



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in BLOEMFONTEIN

Commissioner: PHOLO, GMP (Dr)

Case No.: GPBC1584/2020

Date of Award: 10th November 2022

In the Dispute between:

PSA obo PULE

(Union/Applicant)

and

DEPARTMENT of WATER AND SANITATION & 4 OTHERS

(Respondent)

Applicant's Representative: Mr Nceba Baardman

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1st Respondent's Representative: Mr Ketseletso Mokoena

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2nd Respondent (Self): Mr Mabote, P

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3rd Respondent (Self): Ms Mokoena, V

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4th Respondent (Self): Ms Mokotso, M

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5th Respondent (Self): Mr Nhlapo, P

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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This is an arbitration award in the matter between PSA obo Pule (applicant) and the Department of Water and Sanitation (respondent). The matter was set down for an arbitration in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995. The arbitration was held at the offices of the respondent at Bloemfontein, and was converted to virtual hearings, and at the last instance, it was reverted to the physical sitting on the 10 October 2022. The arbitration proceedings were electronically recorded, and the recordings are filed with the Bargaining Council (GPSSBC).
2. The Applicant was represented by Mr Nceba Baardman (PSA - Labour Relations Officer) and the respondent was represented by Mr Ketsoletso Mokoena (DWS - Employee Relations).
3. The applicant hand in two (2) sets of documents marked annexure "A1" and "A2" and the respondent submitted one (1) page document marked annexure "B".
4. At the end of the arbitration, the applicant requested to submit its written closing arguments on the 17 October 2022.

THE ISSUE IN DISPUTE

5. To determine whether the employer committed an act of unfair labour practice against the applicant in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995.

BACKGROUND TO THE DISPUTE

6. The applicant was employed as the "administrative clerk" (level 5) on the contract basis by the department for the period of eight (8) years.
7. Whilst still in the employ of the respondent, the department advertised four (4) positions of similar nature. The positions were advertised internally and externally. The applicant applied for the position, and she was not shortlisted.
8. The applicant was aggrieved in that she was not shortlisted for the interview, and after raising her dissatisfaction with Dr Ntili with no joy, she referred the matter before the Council (GPSSBC).
9. The Council attempted to resolve the matter through conciliation but to no success, and as the result, the matter was then referred for an arbitration.



JURISDICTION

10. At the commencement of the arbitration precedence on 5 July 2021, the respondent raised the point in limine in that the Council lacks the jurisdiction to preside over the matter arguing that the dispute by the applicant was referred outside the prescribed timeframe.
11. Given that the matter was set for two (2) days, (5-6 July 2021), the parties agreed that the ruling will be issued the next day (6 July 2021). The outcome was issued in the morning of the 6 July 2022, and
12. The ruling determined that:
 - 12.1. The dispute was referred within the prescribed timeframe, and the
 - 12.2. The Council has the requisite jurisdiction to preside over the matter.

SUMMARY OF EVIDENCE AND ARGUMENT

The applicant's evidence

Ms Ivorine Pule testified under oath that:

13. She started with the department as a contract employee (admin clerk) in 2013, and whilst she was still in the employ, the department (Water & Sanitation) advertised the position of administrative clerk (level 5).
14. She applied for the position because she was confident that she meets the job requirements as outlined in the advert (page 12). She attached the required certified copies of qualifications and the copy of the driver's license.
15. Her qualifications included the senior certificate and the degree in public administration. In her degree. She has done the computer which included Microsoft office, MS Word, PowerPoint, Excel, and the Microsoft outlook during her first year of her degree. She is computer literate and proficient, the knowledge gained from her employer during the 8 years of her service.
16. She was not shortlisted because the panel did not know and/or they were ignorantly unaware that the computer formed part of the degree she already acquired.



17. According to item 1.1 of the recruitment and selection policy "**all posts for level 1-6 shall first be advertised internally to promote career development. Should no suitable candidates be found, the post will be advertised for all persons to apply**", the employer advertised internally and externally outrightly, and this constituted a breach.
18. In line with paragraph above, the respondent did not adhere to the policy instead of advertising internally, they went straight to advertise externally, and this action breached of item 1.1 of the policy (page 26) because the position was advertised at level 5, and therefore, it was to be advertised first internally. The applicant first saw the advert from the DPSA, and this was an indication that the advertisement was made internal and external.
19. The advert did not require the submission of computer certificate but expected the candidates to be computer literate. It further needed the candidates to have project management skills and not the certificate thereof. She met all the inherent requirements for the job and to have been shortlisted for an interview.
20. When she noticed that she was not shortlisted she made inquiries from the HR. she was told that she did not include the driver's license with her application. When she insisted that she included driver's license, the statement was then changed to "**she was not shortlisted because she did not include the computer certificate**". The advert did not demand for the submission of the computer certificate.
21. She then wrote the formal complain to Dr Ntuli pleading for her intervention into matter. She informed him that the panel was inconsistent in their shortlisting process and as the result, she is not shortlisted for an interview.
22. The shortlisting sheet of Mr Biyela (page 28), and the one of Mr Burger (page 49) were conflicting each other each other. The conflicting points are visible on the score sheet no. 1, 2, 6 and 7. The shortlisting rating unlike the interview score cannot differ.
23. She scored 12 points from the shortlisting, and as the result, she supposed to have been invited for an interview. The candidates with ratings of 12 and 13 (page 49-69) were invited for an interview. In some instances, candidates with ratings of 10 (page 53, no. 80) and (page 55, no. 140) were also invited for interview.



24. She was scored 12 (page 41, no. 278) and she was not invited for an interview. She was given 3 rating for the computer instead of 4 because she did not submit the computer certificate.
25. If the advert could have demanded the computer certificate, she could have produced the academic transcript of her degree because in her first year of her degree, she completed the computer. There was no demand for the computer certificate except for the computer literacy and proficiency. Her CV (page 20) demonstrated that she was computer literate and proficient.
26. The failure by the employer to shortlist her, denied her an opportunity to compete for the position. Therefore, her exclusion from the competition constituted an unfair labour practice.

Ms Kereemang Alita Moseloane testified under oath that:

27. She is employed by the department of water and sanitation as the senior clerk responsible for regulations, compliance, and enforcement. She is also the shop steward and the chairperson of PSA (the union), and the shop steward she represented members.
28. She knew the applicant because they worked together. They have worked together until the end of the applicant's contract.
29. She knows the recruitment and selection policy and its processes because she regularly sits in the shortlisting and interview processes.
30. She was part of the shortlisting panel which excluded the applicant. However, she attended as the observer. The shortlisting was weighed against the requirements of the advert in page 12, and in accordance with the advertisement, the applicant qualified to be shortlisted.
31. Of the four (4) appointees, (a) Mr Mabote met all the requirements and therefore qualified for the shortlisting, (b) Ms Mokoena did not qualify because she did not have knowledge of "National Water Act" and did not have the knowledge of project management, (c) Mr Nhlapo partially qualified.
32. The applicant qualified in all respect, but she was not selected for an interview, and as such, the process was unfair to the applicant.



33. On the other hand, the process was unfair because the advert demanded that the candidates must have the knowledge of the "National Water Act" and "Project Management" but the candidates including those appointed (apart from Mr Mabote) did not meet those requirements. It was unfair because some of the prospect candidates without those requirements did not apply. The relaxation of the job requirements during the shortlisting process was unfair.
34. There was a debate amongst the members of the panel, in that the requirement for the knowledge of the "National Water Act" disadvantages the external applicants. Therefore, such requirement be excluded.
35. She noted the inconsistency and the unfairness in the deviation from the advert but could do nothing because she only attended as the observer.

ANALYSIS OF EVIDENCE AND ARGUMENTS

36. I must reiterate that I was called upon to determine whether the respondent has committed an act unfair labour practice against the applicant in terms of section 186(2) of the Labour Relations Act, 66 of 1995 as amended from time to time.
37. The applicant led evidence by herself and further called one other witness to substantiate her claim that the respondent acted unfairly against her by not shortlisting her for the position of administrative clerk (level 5) as advertised.
38. The respondent vehemently rejected the claim of unfair labour practice by the applicant. Be that as it may, he brought no witness to rebut the overwhelming evidence advanced by the applicant.
39. It is shocking and surprising that the employer cannot understand and interpret its own advertisement, the advert which was badly phrased set the requirements for the post to read, ***"A senior certificate (grade 12) or equivalent qualification. Computer literate and proficiency in programs such as MS 2007 Word, PowerPoint, Access, Outlook, and Excel. Knowledge of Batho Pele Principles. Report writing skills. General knowledge of information system. Data capturing skills, office, and project management skills. A valid driver's license (attach certified copy)".***



40. In line with the paragraph above, the two (2) physical requirements for submission apart from the CV itself are (i) a senior certificate (grade 12) or equivalent qualification (no instruction to be certified), and (ii) a copy of the valid driver's license (certified). There was no demand for the computer certificate, however, the candidates were expected to be computer literate and be proficient in programs such as "**MS 2007 Word, PowerPoint, Access, Outlook and Excel**". Therefore, a mentioning of the acquired skills and knowledge in the CV, if so acquired, was adequate and not the submission of the certificate thereof. The CV (page 17-21) of the applicant included the (i) grade 12 certificate, and a degree in "**public management**", and (ii) it correctly spelt out the skills acquired (page 20). The applicant's CV indicated the MicroSoft Office, project administration, and the Batho Pele Principles as the set requirement by the advert. Therefore, the CV of the applicant for the application for position met the requirements in all respect. As the result, the non-shortlisting of the applicant constituted an unfair act.
41. As an arbitrator in this matter, I will not act as the "employment agency" for the respondent. However, my analysis to the set of documents marked "A2" which included the applicant's CV and those of the appointed candidates against the evidence presented before me, the applicant deserved to be shortlisted for the position more than the four (4) appointed candidates. Therefore, the act of not shortlisting her constituted an unfair labour practice.
42. Furthermore, the ratings provided in the shortlisting process (page 28-111) and the criteria to select those to attend an interview left much to be desired. Accordingly, some candidates were invited for an interview with the rating of 10 (page 53) and some with the rating of 12 (page 68) but the applicant with the rating of 12 did not make shortlisting. To be more precise with the respondent's shortlisting inconsistency, the score of the applicant (page 41, no. 278) and the score of Ms Mosala (page 68, no.391) are exact the same. However, Ms Mosala was invited for an interview and the applicant not. Surely, these inconsistencies in the process are some of the reasons the respondent could have brought a witness to testify during the arbitration process.
43. In all fairness, the shortlisting process breached the spirit of item 2.3 of the "**DWAF Recruitment and Selection Policy**" (page 27). I must indicate that the attack on the validity of the policy document by the respondent proved worthless because he failed to produce the valid one if there is any nor a witness to corroborate his argument.



44. In his closing arguments, the respondent confirmed that the requirements for the position were **"senior certificate or equivalent and the computer literacy and proficiency"**. He further confirmed that the applicant submitted everything but the computer certificate. I find this argument irrational and baseless for the following reasons:

44.1. Computer proficiency has nothing to do with certificate but simply refers to be competent or skilled in doing or using something, and in this case, to be able to use a computer. Therefore, the narration of such competency in the CV was more than enough and not the inclusion of the certificate. The employer erred in their interpretation of their own advert, in that computer proficiency refers to the computer certificate.

44.2. Similarly, computer literacy has nothing to do with certificate, this merely suggests that the candidate needs to be competent and/or have the knowledge to use computer. I am of the view, the applicant indicated in her CV that she was computer literate and to that effect the employer was aware that she was computer literate because at the time of her application she was in the employ of the department. I have no reason to doubt that her exclusion in the shortlisting process was more a deliberate act than to be fair with the process.

45. At the time of the advert, shortlisting, and the appointment of the four (4) candidates, the applicant was still in the employ of the employer, surely, this caused much grieve to the applicant. Hence, she has written a letter to Dr Ntuli to ask for his intervention to the matter, but she could not receive any joy.

46. I find the comments in ***Apollo Tyres SA (Pty) Ltd v CCMA and Others (2013) 34 ILJ 1120 (LAC)*** to be appropriate in that **"... unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious, or inconsistent conduct, whether negligent or intended"**, the shortlisting of the candidates, the panel proved the inconsistency at its best, and the serious part of their inconsistency includes the following:

46.1. The use of the computer certificate as the determining criterion against the need for the skill and the proficiency in computer,



- 46.2. The decision to abandon the requirement for the candidates to have the knowledge of the National Water Act, and
- 46.3. The decision against the consideration of the candidates' knowledge of the project management as the inherent requirement for the position.
47. The argument by the employer that they relaxed the requirements to accommodate the external candidates who are not familiar with certain requirements and that they wanted to be as fair as possible does hold water. The unfairness did not only start the shortlisting process but at the time of posting the advert. Not all people are gambling when they apply for the job, if they notice that they do not meet the requirements as outlined in the advert they do not even try. Therefore, it is an unfortunate argument that you wanted fair as possible by accommodating the other people with the shortfall requirements during the shortlisting process. The question remains why you included those requirements if the intention is to accommodate the external applicants. However, this argument does not condone the fact that you should have first advertised internally in terms of the "recruitment and selection" policy.
48. I am in agreement with the argument in the ***Minister of Safety & Security v SSSBC & Others [2010] 4 BLLR 428 (LC)*** in that ***"it has been long accepted that the decision to promote or not to promote falls within the managerial prerogative of an employer and that the courts will interfere only where such discretion was exercised capriciously, or for insubstantial reasons or based upon the wrong principle or in a biased manner"*** and the actions of the employer in relations to the above paragraph proved to be inconsistent.
49. I have considered and weighed the practical options to my disposal to undo or redress the act of unfairness in equitable manner. The route of undoing or setting aside the appointments of the 2nd - 5th respondents will have more costs implications than to compensate the applicant whilst at the same time it is not my intention to make an applicant the escape goat. I further considered the fact that the 2nd - 5th respondent cannot be blemished for the employer's capricious conduct. It is not by their own making that the 2nd - 5th respondents are irregularly appointed but the employer. Given the current economic conditions regarding the unemployment rate, the option to undo the appointment of the 2nd - 5th respondents, this consideration was done without playing ignorance to the applicant's prejudice by the employer.



50. In line with the paragraph above, I find it appropriate for the employer to compensate the applicant for the period not exceeding twelve (12) months.

51. I am of the view that the agreed policies forms part of the collective agreement, and that they are designed to be observed by parties, they are not designed to decorate the shelves. I find item 1.1 (page 26) of the recruitment and selection policy to be explicit for every competent personnel to understand and implement. I find it weird for the employer to defend the wrongdoing of the panel. This is an indication that the employer will never apply the consequence management for the breach of the policy and the inconsistent conduct by the panel.

Costs

52. On 3 March 2021 the Council scheduled the arbitration, and the employer was present, but the applicant appeared unrepresented. The applicant argued that she would prefer to be represented but her representative was double booked on another matter at Kroonstad. Her representative (Mr Baardman) was phoned and confirmed the double booking by his organisation. Surely, the Council cannot be held responsible for the costs of postponement but of the applicant. Therefore, the costs of the arbitrator (daily fee, travelling costs, and accommodation costs) for the 3 March 2021 must be paid by the applicant party.

53. On 6 April 2022, the Council issued the notice of the set down to parties for the arbitration to be held on 29 July 2022 (more than 3 months). The applicant party and 2nd - 5th respondents were present but the 1st respondent. The 1st respondent arranged for an alternative representative, he argued that he did not receive the notice from the Council. I verified the information with the Dispute Resolution Union (DRU) of the Council and found that the Council served all parties and thus there was no reason for non-attendance. I could find no wrong on side of the Council but the 1st respondent. Therefore, I find it befitting that the costs of the arbitrator (daily fee, travelling costs, and accommodation costs) for 29 July 2022 be borne by the 1st respondent.

AWARD

54. The employer's conduct was unfair.



55. The applicant be compensated for the period of twelve (12) months calculated from her last month salary in the employ of the respondent.

56. In line with the paragraph above, the respondent to pay the applicant the amount of R173703,00 on or before 31st December 2022.

57. The applicant party to pay to the Council the costs of arbitration sitting held on 3 March 2021.

58. The respondent party to pay to the Council the costs of arbitration sitting held on 29 July 2022.

Dr GMP PHOLO

GPSSBC Commissioner



Signature: _____