

## Arbitration award

**Date:** 16 March 2026  
**Commissioner:** Macjon Maarman  
**Case Number:** GPBC848/ 2025



In the arbitration between

**Lazola Nada Ngwabeni**

(Applicant)

&

**Department of Basic Education (Eastern Cape)**

(1<sup>st</sup> Respondent)

**Qaphela Binta**

(2<sup>nd</sup> Respondent)

### DETAILS OF HEARING AND REPRESENTATION

1. This is an award in respect of a dispute referred by the Ms. Lazola Nada Ngwabeni (herein referred to as "the Applicant") the Department of Basic Education (Eastern Cape) (herein referred to as "the 1<sup>st</sup> Respondent") and Mr. Qaphela Binta (herein after "the 2<sup>nd</sup> Respondent").
2. The dispute was referred in terms of section 191(1) (a) of the Labour Relations Act No 08 of 1995 ("the LRA"). The applicant was present and represented by Mr. Lindile Loli, an attorney from Loli Attorneys Incorporated. The 1<sup>st</sup> Respondent was present and represented by Mr. Toto Tsheka, its Chief Education Specialist: Employee Relations. The 2<sup>nd</sup> respondent was present and represented by Mr. Mbuysile

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Mkendlana, an official from PSA. The matter concluded on 05 March 2026 at the offices of the 1<sup>st</sup> respondent in Butterworth (Eastern Cape).

3. The proceedings were manually and digitally recorded. The parties submitted bundles of documents which was accepted for what it purported to be. Parties submitted closing arguments on the agreed date.

#### **ISSUE TO BE DECIDED**

4. I am required to determine whether the 1<sup>st</sup> respondent committed an unfair labour practice relating to promotion against the applicant and if so the appropriate relief. The applicant seeks to be promoted to the advertised post retrospectively.

#### **SURVEY OF EVIDENCE AND ARGUMENTS**

5. I have considered all the evidence and arguments made, but because the LRA requires brief reasons [section 138(7) (a) of the LRA], I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and the determination of the dispute. The evidence was considered as a whole together with the closing statements of the parties.

#### **Background**

6. In this case the applicant applied and was interviewed for the post of State Accountant: District Budget Planning Amathole East with reference number DOE-SADP69/10/2024. The entry level salary on the post was R308 154, 00 per annum. The applicant alleges that the second respondent should not have been promoted to the job let alone be shortlisted as the job was at a "supervisory level" and the applicant was an intern at the time of his promotion. The respondent says that the second respondent was permitted to apply for the post. The applicant contests both procedural and substantive unfairness in her non-promotion. There were no preliminary issues in this case.

### **The applicants' case**

7. Ms. Lazola Nada Ngwabeni (herein after "the applicant") testified that she was first appointed within the respondent on 06 January 1997, has over 28 years' service with the respondent. She said that her original position is that of Senior Accounting Clerk but she is currently acting as a State Accountant in the Internal Control Unit. She said that she has 14 years' experience in Financial Management and 13 years' experience in Expenditure Management.
8. The applicant continued to testify and said in the interview her own union disrupted the proceedings just before she was meant to be interviewed. She said that the union felt as if she was possessed (spiritual trance) and did not sit in and observe her interview. She said that the Chairperson of the Interview panel, who is also the Deputy Director: Finance, came to her after the interviews were completed and said that she was not successful but the second respondent, Mr. Binta, was promoted.
9. The applicant set out that she has more experience than the second respondent within the employer and in her grievance she queried how an intern could be shortlisted for a supervisory post. She said that she fell sick and was admitted into a mental institution and was placed on treatment. She said that she has a Bachelor's of Administration at NQF Level 7, 14 years' experience in Financial Management and the advert had supervisory duties. She said that according to her understanding employees who are already within the department (permanent) must be prioritized first.
10. The applicant continued to testify and said that according to DPSA circular HRD 1 of 2018 "Developmental programmes shall not be utilised to replace existing personnel, nor shall they be used to fill vacant post on the establishment of the department while on the developmental programme capacity". She said that interns could thus not be promoted over existing employees.
11. Under cross examination the applicant said that supervisory posts start from Level 7. She said that there is no entry level in the Budget sub-unit. She said that the second respondent was an intern at the time of the interviews. She said that she waited 28 years in the department and the second respondent should have

done the same. She said that her non-promotion was premeditated; that the second respondent has the necessary qualification and [work] experience but that experience is under internship.

12. The applicant set out that there was no clause in the advert that an intern cannot apply, that her non-promotion was cooked and she suspects that her trade union was involved in that. She lastly said that the Nehawu union official said that "as Maduna" me and the applicant will sort our own things as she and the second respondent shares a clan name.
13. In their closing arguments the applicant said that the advert was crafted in a manner that effectively limited eligibility to candidates possessing this kind of experience. Most interns would not have been able to apply to the position, as the nature and duration of Internship programmes ordinarily do not permit the accumulation of such working experience, which now raises a reasonable inference that the employer had twisted the criteria for shortlisting the post to favour the preferred intern. They said that the continuous renewal of internship programme for the second respondent undermines the purpose of the internship programme and amounts to an improper use of a developmental mechanism, effectively circumventing the ordinary recruitment and permanent appointment processes within the Public Service. The repeated renewal of internship contracts constitutes an abuse of the Developmental Programme framework and is inconsistent with the policy provisions governing internships in the Public Service.

#### **The First Respondent's case**

14. Ms. Anda Vutula (herein after "Ms. Vutula") testified that she is the Deputy-Director: Finance and was the interview panel chairperson of the post in dispute. She said that there no dispute from anyone including the trade unions when the shortlisting was done. She said that there was no Assistant Director: Finance in the District and she recommended that Deputy-Directors of other District form part of the interview panel and that there was a unanimous recommendation that the first recommended person from the interview process be the second respondent.
15. Ms. Vutula continued to testify and set said that of the five candidates who were shortlisted three were interviewed with the all trade unions present. Before the applicant could be interviewed the Nehawu

representative but the trade union sent another observer before the last candidate was interviewed. She said that the advertised job in on a Level 7 as that is the entry level in the Budget Sub-Unit.

16. Ms. Vutula set out that by the time the applicant joined the sub-unit the second respondent was already there for some time and in fact "helped" the applicant knew the sub-unit as he had more knowledge about the budget office. She said that the second respondent referred to policies when probed in the interviews and was able to give examples whilst the applicant gave average answers which were not comprehensively full.
17. Under cross examination Ms. Vutula said that in the whole department the starting job for the budget sub-unit was that of State Accountant at Level 7; there is no post below that and performance agreements start at level 7 and not level 6 or 5. She said that the second respondent has experience received from his various internships at the respondent of which he was under the departmental Internship and under the Presidential Youth Employment Initiative (PEYI) programme from the Expanded Public Works Programme bringing his total work experience at the respondent [and sub-unit] to 5 years. She said that the interview question of "how do you support your staff at optimal level" was forward looking and did not relate to current experience of staff support.
18. Ms. Vutula lastly said that the four interns who were shortlisted all had experience; that the applicant joined the budget unit two years before the post was advertised whilst the applicant had 4 years there already and that according to her the second respondent met all the requirements to be shortlisted and promoted.
19. In their closing arguments the first respondent said that the applicant has not discharged any onus to prove any evidence that there was, any procedural defects in the process, there was no evidence led that the panel was biased, the applicant was afforded an opportunity to present her candidature but could not be appointed in that despite her experience in the department she did not possess the necessary relevant to the budget unit.

#### **The Second respondent's case**

20. Mr. Qaphela Binta (herein after "Mr. Binta") testified that he joined the 1<sup>st</sup> respondent in 2017 when the internship was still one year but the internship programme was then extended to two years and he stayed on. He said that he then proceeded to an Internship programme still within the respondent but funded by the ETDP

Seta which ended in early 2021. He then then left the employ of the 1<sup>st</sup> respondent but returned in October 2021 under the EPWP PEYI of which he stayed in that programme until the post of State Accountant was advertised of which he had 4 years of experience at that point in time.

21. Under cross examination Mr. Binta said that he was under the departmental internship from 2017 until 2019; the ETDP SETA internship from 2019 until (March) 2021 and the PEYI EPWP internship from 2021 until the advertised post in 2024 of which the interviews took place in 2025. He lastly said that he did not sell any cows to get the job of State Accountant.
22. In his closing arguments the second respondent said that second respondent said that the interviews were fair, there is nothing prohibiting interns to apply for post and the second respondent has met the requirements for post as result he was shortlisted and interviewed.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

23. The standard of proof in labour disputes is on balance of probabilities (which version is most probably true). A trier of fact (such as a commissioner) is required to evaluate the evidence cognizant of the above mentioned. The trier of fact is required to determine where the truth lies. Naturally the question that must be answered is whether the probabilities favor the party that bears the burden of proof. This requires an analysis and evaluation of the probability or improbability of each party's version on each of the disputed relevant and material issues [see *Stellenbosch Farmers' Winery Group and Another v Martell & Kie SA and Others (2003) (1) SA 11 (SCA)*].
24. Section 186 (2) of the LRA holds that "Unfair Labour Practice" means any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the promotion of an employee...". In this case the onus was on the applicant to prove that the first respondent committed an unfair labour practice against her.
25. In *City of Cape Town v. SAMWU obo Sylvester and others (C1148/2010) [2012] ZALCCT 40; (2013) ILJ 1156 (LC); [2013] 3 BLLR 267 (LC)* the court held that "in deciding whether the employer acted fairly in failing

or refusing to promote the employee it is relevant to consider the following: 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 c) whether the employer failed to apply its mind to the promotion of the employee; or d) whether the employer's decision not to promote was motivated by bad faith; or e) whether the employer's decision not to promote was discriminatory; or f) whether there were insubstantial reasons for the employer's decision not to promote; g) whether the employer's decision not to promote was based on a wrong principle and h) whether the employer's decision not to promote was taken in a biased manner".

26. In Unfair Labour Practice: Promotion procedural fairness relates to whether the applicant had a chance to "compete" for the vacancy. In this case the applicant was allowed to apply, was shortlisted and interviewed. The non-promotion of the applicant was thus procedurally fair.
27. The second "trier" of unfair labour practice disputes is to enquire whether had it not been for the actions of the respondent (irregular) the applicant would have been promoted.
28. The requirements of the post held *"An appropriate (3 year) undergraduate NQF Level 6 in Financial Accounting/ Financial Management. A minimum of 3-5 years in financial or accounting services. Knowledge of the Government Financial System (BAS), Public Finance Management Act and Treasury Regulations. Knowledge of financial planning, budgeting and reporting systems of the state"*. None of the aforementioned prohibit the second respondent from applying.
29. It is general knowledge that acting in a position does not guarantee that the incumbent will get the job once recruitment processes are complete. The purpose of Internships is for workers to get practical work experience. The fact that it is labelled "Internship" does not discount the fact that the worker gets practical work experience. Based on the advert the second respondent was thus not barred to apply. There was no exclusion in the advert. The applicant equally was permitted to apply for the advertised. Both the applicant and the second respondent qualified to be considered for promotion.
30. Furthermore, the true place where the participation of the second respondent should have been objected to was the shortlisting phase where the trade unions were also present. That was not done. With the second

respondent being allowed into the interview process it then became fair game. No evidence was led by either party of some underhandedness that occurred in the interview process. Something conspicuous. The applicant, who bore the onus of proof, did not set out anything egregious that the 1<sup>st</sup> respondent did. Some sort of fraud or process manipulation. The fact that the applicant's "trade union" exited the interviews before it was her chance has no material bearing on the outcome as the bundles of documents that the applicant submitted showed that the trade union member was a non-scoring participant in the interviews and merely an observer.

31. Just because the post started at Level 7 does not mean that there are supervisory duties attached to it. The applicant conceded that there is no entry level in the budget sub-unit. The respondent's witness testified that the interview question about supervision was future looking and not asking whether the candidate at the point of time of the interviews had supervisory experience.
32. I could not pick up anything egregious or some sort of under handness in the promotion of the second respondent. The applicant, in her closing arguments that was submitted by her attorney, said that an inference could be drawn that the criteria was twisted in favour of the second respondent. That "inference" was not backed up by any oral testimony of any witness. It is for all the above mentioned, reasons that I find that the first respondent did not commit an unfair labour practice against the applicant.

#### **AWARD**

33. The first respondent, Department of Basic Education (Eastern Cape) did not commit an unfair labour practice relating to promotion against the applicant, Ms. Lazola Nada Ngwabeni.
34. The applicant is not entitled to any relief.



Macjon Maarman  
GPSSBC Panellist