senior Manager Security Governance and Compliance and the successful candidate was one Mrs Varma. He felt that the process followed of appointing her was unfair hence the referral.
13. He felt he was a better candidate than Mrs Varma based on his qualifications. He was of the view that Mrs Varma should not have been short listed as she was an external Candidate and secondly not a SITA Manager. According to him, the newly created positions could only be filled by employees of SITA. He based this on the provisions of a collective agreement put in place to facilitate the restructuring process of SITA. In other words, all employees which held any recognized position at SITA's old structure would through this placement collective agreement be placed into new positions in a new structure. It is on this basis he believes that external candidates could not apply for positions within SITA.
14. He further referred to placement framework and procedure for management levels D1 to D5 which provides that:
- "Classification of posts.*
- Placement is a process of appointing employees from one post in the old organisational structure to another position in the new organisational structure."*
15. With regard to the Risk Management position he testified that he could not understand why he was not shortlisted for this position. He was of the view that he was better qualified than Mr Selowa who was a successful candidate in respect of this position. Further that he did better than Selowa in competency assessment.
16. He further conceded that he had already been placed in a position in the new structure by the time he applied for the positions herein. He further conceded that in terms of page 91 of the bundle A under paragraph 9.3.8 he could have been able to apply for one position after his position of Senior Manager Security, governance and Compliance.
17. He further conceded that according to the score sheet he was the fourth highest scored and Mrs Varma was the first.
18. He further testified that the employer failed to follow procedure of interview by not properly constituting the selection and interviewing panels.

SURVEY OF EVIDENCE FOR THE EMPLOYER

Mr. Ngcezula testified briefly under oath as follows:

19. He is employed by the employer, SITA, in the position of an Employee Relations Lead Consultant. He testified that he received a complaint from Mr. Hadebe relating to his non-appointment in the Varma-position and secondly his non-shortlisting in the Selowa-position.

20. He testified that he was extremely concern about Mr Hadebe not being shortlisted for the position of Mr Selowa. His concerns were based on the fact that Mr Hadebe met all the requirement for the position which had been advertised.
21. However on further investigation he picked up two issues with Mr Hadebe's application. The first issue relates to Mr Hadebe's CV not being consistent with previous CV's which were used in applications for this positions by Mr Hadebe.
22. The major concern was the sudden management experience in which Mr Hadebe held a managerial position which had been included in his CV. The management position which had been included indicated that Mr. Hadebe held a senior position within the business or organization. This however, raised a few concerns because the work experience was gained whilst he was an employee of SITA.
23. An investigation was then lodged to enquire what exactly was the experience, as a manager obtained by Mr Hadebe. When auditors questioned Mr Hadebe about the irregularities in his CV Mr Hadebe refused to answer any question and cited his referral to the CCMA of an unfair labour Practise as the sole reason why he would not answer questions. A decision was taken by SITA to first attend to the unfair labour practise which he had been referred by Mr Hadebe to the CCMA before tackling the irregularities on the CV.
24. The second issue relating to Mr Hadebe's complaint was in terms of the placement policy which stipulated that an employee, who has been directly placed, as Mr Hadebe was placed, cannot apply for more than one position. Mr Hadebe applying for the Selowa position now meant that he had been directly placed and was applying for a second position after being unsuccessful with the Varma position.
25. During cross-examination, he conceded that Mr Hadebe had better qualification than Selowa. He further conceded that Mr Hadebe had better qualification that Mrs Varma. He however stated that Mr Hadebe did not perform very well in the interview process and explained why he was not appointed in the Varma-position. He further testified that appointing Mr Hadebe before Mrs Varma would be irregular as the highest scoring candidate would have been overlooked had Mr Hadebe been appointed.

Mr. P Kotze testified as follows:

26. Testified that he is an executive manager at the employer. He further testified that he was involved in the shortlisting for both positions which Mr Hadebe was contesting.
27. Mrs Varma's appointment was not irregular as the employer was duty-bound to have more than one candidate apply for that position. He indicated that in terms of the recruitment policy of the employer external candidates can be considered for new specialized positions. In view of this there was nothing irregular in inviting external candidates to apply for the position. He referred the commissioner to Bundle A, p136 with particular reference to paragraph 10.1.2 which deals with external recruitment. The relevant paragraph reads as follows at paragraph (e):

"The external recruitment should be used when the organization wants to enter into a new field of business and it needs to gain expertise and there is no capacity of suitable candidates internally."

28. He testified that for the Varma-position the only internal candidate was Mr Hadebe and therefore the respondent had no choice but to invite external candidates as well. This was due to the fact that the respondent had to comply with its recruitment policy with particular reference to p.137 of Bundle A, paragraph 11 (f) which reads:

"sufficient candidates should be shortlisted to ensure open competition at least five candidates may be shortlisted as a minimum particularly for positions that are not regarded as scarce skills. In case of scarce skills at least three candidates may be shortlisted."

29. He testified that there were a total of five people who ultimately contested for the position in which Mrs Varma was appointed. He further referred to the scores which had been obtained by the various candidates. It was clear from the scoring that Mrs Varma scored the highest in the interview process. Mr Hadebe, on the other hand, came fourth out of the five applicants. In his view there was nothing irregular about the appointment of Mrs Varma over Mr. Hadebe.

30. he further noted the discrepancies in the CV of Mr Hadebe. These discrepancies pertained to Mr Hadebe's qualifications and work experience. In particular the CV of Mr Hadebe indicated that he had extensive experience as a manger and his experience was gained at a different organization to SITA yet, the experience was obtained whilst he was employed by SITA: during cross-examination, Mr Kotze conceded that based on Mr Hadebe's CV and qualifications he should have been shortlisted for Mr Selowa's position, yet however, as indicated in the evidence-in-chief there were certain problems with Mr Hadebe's second application.

31. Mr Kotze was further cross-examined about the competency score for Mrs Varma. He responded to these questions by presenting copies of her competency score which reflected that she had a score of 3.8 out of 5. She was therefore competent for the position.

32. He conceded under cross examination that the employer did not comply with procedure when constituting selection and interviewing panels in so far as the senior managers who should sit in the selection and interview as well as consistency of the two panels.

Mr. Tebogo Ramalakane testified as follows:

33. He testified that he was employed within Legal Services of the respondent but however was in Human Resources at the time when Mr Hadebe lodged his complaint about an alleged unfair Labour practise relating to promotion.

34. He testified that Mr Hadebe was not considered/ shortlisted for the second position, the Selowa Position, due to the fact that there were irregularities in Mr Hadebe's CV and secondly, in that he had already applied for one position.

35. In terms of the placement policy of the respondent Mr. Hadebe could only apply for one position after being directly placed. He could therefore not apply for Mr. Selowa's position and therefore was not shortlisted for that position.
36. He further testified that Mrs Varma was the best placed individual to obtain the position for which she was appointed. This was based on her excellent interview results. He testified that it would have been a gross irregularity to have appointed Mr Hadebe when Mrs Varma did so well in the interview process.
37. He further testified that there was nothing irregular for a position within SITA to be advertised externally. He once again referred the sitting to p.136 of Bundle A which speaks to external recruitment.
38. He further testified that there were gross irregularities with Mr Hadebe's CV pointing out that Mr Hadebe could not have held a position of COO at another organization whilst being employed by the respondent.

ANALYSES OF EVIDENCE AND ARGUMENTS

39. In this matter, the employee bears the onus to prove that the employer in not short listing and not appointing him to the position of Senior Manager, Risk Management and Senior manager Security Governance and Compliance respectively committed unfair Labour practise. The employee does so on a balance of probabilities. The employer denied committing unfair Labour practise in respect of this matter.
40. Section 186(2) of the Labour Relations Act 66 of 1995 **as amended** provides that:
- "2. Unfair labour practice means any unfair act or omission that arises between an employer and employee involving-*
- a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding dispute about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits relating to an employee.*
 - b) The unfair suspension of an employee or any other unfair disciplinary action, short of dismissal.*

Risk Management position

41. This position was advertised and the employee applied for it but was not shortlisted. He lodged a grievance and when he could not get any joy he then referred a dispute to the CCMA. He testified that he was a better candidate than the appointed one, Mr Selowa by virtue of better qualifications and the outcome of an assessment, which he passed, and Selowa did not.
42. Evidence was led on paragraph 9.3.8 at page 91 of Bundle A which provides as follows:
- "a manager who is directly placed will be entitled to apply for no more than one competitive position in the structure given that the competitive placement process"*
43. During cross-examination the employee conceded that he had already been placed in a position in the new structure by the time he applied for the position in question.
44. The employee further conceded that, in terms of the above placement policy, ought to have applied for one position as he had already applied for one position and had been directly placed.

45. It is clear to me that when the above policy is applied the employee could not have been considered for the second position. To this he conceded. The employee did not allege that the said policy was unfair, just that proper procedure was not followed in not shortlisting him.

46. I do not hesitate to conclude that the employee failed to prove that the employer committed unfair Labour practise in so far as this position is concerned. He could not have been considered.

Security policy, Governance and Compliance

47. With regards to this position, the employee was shortlisted but not appointed. The employee testified that he was a better candidate than the appointed one, Mrs Varma. He gave a number of reasons for his belief viz he has better qualifications, that Varma did not pass an assessment as required and he did undertake an assessment, that Varma was precluded by the policy from being considered, and that the interviewing panel was not properly constituted, and consistent with the selection panel as required by the policy.

48. With regard to the issue of qualifications, it is clear that the employee is superior to Mrs Varma. The employee has a BSC information Science, Hons, Information Security and Master's degree (information Science), whereas Mrs Varma has a number of certificates relating to IT and Bachelor of Information Technology (Hons)

49. It appears that what made a difference was the management aspect. The employee is a Security Specialist which is classified as a manager for purposes of placement collective agreement. Further that, he testified that he was managing Director of Jessmea Business and Investment. During his testimony it came out that this experience, he received it while in the employment of the employer and received it as extramural activity or outside working hours. On the other hand Mrs Varma in her CV listed current title as Information Security Manager reporting to a CEO (Electronic Toll Collections) and that in her role amongst others she manages a Security team comprising of local and international outsourced and insourced staff. In this position she reported to a CEO of the company. In comparison it appears that Mrs Varma held a substantive senior Management position, whereas the employee held a voluntary or extramural position. In this regard I am of the view that Mrs Varma had a more superior experience in terms of management.

50. With regard to the assessment the employee testified that Mrs Varma did not undergo an assessment. However Mr Kotze produced the said assessment and she did well. This complaint in my view falls away due to the assessment results.

51. The employee further testified that Mrs Varma should have been excluded as the collective agreement did not apply to her. However, the employer led evidence that in terms of the policy the employer is not excluded from recruiting externally.

52. The employee was the only internal applicant in respect of the position under consideration. Paragraph 11(f) of page 137 bundle A says the following:

"Sufficient candidates should be shortlisted to ensure open competition. At least five candidates may be shortlisted as a minimum in particular for positions that are not regarded as scarce skills. In case of scarce

skills at least three candidates may be shortlisted." The employer argued that since the employee was the only internal candidate, the employer had to advertise externally to comply with this policy and I accept the reason.

53. Further that, the employer argued that the policy does not proscribe it to advertise externally The said policy provides as follows:

- a) "external recruitment shall be triggered where it has been established through business talent intelligence that the skills required are scarce and internally there is no suitable successors to fill the position.
- b) Only positions that are classified as scarce and critical shall be advertised externally. This may include very senior positions where no possible successors have been identified.
- c) The external recruitment should be used when the organisation wants to enter a new field of the business and it needs to gain an expertise and there is no capacity or suitable candidates internally"

54. Looking at the policy I do not see a prohibition to advertise externally to achieve certain purposes.

55. The employer further led evidence that Mrs Varma performed better at the interview and indeed has scored higher than the employee. The employee was the fourth candidate below Mrs Varma in terms of performance. The interviewing panel evaluating a candidate's performance in the interview is akin to a court observing for example the demeanour of a witness; they are therefore afforded the discretion to make such assessment. In the absence of any irrationality, gross unreasonableness or *mala fides* their assessment is usually accepted. I have no reason not to accept their assessment that Mrs Varma performed better than the employee and find no unfair labour practice.

56. The employee further testified that the procedure followed at the selection and interview processes was unfair in that the selection panel did not consist of the requisite number of senior managers above the position advertised. Secondly he complained that the selection and the interview panel were not consistent as required by the policy. Mr Kotze admitted that he was the only senior manager above the advertised position instead of two and that the selection and interviewing panel consisted of different members in violation of the employer's policy.

57. The employee is entitled to a fair procedure and by not following procedure it set out for itself, depending on the circumstances it may amount to an unfair labour practice. An unfair procedure may also lead to substantive unfairness.

58. In the case of **Ncane v. Lyster NO and Others (DA27/15) [2017] ZALAC 910** January 2017) at para 24, 25 and 25 the court said the following.

"24] *The purpose of promoting an employee is usually because the employer's organisation has a vacancy for a person to perform a particular task and candidates for promotion are employees functioning at a lower level who possibly have the qualifications, skills and ability to perform the tasks of the higher*

position. Good labour relations dictate that an employer must act fairly towards its employees. In the context of promotion, this means that an employer must abide by the law and the objective standards and criteria that it has set for promotion including eligibility for the post and ensure that an eligible employee has a fair opportunity to compete for the post.[2] It is usually said that this leg of the promotion process must be procedurally fair. But as the aim of a fair process is to achieve a fair substantive result, procedural unfairness may result in the final decision itself being substantively unfair.

[25] When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect an employer to act fairly but it also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides. See on this *Goliath v Medscheme (supra)*. [3]

[26] But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, e.g. as in this case, the candidate who scores the most points must be recommended by the panel, good labour relations requires an employer to be held to this. A failure to comply with the rules may result in substantive unfairness".

In our given case I'm of the view that there was a procedural defect as I outlined above.

AWARD

59. I find that the employer committed no unfair labour practice in so far as Senior Manager: Risk Management.
60. I find that the employer committed procedural unfair labour practice in respect of Senior Manager: Security, Governance and compliance.
61. I order the employer to compensate the employee in the amount equivalent to his three months' salary calculated at his rate at the time of the commission of the unfair labour practice.
62. The above amount shall be payable on or before 30th March 2017.
63. If the parties are not in agreement with regard to the above amount, either of the parties may on notice to the other party approach the CCMA for determination thereof.

MP SHAI
CCMA COMMISSIONER