



**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL**

**Held in Pretoria**

**Commissioner: Tau Hlongwane**

**Case No.: GPBC1552/2020**

**Date of Award: 06 September 2023**

**In the ARBITRATION between:**

**PSA obo DM Ntamo**

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(Union/Applicant)

**AND**

**DEPARTMENT OF CORRECTIONAL SERVICES**

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(Respondent)

**ARBITRATION AWARD**

**PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

1. The arbitration hearing into an alleged Unfair Labour Practice - Promotion referred to the GPSSBC in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended (The Act), was held physically at the Respondent premises on the 11 August 2023.
2. The Respondent was represented by Mr PA Mofokeng, Deputy Director Collective Bargaining employed by the Respondent. The Applicant was represented by Mr. Lesiba Cedrick Masenya, a representative from PSA.
3. Three bundles submitted by the Applicant as bundle "A1", "A2" and "A3" were admitted into evidence. Respondent also submitted one bundle, also accepted into evidence as bundle



“R1” to “R5” also admitted into evidence. Both parties agreed to submit closing arguments on the 24 August 2023.

4. In addition, it is a requirement of the Labour Relations Act in section 138(7)(a) that the commissioner must issue an arbitration award with brief reasons, signed by that commissioner at the conclusion of the arbitration.
5. For this reason, only the salient points will be mentioned in the award. It is to be noted further, that despite this the submissions have been considered in detail in the writing of the award.

## **THE ISSUE IN DISPUTE**

6. Whether or not the conduct of the Respondents was fair for not promoting the Applicant.

## **BACKGROUND TO THE DISPUTE**

7. The Applicant applied for a position of a Deputy Director Asset Management with a notch of R733 257.00 per annum.
8. The Applicant was not shortlisted for the position.
9. Shortlisted candidates were interviewed and one successful candidate appointed.
10. Applicant is presently employed by the Respondent as an Assistant Director Asset Management with a notch of R376 596.00 annum.
11. The reason for the Applicant not to be shortlisted is because the Applicant did not meet the requirements for the position.

## **SUMMARY OF EVIDENCE AND ARGUMENT**

### **EVIDENCE**

#### **The Applicant's Submission Mr Dumisane Ntamo as the 1<sup>st</sup> Witness**

12. Started with the Department in 2011 as an Assistant Director Asset Management. Appointed from 2011 to 2019 as an Assistant Director Asset Management, was also appointed as an Acting Deputy Director as and when required from 2011 to 2017. The Applicant was transferred in 2019 to work in the finance unit.



13. The Applicant applied for a position of Deputy Director Asset Management because he acted on the position in the past and believed he qualified for the position. The duties stipulated on the Applicant's CV and advert of the Deputy Director Asset Management are the same.
14. The requirement of the position is a three year degree or National Diploma Logistics or relevant field. Relevant field means having worked in logistics. The Applicant acquired a National Diploma Taxation in January 2005, the advert closing date is the 14 June 2019. Applicant lodged a grievance after the post shortlisting took place. Applicant believe he qualified to be shortlisted based on experience and qualification. The post involves calculations, Diploma in taxation is a relevant field. Asset Management deals with money of the Department. Applicant complied with all requirements for the position.
15. The shortlisted candidate Ms Pinda PN has Bachelor of Commerce in accounting with experience a Acting Deputy Director Supply Management. Ms Moswana M has B.Com Degree and experience as an Assistant Director. Ms Mthlalefi B.Tech in Public Management and National Diploma in Public Management. Mr Munshi has BCom Accounting with experience in Asset Management. Mr Zwane AM has Diploma in Cost and Management Accounting with experience in Asset Management. Mr Gwabe VC has a National Diploma and Btech in internal Auditing and experience in movable and immovable asset management and inventory management. Out of all candidates shortlisted none have logistics qualifications. The stream of the Applicant's qualifications falls under accounting qualification.
16. The reason provided for not shortlisting is failure to meet the requirements, while none of the shortlisted meet the qualification criteria. Asset management falls under logistics which falls under supply chain. The person appointed for the position is Mr Munshi with the second recommended candidate as Mr Zwane. Mr Zwane has a National Diploma in Cost and Management Accounting. The successful candidate has a BCom Accounting. Both recommended candidates should not have been shortlisted because they have the same qualification as the Applicant's.

**The Respondent's 1<sup>st</sup> Witness Mr Phehello Aaron Mofokeng**



17. The witness is employed by the Respondent as a Deputy Director Collective Bargaining and Negotiations. The advert for Deputy Director Asset Management attracted 356 candidates. Twelve names were shortlisted and interviewed, Mr Munshi MT was the successful candidate. Subsequent to the appointment of the successful candidate the Applicant submitted a grievance. And the response to the grievance was that the Applicant did not have the appropriate qualification. The relevant qualification should be within logistics and the Applicant did not possess such qualification. The candidate required was a candidate to manage procured assets. The National Diploma in Taxation is not a requirement for the post.
18. The Appointed candidate was recommended as the most suitable candidate. The grievance was out of anger, and the Applicant's dispute is baseless and have no legal argument.

### **ANALYSIS OF EVIDENCE AND ARGUMENTS**

19. I am called upon to establish whether or not the conduct of the Respondent was fair or unfair in not shortlisting the Applicant.
20. Section 186(2)(a) of the Labour Relations Act prohibits the unfair labour practice in the conduct of the employer relating to promotion. In a decided case of EN Mbatha vs SSSBC and others JR372/13 the court clarifies the issue of fairness in that unfairness implies a failure to meet objective standard and maybe taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended. In City of Cape Town v SAMWU obo Sylvester & others (2013) 34 ILJ 1156 (LC) the court expressly rejected the notion that the employer has the prerogative to decide who to appoint and that it should not be questioned when it exercises that discretion. The court stated that the proper yard stick was fairness to both parties.
21. The 1<sup>st</sup> Respondent witness testified that the Applicant qualification was not relevant and what was relevant was the successful candidate's qualification. From the assertion of the Respondent am taking note that the dispute is not about the appointment of the Applicant but about the failure by the Respondent to shortlist the Applicant. The Applicant's version is that none of the shortlisted candidates meet the minimum requirements and the Applicant met the



minimum standard or requirements more than most shortlisted candidates. I concluded that there is an existence of dispute of facts. In *Stellenbosch Farmers' Winery LTD and Another v Martell et Cie and Others*, the Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain, as far as possible, where the truth lies between conflicting factual assertions; **to conclude on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probability or improbability of each party's version on disputed issues. The more convincing the former the less convincing will be the latter. But when all factors are equipoised probabilities prevail.**

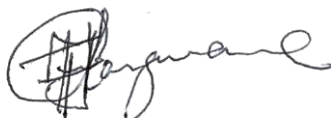
22. There are different categories of shortlisted candidates based on minimum and relevant qualifications which are public management, accounting, auditing and the Applicant's qualification in taxation. My focus is not about the experience as it is common cause that the Applicant possess necessary experience for the post. I found it odd for the Respondent to conclude in shortlisting a candidate in public management and not shortlist the Applicant who has a finance related or accounting related qualification

23. I further conclude that at the time of the dispute the Applicant was not employed as a Deputy Director but employed as assistant Director with a notch of R377 596.00.

## **AWARD**

24. The conduct by the Respondent for not shortlisting the Applicant was unfair.

25. The Respondent is ordered to pay the Applicant compensation of one month salary to the amount of .R31 466.33 to be paid on or before the 30 September 2023.



**GPSSBC Commissioner: Tau Frans Hlongwane**