



GENERAL PUBLIC SERVICE  
SECTOR BARGAINING COUNCIL



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## ARBITRATION

### AWARD

Panellist/s: MYOLI LUSANDA

Case No.: GPBC1170/2022

Date of Award: 12 April 2024

In the ARBITRATION between:

**TH SILAWU**

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(Union / Applicant)

And

**DEPARTMENT OF HUMAN SETTLEMENTS**

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(Respondent)

**Union/Applicant's representative:** Mr A Sigudla - Union representative

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**Respondent's representative:** Mr K Boshomane - Legal representative

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### DETAILS OF HEARING AND REPRESENTATION

[1] This is the award in the arbitration between Mr TH Silawu, the Applicant, and the Department of Human Settlements, the Respondent.

- [2] The arbitration was held under the auspices of the General Public Service Sector Bargaining Council (the Council) in terms of s191(5)(a)(iv) of the Labour Relations Act, 1995 as amended (“LRA” or “the Act”) and this award is issued in terms of section 138 (7) of the Act.
- [3] The arbitration hearing took place at the offices of the Respondent, 240 Justice Mahomad Street, on the 14 October 2022, 1 December 2022, 23-24 February 2023 and 13 April 2023 and at the Council offices on 5,7 June 2023, 14 September 2023 and 23 November 2023.
- [4] The Applicant was present and represented by Mr A Sigudla (Sigudla), his PSA union representative. The Respondent was represented by Mr K Boshomane (Boshomanclse), its legal representative.
- [5] A pre arbitration minute (“pre arb”) was concluded and signed by the parties. It was admitted into the arbitration record.
- [6] The parties requested to file written closing arguments. Same received have been considered in the analysis below.
- [7] The proceedings were digitally recorded.

## **BACKGROUND TO THE MATTER**

- [8] The Applicant referred an unfair labour practice related to promotion dispute to the Council.
- [9] The pre-arbitration minutes item 3 states the common cause issues.
- [10] The Applicant was employed by the Respondent on 1 March 2019, as a Deputy Director Labour Relation, Level 11 at salary 801 786,00 per annum.
- [11] The Applicant acted for just over two (2) years in the Director Labour Relation position.
- [12] The Director Labour Relation, Corporate Services Branch in Human Resources Chief Directorate, Level 13, at R1 057 326 per annum, position was advertised in October 2019. The shortlisting was done on 10 June 2021 and interviews were held on 26 October 2021.
- [13] The Applicant applied for the vacancy and the interviewing panel recommended him as best preferred candidate for the post, which was approved by the Director General (DG).
- [14] The Minister did not appoint the Applicant, the position is still vacant.
- [15] The pre-arbitration minutes item 4 states the issues in dispute, as follows:  
Stopping of the interview process by the Minister and disapproving of Applicant appointment;  
Fairness of the Respondent in filling other 4 director positions advertised at the same time and refusing to fill the position of Director Labour Relations; The reason that the position could not be

filled because it was advertised during 2019; Whether the Minister or the DG had the power to appoint for the position. Whether the Applicant was the best candidate.

- [16] The Applicant sought that the conduct of the Respondent be found to be unfair, and an order for appointment to the position with effect from 1 February 2022.
- [17] The Respondent sought the dismissal of the dispute.
- [18] Noteworthy, I received the condonation application ruling dated 3 April 2024, on 12 April 2024, following directive prior issuing the award that condonation application was required.

### **ISSUE TO BE DECIDED**

- [19] I am called upon to determine whether the Respondent by its conduct committed an unfair labour practice related to promotion against the Applicant in terms of section 186(2)(a) of the LRA.
- [20] If I find that the Respondent committed an unfair labour practice related to promotion, I must determine the appropriate relief otherwise the referral will be dismissed.

### **SURVEY OF THE EVIDENCE AND ARGUMENT**

- [21] Sigudla let the Applicant's case, he discovered a bundle of documents marked 'A', pages 1-242 and called four (4) witnesses. Boshomane led the Respondent's case, he called two (2) witness and discovered a bundle of documents marked 'R' pages 1-96.
- [22] The evidence considered relevant is summarised hereunder.

### **APPLICANT'S CASE**

#### **First Witness: Mr TH Silawu (the Applicant)**

- [23] The Applicant testified that he joined the Respondent on 1 April 2019, transferred from the Department of Sports and Recreation.
- [24] He was screened by Ms Letsholonyane (Letsholonyane) DDG corporate services and HR for the transfer. In 2012/13 he assisted a PSA member who was dealing with Letsholonyane's suspension case. Their relationship was good, but it changed, as shown by emails R207, 209,210 that Letsholonyane did not want to work with him as head of labour relations.

- [25] The position of Director Labour Relations was vacant, and he was appointed to act in it from April 2019, after Letsholonyane was again suspended until August 2021 when she came back from suspension.
- [26] The Director Labour Relations vacancy was advertised, the closing date of the advert was 4 October 2019. The department's recruitment processes were affected by the March 2020 lockdown.
- [27] He applied for the post, he was shortlisted, interviewed, and recommended by the interviewing panel as the best preferred candidate and approved by the Director General. Interviews were on 26 October 2021.
- [28] After the three months waiting period, he followed up with HR on the interview outcome. HR, Ramalepe, advised him that HR was awaiting approval of appointment of the successful candidate from the Ministry. On 22 February 2022, Ramalepe advised him that the Minister said she had requested that shortlisting be stopped following enquiry about the post on 26 October 2021.
- [29] Ramalepe was not aware of the Minister's instruction to stop the shortlisting, per her handwritten comment dated 28/01/2022, on the DG approved Memo for Approval for Filling of the Advertised Post of Director Labour Relations, A110, wherein she wrote: *On 26/10/2021 I received an enquiry about this post where there was an intended shortlisting process. I requested that it be stopped. Can I receive an explanation of that incident in relation to this submission.*
- [30] A103, Director General (DG) Tshangana advised the Minister that his office, interviewing panel chairperson Deputy General Neville Chainee and Chief Directorate Human Resources had not received her instructions to stop the shortlisting and the interviews processes.
- [31] In terms of the 26 October 2021, R24, WhatsApp communication between DG and Minister, he (Applicant) was not aware of objections that were raised regarding interviews.
- [32] A5, NEHAWU and A4, Deborah Dhlomo (Dhlomo) PSA, union observers in the process, said in the panel they did not receive any written or verbal dispute regarding the whole process, it was done fairly in line with the recruitment policy. Dhlomo, stated that the chairperson of the panel and DG attended to her query regarding the exclusion of one senior manager from the process, and that after deliberations the panel decided to continue with the interviews.
- [33] The Minister was included in the correspondence, and she said she noted the messages and requested submission of all the information for final determination on the matter and not to be copied in such communication in future.

- [34] He did not receive interview outcome per his request and lodged a grievance relating to the outcome, on 14 March 2022.
- [35] The Minister responded and said his request could not be approved because the process was incomplete, in terms of policy,
- 'A job applicant shall not be regarded as a successful candidate until the executive authority or delegated official has approved the recommendation of the selection committee and the candidate has received a signed offer of employment'.*  
*'the department also failed to comply with the provisions of Public Service Regulation of 2016; Section 65(7) 'A funded vacant post shall be advertised within six months after becoming vacant and be filled within twelve months of becoming vacant'.*
- [36] He advised the Minister few of the posts that were advertised in the same circular as his vacancy were filled and other posts in the department. She must check Director Contract Management; Director Management Accounting; Director Financial Administration and Internal Control; Deputy Director Demand and Acquisition. He thought the appointments were filled by DG Tshangana.
- [37] Regarding R54, Minister response dated 17 February 2022, to the Memo for Approval for Filling of the Advertised Post of Director Labour Relations, A110, requesting the panel to consider making the offer to second recommended candidate, Ms T Makuya:
- 1. To increase equity numbers, gender representation of SMS level.*  
*2. Silawu's work showing huge areas of development – not ready to assume the responsibility of Director Labour Relations*  
*3. A person appointed at this level should be competent and help stabilise the department. PSA and NEHAWU raised serious concerns about how Labour Relations has been performing and appointment of Silawu will not help build confidence in the work done by the unit in the department.*
- [38] He disputed the Minister's reasons because he has never worked with the Minister directly. He had never been put through personal development plans. He got performance bonuses and was never addressed about non-performance. No competency issues were ever raised with/about him and none of the concerns were raised with him except the PSA email. Per A242, the Minister brought in a male, Mr Lufuno Lifhiga, from the Department of Transport as Director Risk Management on a lateral transfer with effect from 1 September 2022.
- [39] He thinks it was Letsholonyane who gave the feedback on behalf of the Minister.
- [40] R55-57 dated 23/02/2022, read into the record, the DG responded to the Minister request for panel to consider recommendation of making the offer to Ms T Makuya. He dealt with the Minister's reasons and in conclusion advised her to consult PSC regarding review and amendment of the interviewing panel decision before it is implemented.
- [41] Letsholonyane forwarded the Minister's letter dated 18 August 2022, which was sent to the Public Service Commission (PSC) stating the Minister stopped the recruitment process that started in 2019

for the post of Director Labour Relations. His queries were not addressed. The PSC grievance was closed, A42, based on the outcome that the recruitment process was terminated

- [42] He was not aware why the appointment of his position went to the Minister for approval.
- [43] The Minister acted outside her authority, overusing her authority by terminating the recruitment process for the Director: Labour Relations post.
- [44] The Recruitment and Selection Policy A48-66, regulating the executive authority powers to appoint states that short listing for director level is done by the DG, A59 and appointment of director level posts by DG, A63 point 19.2. The Delegations applicable at the time was, A18, stating that the DG had the authority to appoint director level posts. New delegations are dated 6 Sept 2022, A116.
- [45] He sought to be appointed from 1 February 2022, the time the panel recommended his appointed, per Memo on A110/R44. His recommendation by the panel for the post was based on his identified strengths and stated reasons. The second-best candidate's strengths and weaknesses were identified.
- [46] Halting of the appointment was not within the Minister's authority. The position is still vacant.

#### **Cross Examination**

- [47] He worked closely with DG and per R56 para 7, read into the record, according to the DG he was one of the best deputy directors although he was the only one.
- [48] Power to appoint directors lied with DG, per A18 -19 Memorandum section 2. Delegated power by the Minister cannot be willy nilly taken and given.
- [49] The reasoning behind the decision to cancel recruitment per advert is what matters whether done by minister or DG. For the Minister to cancel post recruitment for any reason would be overstepping her authority because she delegated the authority to the DG and that had not changed.
- [50] The Minister sent contradicting messages, stopping the process and later recommending a person for appointment.

#### **Second Witness: Ms Noelien Nortman (Nortman)**

- [51] Nortman testified that she is a Chief Personnel Officer, Level 8, in the Human Resource Administration Directorate since July 2004.
- [52] She was involved in placing the A2&3 department adverts.

- [53] She sat in for her supervisor in interviewing process for the Director Labour Relations post but not in shortlisting.
- [54] An objection was raised regarding the nomination of the chairperson, constitution of the panel and continuation. Letsholonyane complained to unions because she was not included in chairing the interviews of a position in her department.
- [55] The DG recommendation made before the shortlisting panel appointment, which is also the interview panel was that someone else must chair the panel because of past history and some disciplinary action taken against Letsholonyane for things that happened. She thinks Letsholonyane was still on suspension.
- [56] On the day of the interviews the unions PSA Deborah raised an objection saying Letsholonyane had raised an objection that she was not appointed to chair interview for post in her department, Email A4. She took it the concern was not saying the process must be stopped. She got a sense that the panel was aware of the issue raised.
- [57] There is no requirement that the head of the division must chair the interviews but according to policy chairperson should be someone in a higher position than the advertised post.
- [58] A5, Nehawu message. She was present in pre discussion before interviews where Ms Buthelezi raised the issue of missing chair. After she made a call she came back and participated.
- [59] The position was closing on 4 October 2022, it was not closed because of Covid hard lockdown.
- [60] Remembers about three (3) positions were advertised. Two (2) Finance (Level 13, Director Level) and 1 Labour relations and Director Human Settlements Master Plan
- [61] The Finance positions were filled and the Director Settlement was not filled.
- [62] The Minister issued a Memo that the Labour Relations post must not to be filled. The reasons she gave was that she issued a message that the interview process was not to proceed. Minister Kubayi made the comment on the Memo, A104-110, T Silawu panel recommendation with reasons for recommendation. She drafted the Memo as secretariat.
- [63] The Minister comment reference to 26 October 2021 was an error because that date was interviews. She never saw the request the minister was referring to.
- [64] The DG was responsible for Director appointments, per previous delegations.
- [65] Letsholonyane issued an email to HRA that the director posts were not to be done by DG but to go to the Minister.
- [66] DG can also appoint the panel.

- [67] She agreed not completing the process in six (6) months was irregular – it was the panel and delegated authority decision whether the process proceeds.
- [68] The advert, A3, stated that Representativity – diversity is prioritised. Female candidates and people with disabilities are encouraged to apply.
- [69] The short list was sent to the delegated authority, DG.

#### **Cross Examination**

- [70] The previous delegations gave authority for DG to appoint director level posts. The new delegations introduced in September 2022 gave authority to the Minister.
- [71] The panel was conflicted because of the Minister's instruction to stop interviews through DDG Corporate Services, Letsholonyane which the DG did not know about.

#### **Third Witness: Ms Tshepiso Moloi (Moloi)**

- [72] Moloi, Chief Director Affordable Rental and Social Housing, testified that she joined the Respondent in June 2014.
- [73] Her involvement when the adverts, A2-3, were filled was as a Chief Director HR and she was part of the panel for the Director Labour Relations post interview.
- [74] PSA raised a concern that Letsholonyane was excluded. The chairperson said the DG dealt with the matter and said the process should proceed.
- [75] Buthelezi also raised an issue and after clarity on the issues that were raised the panel proceeded.
- [76] A104, panel recommendations were made for approval of Silawu as best candidate.
- [77] She was not aware of any submission from the Minister to stop the process but only aware of organised labour queries.
- [78] Ramalepe informed the Minister that HR had not received her query regarding stopping the process of shortlisting.
- [79] The department did not comply with the provisions per A12 last paragraph due to Covid and other posts were filled while they were over 6 months and it is normal in government for processes to take more than 6 months.
- [80] The DG effected the finance vacancy appointment, and she thinks also for contract management.
- [81] She was not sure why the process for the director labour relations post was through the Minister when there are delegations. nelly asked ppl to not deal with her and also asked ppl to



- [82] SMS 13 appointments per 2017 delegations are the responsibility of DG up to level 13. Level 14, 15 and 16 for the Minister, executive authority. She was used to be on level 13 on interview panel nominated by DG.
- [83] The Minister's recommendation of Ms Makuya, R53-54 and when the Minister stopped the process the department had met the employment equity (EE) targets. The advert contained the recommendation for women to apply but appointment depended on performance at the interviews. When she joined in August 2021 EE targets in terms of women were met, hence she thinks that at the time the posts were advertised employment equity targets in terms of women were met.
- [84] The Applicant as acting director reported to her when she was a Chief Director HR. She was not aware of performance issues regarding him.
- [85] There were no formal complaints lodged to HR by organised labour about the Applicant, per the Minister comment. She was only aware of an issue raised by a PSA person in a staff meeting around 2021 but that was about something that happened about 2 years back.
- [86] After all clarity on Letsholonyane issues the panel proceeded. A104 panel recommendations were made for approval of the Applicant as the best candidate.
- [87] She was not aware of any submission from the Minister to stop the process but only aware of organised labour queries. Ramalepe indicated to the Minister that HR had not received her query regarding stopping shortlisting process.

### **Cross Examination**

- [88] She worked as the Applicant's acting manager for 6 months.
- [89] In the department it was not an anomaly that the head of department was not part of the shortlisting/interviewing process.
- [90] The Ministers are precluded from changing delegations as and when they want to.
- [91] If the Chairperson of the hearing had advised them that the DG said interviews should stop they would have stopped and not proceeded with the interviews.
- [92] The DG said he would discuss R54, recommendation for appointment of Ms T Makuya with with the Minister. The file was recalled by DG from her office so they could not process it. When they received it the Applicant was already told that the appointment was stopped.

**Fourth Witness: Mr Mbulelo Tshangana (Tshangana, also former DG)**

- [93] Tshangana testified that when the director labour relations vacancy, A3, was advertised he was the accounting officer/ DG of the Respondent. He approved the panel for the post per delegations, A59 13.2, director level shortlisting approval and A63 19.2 director level appointment approval.
- [94] R24, the Minister forwarded him Letsholonyane's WhatsApp messages to Lebohang, chief of staff, asking for postponement of the interviews until the Minister's ruling on the union and her objection.
- [95] He advised the Minister, R24, that Letsholonyane's DC for violation of the Respondent's selection and recruitment process dispute was at the Labour Court and she could not sit in the recruitment panel until her case is complete. Indicated that Tshepiso, Nonhlanhla, Khwezi, Xolanid, chief directors, and Neville, DDG who chaired in Letsholonyane's absence constituted the panel and that shortlisting was done a while ago without Letsholonyane.
- [96] He became aware later, after the interviews, that the minister did not want the interviews to continue. He believes it is Letsholonyane who did not want the interviews to proceed per her messages forwarded by the Minister which he responded to.
- [97] The A116 new delegations by Minister Kubayi were signed on 6 Sept 2022 while he was on special leave from 8 June 2022.
- [98] Before these new delegations the previous ones would have been applicable until due process per PFMA which does not make reference to email or whatsapp messages to replace delegations was followed. This was with reference to Minister whatsapp message R25, stating she was not delegating from director level upwards and that the process of delegations had to be urgently finalised.
- [99] During interviews Buthelezi raised concern that Letsholonyane was not part of the panel while the position fell under her department. He told her there was a quorum and it was the DG who makes the decision on the shortlisting and interviewing panels and said the panel must continue. Buthelezi registered the same concern in the panel, and they continued with the work.
- [100] He made the recommendation for approval of filling of the director labour relations post per recommendation of the panel A108-110, co-signed by the Minister. The minister usurped the powers she did not have and officials included her per A108 stating Minister should approve although DG has powers per the delegations, this was done for maintaining peaceful working conditions.

- [101] Regarding the Minister comment for not approving DG recommendation on A110, he was only aware of the concern raised about interviews not shortlisting. The concerns were addressed about stopping the process and the unions responded and stated that the issues were addressed, and the process was fair, A4-8.
- [102] He advised the Minister, per R53 letter, that there was no record of her request for stopping shortlisting and interviews ever received and asked for information to be provided to him. He followed up with a comprehensive submission made on 23 Feb 2022 after consultation.
- [103] R54 read into the record, the Minister requested the panel to consider recommendation of making an offer to Ms T Makuya for the advertised post of director labour relations in the chief directorate – human resources .
- [104] In terms of the Minister’s reasons for not appointing the Applicant based on his work, the Minister started in August 2021. The Applicant reported to the chief director human resources who was in the panel and reported to DG Corporate Services. The Applicant acted in the position and was not reporting to the Minister, and he had been a deputy director for long. He found it difficult to believe that the Minister could have made the assessment about the Applicant’s work but believes the Minister was acting on Letsholonyane’s instructions.
- [105] Regarding the reason that appointment of Makuya would increase equity numbers -gender representation on SMS level, the note in the advert, A3, about representivity is a standard clause. The people were to be appointed on merit not just for targets. During the period he approved filling of three director level posts including finance and supply chain. At all times, the panel members looked at equity issues on all appointments – to avoid interference with the process.
- [106] Regarding A12, the recruitment process was finalised but not implemented because the Minister did not approve. He afforded the Minister an opportunity to approve – in the interest of good working relations.
- [107] The process was disrupted by Covid 19 which caused disruption of processes. There was no constitutional issue that arose out of that or irregularity on audit by AG for the delay or concerns regarding virtual meetings interviews. He received the circular to fill positions and had to reduce vacancy rate. The post was filled exactly the same as others.
- [108] He addressed the Minister on the issues she raised and warned her regarding tampering with process, R55-57.

[109] The Applicant's grievance was submitted to the office of the public service commission per HR submission he signed on 16 May 2022 and it was finalised and closed per R95 dated 29 August 2022.

### **Cross Examination**

[110] Per R119, dated 6 September 2022, Minister's new delegations, the executive authority approved level 13 to 15 and the DG has powers for levels 1-12.

[111] In terms of the delegations at the time, the Minister used powers that were delegated to the DG. A proper process had to be followed to change delegations not by WhatsApp or email. The instruction to stop interviews on same day they were scheduled received by WhatsApp from the Minister was illegal.

[112] The decision by the Minister not to approve the Memo for approval of filling of the position submission by the DG was not in line with the law.

[113] He could not remember if he told the interviewing panel that the Minister had asked to stop interviews, R50.

[114] It was correct that the department had the right not to fill the positions. The Minister can per statement either implement the recommendations or disagree with panel recommendations. However, in terms of the delegations the Minister had no power.

[115] If there was a submission the interview process would have been stopped

[116] As the delegated authority the submissions were initially submitted for him only to sign and he advised HR to include the Minister.

[117] He denied he was friends with the Applicant.

[118] Appointing second recommended candidate would be overruling the decision of the panel. It is not unlawful to do so but must be done through the process but the Minister did not have the delegated power to do so.

[119] Equity stats in terms of gender were skewed towards women and when he left it was 50/50.

[120] R56 read into the record, SMS level 13 -15 needed women. The panel could have assisted by appointing female. Minister recommendation of appointment of Ms T Makuya could have rectified it if it was done properly.

### **RESPONDENT'S CASE**

**First witness: Ramoroaswi Deborah Dhlomo (Dhlomo)**

- [121] Dhlomo, PSA Union representative observer in the interview, testified that prior the interviews she was approached by their member Letsholonyane complaining about exclusion in the process.
- [122] In terms of HR Management Recruitment and Selection Policy the line manager should be part of the process for an SMS position.
- [123] Based on the complaint she wrote to the panel in response to the invite and said interview is not supposed to take place without Letsholonyane, R2 read into the record.
- [124] Where there are compelling reasons interview date can be moved.
- [125] Chairperson of interview panel Neville Chainee, DDG Strategy R2 response read into the record
- [126] The DG said he was doing this to protect the interview integrity.
- [127] Letsholonyane said she will take it up with the Minister and also raise it again at interviews.
- [128] On the day of interviews, the chairperson addressed letsholonuyane's exclusion which she had raised.
- [129] Letsholonyane said Moloi told her that professional integrity required that she excuses herself
- [130] Due to issue of integrity raised asked Letsholonyane if there was something they all knew which she did not know.
- [131] The panellists' explanation regarding the integrity issues was that the DG excused Letsholonyane because there were two members of her department who were going to be interviewed for the position, Snyman and the Applicant.
- [132] She questioned if the DG and Letsholonyane had a conversation about Letsholonyane being excused. After deliberations she saw it fit that interviews must proceed because Letsholonyane said she would take up the matter with the Minister. Buthelezi, panellist, also called DG and questioned Letsholonyane involvement but she continued with the process thereafter when other panellists convinced her not to recuse herself.
- [133] Objections in terms of interview process are common but it was the first where they were quiring exclusion of a person. They were given a memo that approved the interview panel.
- [134] She was not aware of the forwarded messages between the Minister and the DG, R24 ,R26, which upon reading them thinks the Minister was asking the DG not to proceed with interviews.
- [135] There was no message as union member she was aware of from the Minister instructing the stopping of the process.

### **Cross Examination**

- [136] She worked for the Respondent and was a shopsteward. She only attended the interviews.
- [137] The HR recruitment and selection policy required that line manager be included. Letsholonyane was suspended for a long time there was the acting DDG corporate services. Per policy, A58 13.1.2, read into the record, shortlisting process must be conducted by, 'the line manager (chairperson) who must be of a higher grading than that of the post to be filled. The union agreed to proceed because the director post reported to Moloi and she was present and part of the process. The selection panel complied because per R59 14.3, read into the record, 'the Selection Committee shall consist of at least three but not more than five members who are employees higher than the grading of the post to be filled'. Her observation was that the interview process was fair.
- [138] The explanation about Letsholonyane exclusion related to pending matters in the courts involving her and some of the candidates hence her presence would compromise the process. After caucus with NEHAWU they found the process was fair and continued.
- [139] She sat in other interviews of same level around the same time. The appointed directors for finance and accounting were both women. The Respondent had no alarming difference in women stats in senior management positions, the recent stats was 49 / 51 women to men.
- [140] The process of appointment for the posts was delayed due to Covid.
- [141] She had not the Minister recommendation to the submission on approval of filling of the post
- [142] In terms of delegations the DG appointed director level.
- [143] It was one of the PSA officials who raised a personal issue about the Applicant, HR issues not filling of positions, readvertising, policies flouted. There was no complaint about the Applicant by PSA as a collective.

#### **Re-examination**

- [144] Snyman and the Applicant were involved in Letsholonyane's disciplinary hearing.

#### **Second witness: Nonhlanhla Buthelezi (Buthelezi)**

- [145] Buthelezi testified that she is a Chief Director Policy Development and joined the Respondent in October 2013. She was a panellist in the interviews for the director labour relations post in dispute.
- [146] R10, Dhlomo, union representative advised that Letsholonyane was objecting to the interview process that was about to take place, Chaine responded and the DG responded that the interviews should proceed, R9.

- [147] The panel discussed the issue and talked about whether interviews should proceed – she personally called the DG to get clarity on whether to proceed or not. The DG confirmed that the interviews should proceed.
- [148] After talking to the DG she went back to the meeting and advised chairperson that she had spoken to DG and they continued with interview preparations and proceeded.
- [149] Her enquiry was triggered by the email suggesting that interviews should not proceed, and she also questioned why the other female DDG, Letsholonyane, was not part of the panel.
- [150] She was not aware of R24, R25, R26 WhatsApp messages between DG and Minister about Letsholonyane requesting DG to be stopped from continuing with the process and the Minister saying the process must stop.
- [151] In the interviews she scored the candidates based on how they answered, she did not remember the questions that were asked, but per R48 she scored the Applicant 81 and Makuya a higher score on a question about advocacy.
- [152] The summary of assessment of interviewed candidate R45-47 was completed based on what was discussed in interviews, she does not know why weaknesses were not included for the Applicant.
- [153] R51, item i, read into the record,  
*‘...an executive authority or his or her delegate, may decide not to heed the recommendation by a selection committee and may opt to approve the appointment of a candidate either than the candidate (s) nominated by the selection committee. This is permissible provided that this decision is properly motivated in writing and confined to the advertised requirements.’*
- [154] To change the panel recommendation the executive authority had to look at profiles and call member of the panel to check why the second best candidate was not recommended and then she could appoint second best candidate, or follow R51 (i).
- [155] She did not recall the Minister’s query to stop process of shortlisting and interviews per the comment on R50.
- [156] The panel never received R54 dated 17 February 2022, Minister request to consider making an offer to Makuya for the advertised director labour relations position, the appointment of Makuya was never discussed in the panel.
- [157] She remembered the director policy position which reported directly to her was completed without objections and cannot recall any other that she formed part of which had objectives.

### **Cross examination**

[158] She was appointed by the DG as a panellist per policy.

[159] The conversation she had with the DG regarding her query about the exclusion of Letsholonyane made sense hence she proceeded with the interview process after the DG explanation.

[160] The director that was appointed in her department was a male and the appointment probably took 6 months.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

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

[161] Section 186(2)(a) of the LRA stipulates that unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to promotion, *inter alia*.

[162] This is a dispute relating to promotion and therefore, my determination will focus on whether there was unfair conduct by the Respondent against the Applicant concerning his non-appointment to the Director Labour Relations post.

[163] The Applicant had to demonstrate through evidence and argument that the Respondent's conduct in not appointing him to the Director Labour Relations post was unfair. The Applicant also needed to show that such unfairness by the Respondent falls squarely within the ambit of section 186 (2) (a) of the LRA as unfair labour practice relating to promotion.

[164] The Applicant should prove at least three things, namely:

- (a) That the dispute concerns conduct by the Respondent relating to promotion of the Applicant.
- (b) That there was unfair conduct on the part of the Respondent during the promotion process.
- (c) That the unfair conduct constituted an unfair labour practice and that he is entitled to the relief he seeks.

[165] In assessing whether this dispute relates to promotion for the purposes of section 186(2)(a) of the LRA, in *Malatji v City of Tshwane Metropolitan Municipality and others*,<sup>1</sup> the Court held that it is trite that promotion for the purposes of section 186(2)(a) involves a move by an existing Employee to a higher rank or position that carries greater status, responsibility, and authority.

[166] The Applicant is currently employed by the Respondent as a Deputy Director Labour Relations, level 11. The post of Director Labour Relations at Level 13 which the Applicant had applied for, had he

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<sup>1</sup> (JR 654/17) [2019] ZALCJHB 300 (handed down on 7 November 2019)



been successful, carries greater status, high remuneration, responsibility, high-level job security, and authority than the Deputy Director Labour Relations post offers.

- [167] Given the above, I am satisfied that the dispute is a promotion dispute for the purposes of section 186(2)(a) of the LRA.
- [168] Regarding whether the conduct by the Respondent complained of exists and if found to exist whether it was unfair.
- [169] I consider the issues in dispute stated in point 15 above.
- [170] It is common cause that the Applicant applied for the post and was shortlisted, interviewed, and did competency assessments and criminal check. He met the job minimum requirements. The interview panel recommendation for his appointment was approved by the DG. There was no dispute about Makuya meeting minimum requirements and it was common cause that the interview panel recommended her appointment in the event the Applicant declined the offer, and this was approved by the DG. However, the Minister's response to the appointment recommendation submission was that the panel should consider making an offer of appointment to Makuya.
- [171] The Applicant's testimony that in terms of the existing delegations at the time, the DG had the authority to appoint for director level posts, was corroborated by his witnesses and the Respondent's witnesses, and by documentary evidence. The delegations that were in place before the new ones dated 6/09/2022.
- [172] Therefore, I found on a balance of probabilities the DG had the delegated authority to conduct selection and appointment process for the post in question, following circular for filling of vacancies.
- [173] The evidence led showed there was no record of the Minister instruction for stopping the shortlisting.
- [174] The DG, without the knowledge of the panel, was aware of Minister WhatsApp instruction to stop interviews on interview date due to a query about the process and their discussion about pending amendment of delegations. The other witnesses, including the Respondent's were not aware of the instruction, it was not communicated to the panel.
- [175] Tshangana testified that he proceeded with the interviews because the instruction was not lawful and not in line with delegations.

- [176] The Applicant's third witness testified that interviews could have been stopped on the day if such was communicated to the chairperson by the DG.
- [177] The Applicant and Respondent's witnesses agreed there was no dispute about the process and there was quorum. They proceeded with interviews after clarity was received on exclusion of Letsholonyane and they believed the process was fair.
- [178] Tshangana, testified that as DG he approved recommendation of the panel for appointment, but to maintain good working relations he opted to seek Minister recommendation approval as well, although he had the authority to appoint for the position. Hence the Minister did not approve, after seeking explanation of what happened on the matter of exclusion of Letsholonyane, made recommendation for panel to consider making offer of appointment of Makuya and subsequently, after he was no longer with the Respondent, terminating recruitment process.
- [179] My assessment is that Tshangana's decision to seek the Minister's co approval of the appointment was not shown to be supported by the delegations or legislation but a personal decision to maintain good relations as he stated.
- [180] The Labour Appeal Court (LAC) in *Ekurhuleni Municipality v Mabusela NO and others* (JA 56/21) [2022] ZALAC 112 (handed down on 13 October 2022) held that it is trite that if a power given to a particular official is exercised by another official, who was not authorized by law to do so, such exercise would be illegal or unlawful. The first principle of administrative law and the rule of law is that the exercise of any public power must be authorised by law.
- [181] The Applicant's reasons for challenging the Minister decision to recommend appointment of Makuya, in the main were not successfully rebutted by the Respondent. Except for the equity in relation to gender point. I found Tshangana and Moloi in essence confirmed appointment of a woman instead of the Applicant would have benefited the Respondent in terms of gender equity in relation to women.
- [182] I note that the panel was not aware of the recommendation, per Tshangana's instruction it was not processed by HR as he said he would discuss it with the Minister and the vacancy was not filled.
- [183] On whether the Applicant was the best candidate it was not shown there was a huge margin in scores between the candidates recommended or query in terms of qualifications and experience, although that would not be the deciding factor. The decision to promote or not to promote falls within the managerial prerogative of the employer. It was also shown the delegated appointing authority was not bound by the panel decision.

- [184] Also, acting in a post, does not give rise to an automatic right to promotion when the position becomes available. On this basis I could not find the Applicant showed on a balance of probabilities that he was the best candidate for the appointment, despite panel recommendation.
- [185] Regarding the Minister response to the Applicant's interview outcome grievance that the recruitment and selection policy was not followed and there was no compliance with the recruitment time periods because the position was advertised in 2019. The Applicant's testimony that the post was delayed due to Covid and other vacancies advertised during same period were filled was corroborated by his witnesses and also the Respondent's second witness. The Respondent's rebuttal could not succeed in this regard.
- [186] The evidence led showed the Minister subsequently issued the outcome that she '*decided to terminate the recruitment process that started in 2019 for the post of Director Labour Relations.*' The Applicant challenged the termination of the process.
- [187] In *City of Cape Town v SAMWU obo Sylvester and others* (C1148/2010) [2012] ZALCCT 40; (2013) 34 ILJ 1156 (LC); [2013] 3 BLLR 267 (LC) (handed down on 7 September 2012) it was held that the overall test is one of fairness. 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 unfair; 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;
  - e) whether the Employer's decision not to promote was discriminatory;
  - 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 upon a wrong principle; and
  - h) whether the Employer's decision not to promote was taken in a biased manner.
- [188] It is trite that an employer has the prerogative not to proceed with the appointment, however such has to be in line with the requirements stated in the preceding paragraph. With substantial grounds to do so the Respondent could refuse to approve any candidate and terminate the process.
- [189] In *Pamplin v Western Cape Education Department*<sup>2</sup> the Court emphasised that whilst in unfair labour practice disputes relating to promotion the onus is on the Employee to demonstrate that the failure to promote was unfair, the Employer, in the same token, obliged to defend challenges on the substantive and procedural fairness if it wishes to avoid a negative outcome.

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<sup>2</sup> (C 1034/2015) [2018] ZALCCT (handed down on 9 May 2018).

- [190] According to *Pamplin*, there is an obligation on the employer to place evidence that it acted fairly and in good faith during the promotion exercise. In the absence of such evidence, it would be irrational and unreasonable to conclude that the employer acted fairly, regardless of where the onus lies.
- [191] Based on the evidence led, I note the termination letter does not state the reasons. However, considering the backdrop of circumstances leading to the termination of process outcome as stated above, I note the Applicant successfully rebutted some points. However, largely I could not find on a balance of probabilities that the Respondent acted arbitrary, or capricious, or unfairly in terms of the factors stated in *City of Cape Town v SAMWU obo Sylvester and others*, mentioned above.
- [192] Regrettably, I could not find on a balance of probabilities that the Applicant discharged the onus to show that overall, the termination of the process amounted to unfair conduct by the Respondent.
- [193] In *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwana & others* (2002) 23 ILJ 761 (LC) paragraph (29)-(32) the Labour Court held that: There is considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process. Courts should be careful not to intervene too readily in disputes regarding promotion and should regard this area where managerial prerogatives should be respected unless bad faith or improper motive such as discrimination is present.
- [194] I have considered all the factors above and that no appointment was made, the post remains vacant. In *Reddy v KZN DOEE & Culture* (2003) 24 ILJ 1358 (LAC), the Court held that the referral of a promotion dispute before the Head of Department as employer has taken a final decision to appoint, is premature and should be dismissed’.
- [195] While the Applicant's appointment to the Director Labour Relations post would have constituted a promotion for him, whereas the appointment of another might constitute a denial of a promotion, as the matter stands, no appointment has been made, which remains the employer's prerogative. Although the Applicant may be aggrieved in this regard, under the circumstances, the employer's failure to make an appointment of a suitable candidate does not give rise to an act or omission constituting an unfair labour practice.
- [196] Under the circumstances, I do not find that the employer committed an unfair labour practice relating to promotion to the employee as contemplated in s186 (2) (a) of the LRA.

I therefore order the following:

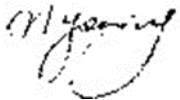
**AWARD**

[197] The Respondent, Department of Human Settlements, did not commit an unfair labour practice relating to promotion to the employee, as contemplated in terms of section 186 (2)(a) of the LRA, against the Applicant, Mr TH Silawu.

[198] The referral is dismissed.

Thus, done and signed at Johannesburg on 12 April 2024.

LUSANDA MYOLI



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**Name:**

**(GPSSBC) Arbitrator**