GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

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ARBITRATION AWARD

Panelist: KATLHOLO WABILE
Case No.: GPBC2045/2023
Date of Award: 25 AUGUST 2024

In the ARBITRATION between:

PSA OBO BENEDICTA T. GUMEDE **APPLICANT**

and

DEPARTMENT OF MINERAL RESOURCES AND ENERGY **1ST RESPONDENT**
BRIAN RAPHASHA **2ND RESPONDENT**

Union/Applicant's representative: **MR. J. RAMOKGOPA**
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Respondent's representative: **MR. J. MATSIMELA – 1ST RESPONDENT**
MR J. MATSIMELA – 2ND RESPONDENT
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ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

1.1 This matter was heard at the premises of the 1st Respondent situated at 192 Visagie Street in Pretoria on 02 May 2024. The matter concerns an alleged unfair labour practice related to promotion. The matter was postponed on the day for reasons that are canvassed in a separate ruling subsequently issued by the GPSSBC. In terms of that ruling, I joined the 2nd Respondent as a party to the proceedings because the Applicant asserted that its challenges would be on both procedural and substantive grounds. The matter was then set down again on 07 and 08 August 2024 whereupon the arbitration was completed on the evidence. At the conclusion of the proceedings on 08 August 2024, parties requested to present closing arguments in writing by 16 August 2024. The representatives duly submitted their written arguments and I am indebted to them for fulfilling their obligation in this regard. I recorded the proceedings on my digital audio recorder, backed the recording up on my mobile device recorder, and also made copious notes in shorthand.

1.2 The Applicant was represented by Mr J. Ramokgopa an Official of the PSA, a registered union. Even though the Applicant then becomes the PSA, the term will be applied to the employee, Ms Benedicta Gumede, in this award and, where any specific reference is/ may be made to the union, it will be referred to as the Applicant Union. The Respondents, collectively, were represented by Mr J. Matsimela, its Labour Relations Officer, who took over from his predecessor in his unit who had reportedly become indisposed on grounds of ill-health. There appears to have been a merger of departments which seems to have culminated in the 1st Respondent now bearing a name that varies from the Department of Mineral Resources and Energy, as appears from the papers of the parties, and the Department of Mineral and Energy as appears from the notice of set down. Whatever variation is the correct one the essence is the employer remains the same. The 2nd Respondent took no active part in the proceedings and his demeanour was that of someone who abides by the decision of the GPSSBC.

2. ISSUE TO BE DECIDED

2.1 Whether or not the 1st Respondent committed an unfair labour practice related to promotion against the Applicant.

2.2 The appropriate relief, if any.

3. THE PRE-ARBITRATION MINUTE

Common cause issues

3.1 The Applicant was employed as a Human Resources Officer on 01 January 2010;

3.2 The Applicant applied for the advertised post of PMDS: Practitioner, on 07 July 2023;

3.3 The Applicant met the requirements of the advertised post (Qualifications);

3.4 The post was advertised on the Department of Public Service and Administration (“DPSA”) website Reference DMRE/2397;

3.5 The Applicant filed a grievance on 12 September 2023 and the outcome was communicated to the Applicant.

3.6 The Department of Mineral Resources and Energy has an approved Recruitment and Selection Policy which guides the Recruitment and Selection process.

Issues in dispute

3.7 Whether the Applicant's CV met the requirements of the department's recruitment process.

3.8 Whether the grounds for not shortlisting the Applicant were fair.

3.9 Whether the 1st Respondent committed an unfair labour practice against the Applicant.

Bundles

3.10 The Applicant handed down a bundle of documents referred to as Bundle A.

3.11 The 1st Respondent handed down a bundle of documents referred to as Bundle R.

3.12 The documents were what they purported to be and evidence would be led to prove the contents.

3.13 The Applicant had the duty to begin.

4. BACKGROUND TO THE MATTER

4.1 The Applicant was employed as a Human Resources Officer ("HR") in January 2010 and has been in the 1st Respondent's employ ever since. The 1st Respondent is a government department employing thousands of employees in the public sector of the economy. The 2nd Respondent, also an employee of the 1st Respondent, has been joined because he was the successful candidate in the recruitment process.

4.2 Briefly, the facts are that the DPSA floated an advertisement for the post of Performance Management Practitioner (Reference DMRE/2397). The Applicant applied and was shortlisted through a couple of shortlisting rounds but fell in the third round when she was excluded for not meeting a further requirement set by the Respondent which, on its version, was intended to reduce the number of shortlisted candidates to a manageable number. The Applicant's contention is that she met the requirements of the post as advertised and it was unfair of the 1st Respondent not to shortlist her on the basis of the new requirement or criteria. The 1st Respondent denies any unfair conduct. The 2nd Respondent, who had ostensibly also applied, was the successful candidate. It appears that even prior to the appointment of the 2nd Respondent to the post, the Applicant lodged a grievance over the failure of the 1st Respondent to shortlist her for the post. The grievance was unresolved. The 1st Respondent proceeded with the appointment of the 2nd Respondent. The 1st Respondent referred a dispute for conciliation under the auspices of the GPSSBC. The dispute was unresolved at that stage. This is, in a nutshell, the dispute that is the subject matter of these arbitration proceedings.

4.3 The 2nd Respondent abides by the decision of this tribunal.

5. SURVEY OF EVIDENCE AND ARGUMENT

5.1 The Applicant's Evidence and Argument

5.1.1 The **Applicant** testified under oath. What follows is not a verbatim account of her testimony but the salient features thereof.

5.1.2 She testified as to the length of her tenure at the 1st Respondent, her level, which is 6, and her remuneration of R300 912.00 per annum.

5.1.3 She was referred to a document[1] which she described as the advertised post. She applied, using the Z83 Form and Curriculum Vitae ("CV"), the 1st Respondent having deferred copies of qualifications to the shortlisting stage. She believed she met the requirements of the post.

[1] Pages 21- 22 of Bundle A

5.1.4 She was referred to a document[2] which she identified as her CV. She was, over and above Recruitment and Selection functions, responsible for the Performance Management and Development System ("PMDS") prior to the introduction of specialisation at the 1st Respondent. However, after the merger of departments in 2022, the PMDS function was removed to a different section. She was now being told, in respect of the application she submitted for the advertised post, that the 1st Respondent did not want anyone who worked with recruitment and selection.

5.1.5 She then testified on her execution of the PMDS function[3] over the years and was stymied that she should be branded a non-specialist when she did the full PMDS function. In this regard, her representative took her through documents[4] which turned out to be her performance appraisal beginning from the period 1 April 2014 through to 31 March 2020 and she testified that she consistently attained a score of 4 relating to her performance.

5.1.6 She only learned that she had not been shortlisted when she heard that interviews had been scheduled. She sent an email[5] to Maggie to inquire about the matter. Maggie's prompt response was that she had not met the requirements. She immediately lodged a grievance and received an outcome[6] in relation thereto. She read parts of the response into the record.

5.1.7 She was frustrated by the response and heard later that the 1st Respondent sought to appoint someone who specialised in PMDS. The successful candidate was appointed on 01 November 2023.

5.1.8 Finally, she testified that it was unfair of the 1st Respondent to exclude her in circumstances where she had met the requirements. It would be better if she had been given the opportunity to compete for the post. She sought to be promoted into the post and to be compensated for the 1st Respondent's unfair conduct.

5.1.9 The Applicant was cross-examined and re-examined on this evidence in chief. I may refer to such evidence in the analysis but only to the extent that it is necessary to resolve the factual disputes.

5.1.10 Mr Ramokgopa submitted closing arguments in writing. I may refer to such arguments in the analysis section of this award but also only to the extent necessary to resolve the factual and legal disputes.

5.2 **The Respondent's Evidence and Argument**

5.2.1 **Ms Maggie Nchabeleng ("Nchabeleng")** was the 1st Respondent's first witness. She took an oath. I present only an abridged version of the essence of her evidence. She is an HR Officer at the 1st Respondent and has been thus engaged since 2007. She testified regarding her role and responsibilities.

5.2.2 She was referred to a document[7] which she recalled as the advertised post and also stated that the post was one of a Performance Management Practitioner.

5.2.3 She testified that a total of two hundred and ten (210) applications had been received for the post. She read the requirements into the record.

5.2.4 Testifying on the first round of shortlisting, she stated that, based on the requirements, including two (years) of experience, the candidates were whittled down to sixteen (16). The Applicant made

[2] Pages 23-28 supra
[3] Page 22 supra
[4] Pages 29-75 supra
[5] Page 20 supra
[6] Pages 15-16 supra
[7] Pages 6-7 of Bundle R

this shortlist. In the second round, the criteria was upped to three (3) years of experience with specialisation in PMDS. The shortlist was truncated to seven (7) candidates. When the criteria was upped to six (6) years of experience specialising in PMDS in the third round of shortlisting, still specialising in PMDS, only four (4) candidates were left standing.

5.2.5 She then testified that when shortlisting, the objective is a manageable number (of candidates). There was a need to be fair and transparent. The Applicant was in after the first round of shortlisting but, in the second round she was out because of specialisation and because of experience. The Applicant was part of the 16 candidates at the end of the second round but when the criteria was upped to three years specialising in PMDS, she was out.

5.2.6 She also testified that the Applicant performed PMDS functions like she asserted but had been a generalist whereas the 1st Respondent sought a candidate who specialised in PMDS. The successful candidate had twelve (12) years' experience specialising in PMDS. The Applicant's CV did not betray that she specialised in PMDS. The minimum number of candidates shortlisted should be three according to departmental policy.

5.2.7 Finally, when referred to the Applicant's CV[8], she testified that the inscription "experience" written thereon was because the Applicant had not specialised in PMDS.

5.2.8 Nchabeleng was cross-examined but not re-examined on this evidence in chief. I may refer to such evidence in the analysis but only to the extent that it is necessary to resolve the factual disputes.

5.2.9 **Mr Headman Mbiko ("Mbiko")** was the 1st Respondent's second witness. He is the 1st Respondent's Director: Human Resources. He also took the oath. What follows is only the salient but core features of his evidence. He testified as to his role and responsibilities.

5.2.10 He was chairperson of the shortlisting panel. He corroborated the evidence of Nchabeleng insofar as the progress of the shortlisting rounds save for the fact that he testified that specialisation as a criteria was introduced during the third round of shortlisting. This was done because the panel opted for a more manageable number of candidates. They also considered the proficiency of applications received. When the feeling was that the panel was still not getting the manageable number of candidates, the years of experience would be increased, including experience in PMDS.

5.2.11 The advertisement had the minimum relevant requirements. It was fair on the department and the employee to consider a candidate who could deliver on the KRA's of the advertised post. The Applicant's CV projected a generalist's experience. She was excluded on specialisation.

5.2.12 There were a lot of candidates who had a similar profile or employment history as the Applicant who were also not shortlisted. The panel was guided by the criteria that was set. The Applicant was considered and was part of the six shortlisted candidates. The criteria applied equally to internal and external candidates. The successful candidate met the criteria

5.2.13 Finally, he testified that the Applicant's assertion in her CV that she managed PMDS could not be as HR Officers did not perform a management function. A CV is a document open to be written as one wanted to. He did not have the history but maybe at some point in the department before PMDS was allocated to him the Applicant could have managed. However, one could not be an officer and a manager. It had been fair not to shortlist the Applicant.

5.2.14 Mbiko was cross-examined and re-examined on this evidence in chief. I may refer to such evidence in the analysis but only to the extent that it is necessary to resolve the factual disputes.

[8] Page 7 supra

5.2.15 Mr Matsimela submitted closing arguments in writing. I may refer to such arguments in the analysis section of this award but also only to the extent necessary to resolve the factual and legal disputes.

6. ANALYSIS OF EVIDENCE AND ARGUMENT

6.1 Section 191(5)(a)(iv)[9] of the Labour Relations Act 66 of 1995, as amended **("the LRA")** requires that an unfair labour practice dispute be arbitrated when it remains unresolved after conciliation. The present dispute ran that course and the GPSSBC is, accordingly, clothed with the jurisdiction to determine it through arbitration.

6.2 Section 186(2) of the LRA provides what I consider to be the starting point in defining an unfair labour practice and sets out in (a)[10] what the present dispute is about. The Applicant occupies the post of Human Resources Officer. She applied for the position of a Performance Management Practitioner. There appears to be no dispute about the fact that the latter position is a more senior position than that currently occupied by the Applicant and that the Applicant, upon being so invited, made an application to move into the more senior position.

6.3 The movement or ascension of an employee from a lower position to a higher position is termed promotion. There is, perhaps, more to promotion than the crude description I present herein but of essence is that the Applicant sought to move from a lower to a higher position. The dispute is not about the Applicant having competed with other candidates and subsequently being adjudged to have failed to convince the 1st Respondent that she was a suitable candidate for appointment. The controversy is more about the door of opportunity being allegedly firmly shut in the Applicant's face even before she could enter the arena in that she was not ultimately shortlisted for the interviews. I use the term "ultimately" because the evidence informs that there were three rounds of the shortlisting process. In her evidence in chief, Nchabeleng asserted variously that the Applicant fell at the second and third rounds of the shortlisting process. However, her evidence later seemed to come into sync with that of Mbiko who, without equivocation, asserted that the Applicant fell short during the third round of shortlisting. This ultimate failure to shortlist the Applicant qualifies this alleged act or omission which has arisen between the Applicant and her employer, the 1st Respondent, as one of alleged unfair conduct relating to promotion. The dispute thus falls within the four corners of the unfair labour practice as defined. It was, after all, in ***South African Post Office v CCMA & Others***[11] that the Court, rather brusquely, held that:

"The CCMA does not have a general unfairness jurisdiction. An employee referring an unfair labour practice dispute in terms of section 186 must demonstrate that it falls within that section" (at para 18).

I postulate that the above dictum applies equally to Bargaining Councils.

6.4 The authorities are clear. It was established in ***NEHAWU v University of Cape Town***[12] and ***Sidumo v Rustenburg Platinum Mines***[13], that every employee has a right to fair labour practices.

6.5 However, it is also trite that there is no automatic right to promotion. This is not a bar to bringing a promotion dispute. In ***Apollo Tyres*** supra, the Court clearly held that access to a remedy is not dependent

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[9] S191(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –
(a) the Council or the Commission must arbitrate the dispute at the request of the employee if-
(iv) the dispute concerns an unfair labour practice.

[10] S186(2) '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, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

[11] (2012) 11 BLLR 1183 (LC)

[12] (2003) ILJ 95 (CC)

[13] (2007) 28 ILJ 2405 (CC)

upon the establishment of a right to promotion. What needs only be proved is that the employer failed to meet an objective standard thus establishing the unfairness that could entitle an employee to a remedy.

6.6 In ***Ncane v Lyster NO and Others***[14], the Court found that the decision by an employer to promote an employee is a substantive one. The Court did this in order to distinguish the procedural aspects of promotion from the substantive aspects. Having made this distinction, the Court then held that an arbitrator may only interfere with an employer's substantive decision to promote a certain person (as opposed to a procedural decision where objective criteria have been set) where the decision is irrational, grossly unreasonable or *mala fide* unless the employer has set an objective standard (the underlining is my own emphasis). It appears, therefore, that in order to succeed in a claim of unfair promotion, an applicant must show, over and above an unfair process, an unreasonable outcome. In fact, Lagrange J had, the year before the ***Ncane*** decision, succinctly set this principle out in ***Sun International Management (Pty) Ltd v CCMA and Others***[15]. I briefly hereunder reminisce on the issue that was before the learned judge.

6.7 In that matter, the third respondent, an internal candidate who had been unsuccessful in his application for a promotion post as the applicant (employer) had found all internal candidates unsuitable, nevertheless, succeeded in arbitration and was awarded compensation after an external candidate had been appointed following external advertisement of the post. Thus the matter came to rest before Lagrange J on review as aforesaid. The learned judge endorsed the approach arbitrators should adopt in such disputes as articulated in ***Ndlovu v Commission for Conciliation, Mediation & Arbitration & Others***[16] where the Court essentially came to the following conclusions:

6.7.1 It does not suffice for a complainant in a promotion dispute to say that he or she is qualified by experience, ability and technical qualifications because that is just the first hurdle.

6.7.2 The next equal if not greater hurdle was that the complainant had to show that the decision to appoint someone else to the post in preference to the complainant was unfair upon a consideration of the comparative abilities of the two candidates. If, after this comparison, the decision of the employer passes the test of rationality, no unfairness can arise.

6.8 The learned judge further considered that, in addition to the above, it is also important for an applicant to show, as held by the Court in ***National Commissioner of the SA Police Service v Safety and Security Sectoral Bargaining Council and Others***[17], a causal connection between the unfairness complained of and the prejudice suffered.

6.9 Most significantly, the learned judge noted that, in promotion disputes, it is not enough to merely show that there was a breach of protocol or procedures in the recruitment process. It is also necessary, in the view of the Court, for a complainant to show that the breach of the procedure had unfairly prejudiced him. As such, the learned judge in that case postulated that the main question was, therefore, but for the alleged failure to consider internal candidates first, would the third respondent have been appointed? So much for this jurisprudential discourse. Turning to the facts of the case before me, the main question, by necessary implication, becomes one of determining whether, but for the alleged breach of procedure in that she was not shortlisted for the advertised post, the Applicant, and not the 2nd Respondent, would have been appointed to the post. I turn to consider this question in the light of the evidence. As I do that, it is important to bear in mind that the test is one of a balance of probabilities. It is also important to note that I seek to resolve herein only the disputes of fact which are key to arriving at a fair decision.

6.10 The facts of the dispute are straight forward. The 1st Respondent apparently had need to fill the vacant post of Performance Management Practitioner. The advertisement, floated via the DPSA website, suggests that the invitation to apply was extended to employees within and outside Public Service departments. The Applicant applied. Even though he did not lead any evidence in this regard, it is reasonable to assume that

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[14] (2017) 38 ILJ 907 (LAC)
[15] (LC) unreported case no JR 939/14, 18-11-2016 (Lagrange J)
[16] (2000) 21 ILJ 1653 (LC) at 1655-6
[17] (2005) 26 ILJ 903 (LC)

by virtue of being the successful candidate, the 2nd Respondent also applied. The events that unfolded after the closing date of the advertised post are at the heart of this dispute.

6.11 The Applicant's version is that, despite meeting all the requirements relating to the advertised post, she was not shortlisted for interviews. In fact, she only learned that she was not shortlisted when she heard that interviews would be held and, upon inquiring into the matter, she was informed that she had not made the shortlist. She was aggrieved and lodged an internal grievance all to no avail, hence her approach to the GPSSBC to pursue her right not to be subjected to an unfair labour practice. The 1st Respondent's version is diametrically opposed in that it contends that the Applicant was not shortlisted precisely because she did not comply with the requirements of the advertised post as and when the bar for meeting the requirements was raised during the shortlisting process. In particular, the 1st Respondent contends that the Applicant was a generalist in regard to the advertised post whereas the 1st Respondent sought to, and eventually, appointed, a specialist. The dispute, in short, poses the crisp question whether the applicant met the requirements of the advertised post. In this regard, I turn first to consider the procedural aspects of this promotion dispute because, on a conspectus of the evidence, I believe that is the core of this dispute.

6.12 However, before I deal with the above-mentioned aspects, it is necessary to consider briefly an issue raised by the parties in the signed pre-arbitration minute. At subparagraph 3.2 thereof, the advertised post has been described as "PMDS: Practitioner". This is palpably incorrect because, firstly, that is not how the position is described in the advertisement and, secondly, Mbiko correctly testified that the post is one of a Performance Management Practitioner. This is a very important point to make because it bears a direct relevance to the most sticking point in this dispute.

6.13 It is not in dispute that the Applicant satisfied all the requirements of the advertised post when it was initially advertised. After all, this is why she was able to make it through the first two rounds of shortlisting, if regard is had to the 1st Respondent's version. The Applicant's version that she had performed the PMDS function from 2010 to the date when she ceased to do this due to the merger of two government departments to bring about the establishment of the 1st Respondent was not in any way discredited. The 1st Respondent only assailed her many years of experience in this regard on the basis that she had performed the function in the capacity of a generalist. Since the 1st Respondent had raised the bar during the third round of shortlisting to include the criteria of specialization in PMDS, the Applicant failed to make the final shortlist on this basis, according to Mbiko. There was nothing unfair in the conduct of the 1st Respondent in so doing, so its version went, because the shortlisting panel seemingly had a discretion to add to the minimum criteria of the advertised post. Mbiko, to my mind, also somewhat ambivalently testified that the Applicant could have managed PMDS as she asserted in her CV but this could also never be because employees at the level of HR Officer like the Applicant was did not manage. It seems to me that this ambivalent evidence cannot be construed to be a strong rebuttal of the Applicant's version that she managed the PMDS function. I thus accept her unscathed version that she managed the PMDS function for the length of time she asserted in her CV.

6.14 If Mbiko's evidence that the Applicant failed to make the final shortlist purely on the basis that she had been a generalist whereas the Respondent sought to appoint an incumbent who had specialized in PMDS is to be accepted as credible, then a reconciliation has to be found between this version and the version of Nchabeleng as summarised in subparagraph 5.2.5 of this award. Nchabeleng corroborated Mbiko's evidence that the Applicant fell at the specialization hurdle but also added that she failed to make the final shortlist on the basis of experience. In fact, in cross-examination, Mr Matsimela asked Nchabeleng to explain the inscription "experience" which appeared on the Applicant's CV and her evidence was that the Applicant was found to be lacking in experience. My recollection is that the lacking experience was in relation to PMDS. This is clearly at odds with the evidence of Mbiko who, on a close examination thereof, did not assail the Applicant's experience, at all. Conversely, he conceded as to the probability that the Applicant could have been working with PMDS over the considerable period of time she mentioned in her CV albeit in a generalist capacity. Both Mbiko and Nchabeleng, to my mind, occupied crucial roles within the shortlisting process in that Mbiko was not only the chairperson of the shortlisting panel but was the 1st Respondent's Head of the component within which the post to be filled resided, whereas Nchabeleng was expected to ensure adherence with the policies, procedures and practices of the 1st Respondent and give advice as and when required within the shortlisting process.

6.15 It was also clear from her evidence that the Applicant did not consider specialization to be a fair criterion to be added during the shortlisting process. Her evidence also shows that she deemed it unfair to be excluded and penalized on the basis that she had not specialized in PMDS in a context where the decision to create that specialization dispensation was a management prerogative over which she had no say. In seeking to understand the 1st Respondent's rebuttal of these assertions by the Applicant, I may have ever so slightly caused one of my toes to descend into the arena but, in order to form a more holistic assessment of the fairness of this additional criterion, I considered it incumbent upon me not to accept the Applicant's assertions at face value, but to inquire a little bit into the background of that decision to have employees who specialized strictly in PMDS because the 1st Respondent might well have had a sound and reasonable business rationale for doing so which could then mean that its decision might have invoked unavoidable prejudice but could never approximate unfairness. An employer, after all, knows what works best for its business and the addition of criterion which is in the best interests of the business during shortlisting in a recruitment process can never amount to unfair conduct by the employer.

6.16 What emerged from my little inquiry above was that the 1st Respondent (not that it was obliged to) did not even seize this opportunity to explain its business case for specialization but, most importantly, did not advance any proposition that the Applicant was afforded the opportunity to specialize in PMDS and had, of own accord, opted to remain a generalist. In such circumstances, the Applicant could not later be heard to cry that the additional criterion of specialization was unfair but if she went ahead and cried anyway it would be perfectly reasonable not to heed such a cry. Save for what I deemed to be a rather sudden and opportunistic but unsubstantiated assertion by Nchabeleng that such a choice was offered to generalist employees in the shoes of the Applicant, the 1st Respondent failed to show that the Applicant had a choice in the matter and, in the circumstances, I find that her assertions that not only was this criterion unfair, but that she was being unduly penalized on its basis, are not far-fetched at all.

6.17 As a final inquiry into the criterion of specialization which was added during the second or third round of the shortlisting (depending on which version of the employer we go with), and perhaps thereby putting half a foot into the arena, I inquired whether the addition of this criterion might not have changed the advertised post in a material way and, if so, whether the 1st Respondent had no remedies in place in such circumstances. If regard is had to paragraph 6.12 of this award, it seems to me that this very thought, that the essential character of the advertised post had been changed by the addition of the specialization criterion, was upper most in the mind of the Respondent's representatives at the time it concluded the pre-arbitration minute with the Applicant's representative. The advertised post, in essence, speaks to the intention to appoint a practitioner, just like the Applicant was, who would be called upon to focus only on PMDS functions. To my mind, nothing in the advertisement suggests that such a potential incumbent would be specializing in PMDS. It seems to me that the potential incumbent could have been a generalist just like the Applicant who saw, in the advertisement, the opportunity to jettison the baggage of recruitment, selection and other related general HR functions, in favour of focusing purely on performance management. Sole focus on performance management and, by analogy, PMDS, cannot, to my mind and by any stretch of the imagination, be equated with specialization. All it means is that the incumbent will focus only on the PMDS. As I put it to the 1st Respondent's witnesses, if the post had been intended to be one with its core as specialization in PMDS, then the post would have been advertised as such, thus excluding the Applicant. However, nothing in the advertisement says that any applicant to the post who performed other HR functions over and above PMDS functions, would not be shortlisted for interviews. It seems to me that, far from using specialization as a tool to reduce the number of candidates to be shortlisted and, ultimately, interviewed, to a manageable level, the 1st Respondent could have contemplated fairer conduct such as using its vast array of HR tools to repurpose and eventually re-advertise the post so that its character need not have changed materially during the shortlisting process on the flimsy grounds advanced by the 1st Respondent.

6.18 To that extent, I find that the addition of specialization as a criterion in the shortlisting of candidates to be interviewed for the advertised post fails the objective standard as contemplated in ***Ncane*** supra because it is clear from the evidence that it was irrational and grossly unreasonable even if *mala fides* is absent. However, the question which arises at a substantive level is whether the outcome reached was ultimately unreasonable because that is the only basis upon which the Applicant could attain to the portion of substantive relief she seeks in the totality of the relief sought. I briefly dispose of this question as follows.

6.19 In boxing analogy, the Applicant in her own version suggests that she would be content to have entered the ring and fought (perhaps even have lost) the battle rather than sit outside the arena (not even the dressing room) awaiting the call to make her walk to the ring, only to be informed that she had lost the battle before so much as entering through the turnstile of the arena. All she wanted was the opportunity to compete for the post and she expressed her confidence that she, and not the 2nd Respondent, would have been appointed to the post in the aftermath of such competition. On the face of it, the Applicant makes a strong case but arraigned against her are the authorities. However, before considering the authorities, let us look at the Applicant's version first.

6.20 The Applicant did not testify that she was a better candidate than the 2nd Respondent and was, therefore, a more suitable candidate to be appointed. She did not even say she was more qualified or had greater abilities than the 2nd Respondent, and even if she said it and it is merely an oversight on my part, the fact remains that, as contemplated in ***Ndlovu*** supra, this would have merely been the first hurdle. The second and greater hurdle, that of comparing her abilities to those of the 2nd Respondent and, resulting from that, the reaching of a determination that she had trumped the 2nd Respondent, simply did not materialize by virtue of the 1st Respondent's fatal procedural flaw in not shortlisting her in circumstances where the evidence shows she fully deserved to be shortlisted. However, that can never detract from the fact that the 2nd Respondent's abilities were tested against those of three other candidates and he was found to be the most suitable. There is nothing unreasonable in this outcome going by the authorities and, to my mind, the 1st Respondent's procedural flaw, fatal though it may be, is not sufficient to vitiate the outcome of the recruitment process. So, it seems to me that, consistent with the principle of the Court in ***National Commissioner of SA Police Services*** supra, the Applicant has not been able to show that but for the 1st Respondent's breach of procedure, she and not the 2nd Respondent, would have been appointed to the advertised post. It, therefore, ill befits me to interfere with the 1st Respondent's decision to appoint the 2nd Respondent. In a moral context, it could perhaps have been possible to find some merit in the Applicant's case. I am, however, not called upon to make a moral decision, but a decision on fairness consistent with established legal principles.

6.21 Finally, I reflected long and hard on whether this is one of those cases where the procedural unfairness committed by an employer may not, in the full circumstances of the case, be found to fall short of censure through an award of compensatory relief in favour of an employee especially in the light of a plea for such relief by the Applicant *in casu*. The Applicant has characterized the conduct of the 1st Respondent towards her as disgraceful and she is left with a feeling of being frustrated and excluded. On a consideration of the totality of the evidence, it is clear to me that the 1st Respondent made its decision to exclude the Applicant from the shortlist and eventual interview process without due regard to the impact this would have on her. Its primary concern was simply to manage the number of candidates to be shortlisted for the interview. That conduct is a serious offense to my sense of fairness. People are not numbers. They are humans with inherent dignity and in our post-apartheid dispensation, the supreme law of the country has recognized the need to protect, among others the right to human dignity. People, or some of the people, were mere numbers under the apartheid system. This is no longer so.

6.22 I have had regard to the closing arguments of the parties. The 1st Respondent merely rehashes the evidence and its conclusions do not necessarily address the issues I have set out in the analysis. The Applicant has made an attempt to support its arguments through case law but does not clearly articulate how the legal principles in those cases apply to the facts of this case. However, even the Applicant herself concedes that she only maintains that she would have proved she was the better candidate only if she had been afforded the opportunity to compete for the post. This is evidence that she has not proved for a fact that she was the most suitable candidate to be appointed. I am, nevertheless, appreciative of the representatives' respective attempts to persuade me one way or the other. I have, however, found no reason to be dissuaded from the reasons and findings I advance in this award.

6.23 It stands to reason that the Applicant has discharged the onus to prove that the 1st Respondent committed an unfair labour practice against her but only insofar as the procedure it followed in filling the advertised vacant post. I find that the Applicant, while not entitled to substantive relief, deserves a *solatium* for the procedural unfairness. Compensatory relief under the LRA was adequately summarised by the Court in

ARB Electrical Wholesalers (Pty) Ltd v Hibbert[18]. Without traversing that decision, the Court essentially ruled that the purpose is to soothe the injury to an employee's feelings as a result of the employer's unfair conduct. It is neither an order of damages, nor patrimonial relief. The impairment to the Applicant's dignity was self-evident in the manner in which she was excluded from the shortlist. In my view, it cries out for some solace. The Court also recognized that the quantum of compensation was a difficult horse to ride. It should neither be a token amount, nor a punitive sanction against an employer, especially in circumstances where there is still an ongoing employer-employee relationship. For these reasons, I consider four months' remuneration to be just and equitable compensation in all the circumstances of this case.

6.24 The evidence shows that the Applicant earns R300 912.00 per annum. I thus compute her compensation as follows:

6.24.1 R300 912.00 per annum / 12 months = R25 076.00 per month x 4 months = R100 304.00.

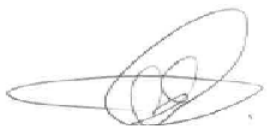
6.25 In the premises, I find the following award competent:

7. AWARD

7.1 The 1st Respondent, Department of Mineral Resources and Energy, committed an unfair labour practice against the Applicant, Benedicta T. Gumede.

7.2 I order the 1st Respondent, Department of Mineral Resources and Energy, to pay compensation to the Applicant, Benedicta T. Gumede, in the amount of R100 304.00 (one hundred thousand three hundred and four rand) by no later than 15 October 2024. The 1st Respondent may make such deductions from the compensation amount as are permissible in law and the amount owing attracts interest at the rate of 11.75% from the date it becomes due and payable.

7.3 I make no order as to costs.



NAME: KATLHOLO WABILE

GPSSBC ARBITRATOR

[18] (2015) 36 ILJ 2989 (LAC)