

In the

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

Held in Nelspruit

Date: 18 July 2024

CASE NO: GPBC1274/2022

In the matter between

PSA obo MM Nkosi

Applicant

And

Department of Home Affairs

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- [1] This is an arbitration award issued in terms of section 191(5)(a) of the Labour Relations Act of 1995. The hearing was scheduled under the auspices of GPSSBC heard before me on the 31 October 2022, 26 January 2023, 12-13 April 2023, 30-31 May 2023, 18-19 October 2023 and on the 12 -13 February 2024 at the offices of the Respondent in Nelspruit.
- [2] The Applicant was represented by Mr Jakobus Heyneke of PSA and the Respondent was represented by Mr Vusumuzi Mngomezulu. Proceedings were in English and were electronically recorded. Parties submitted their bundles which I labelled them as "Bundle A1 and A2" for the Applicant bundles and the Respondent bundle was labelled Bundle R. Parties agreed to submit their closing arguments on or before the 1st of March 2024 which they did.

ISSUE TO BE DECIDED

- [3] I had to decide whether the failure to shortlist the Applicant for the position of the Office Manager constitutes unfair labour practice relating to promotion in terms of section 186(2)(a) of the LRA.

BACKGROUND TO THE DISPUTE

- [4] The dispute arose from the dissatisfaction of the Applicant when he applied for the position of the Office Manager Larger Office in Mbombela in 2021. The post required a person to have a minimum 3 years' experience in junior management or assistant director level, knowledge in change management and knowledge of civic and immigration services. The Applicant applied for this post as he felt he meets all the minimum requirements.
- [5] At the time of the application, the Applicant was holding a position of Local Office Manager Medium Office in Komatipoort. The post he held is level 10 with a salary of R51, 468.50 per month. Despite being at this level and having qualifications above the minimum requirements he was surprised not to make it to the shortlist and he was aggrieved by this. He followed internal grievance process where the outcome was that he didn't display or show any knowledge of civic and immigration services.
- [6] Annoyed by this decision he approached this Council for resolution of this dispute as he felt he was prejudiced and left out whilst he was meeting all the minimum requirements. His desired outcome is the compensation as he doesn't dispute the appointment of the incumbent because she meets all the requirements.

INTERLOCUTORY APPLICATION AND RULING

- [7] The Respondent representative Mr Vusumuzi Mngomezulu raised an interlocutory application to the Commissioner to recuse himself as he has misconducted himself in one hearing where Mr Mngomezulu was not present, but Ms Nompumelelo Ndlangisa was representing the Respondent to relay the request for the postponement since Mr Mngomezulu was off sick. In that hearing, the then representative Ms Ndlangisa indicated that there was a subpoenaed witness Ms Siphiwe Masondo who is based in Bronkhorspruit, what will be happening to her as the Respondent is bearing the costs of her traveling.

- [8] The Commissioner asked the Applicant what did they wanted to deduce from the subpoenaed witness, the Applicant indicated that they wanted her CV to use it as a comparator to the Applicant's CV where the witness showed no experience of civic and immigration knowledge but she was shortlisted and appointed. The Commissioner called the witness in to ask if she will be okay to hand over the CV to the Applicant without really having to bring it in the next sitting, the witness opted to come with her CV in the next sitting.
- [9] Mr Mngomezulu was informed about this and raised this application to have the Commissioner recusing himself in the proceedings. This application was refused on the basis that the Commissioner did not act ultra vires by making such an enquiry as both parties were represented and this was on record, in addition, the Commissioner is empowered by the section 138(1) of the LRA that the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
- [10] As a result, the Commissioner followed the guidelines stipulated above to ensure the quick and fair manner in resolving the dispute and nothing untoward to what the Commissioner did and as a result the application fell off and the Commissioner proceeded with the arbitration.

SURVEY OF EVIDENCE AND ARGUMENTS

APPLICANTS' CASE

- [6] The Applicant Mr Nkosi testified that he is employed by the Respondent as the Lcal office Manager Medium Office in Komatipoort. Apart from being a Local Office Manager at Komatipoort he acted as District Manager from 01 October 2017 until 31 July 2019 where he was responsible for all 5 offices in the region, including the Mbombela Office that is now in dispute. He testified that in both roles he was actively involved in overseeing and management of both civic and immigration processes as the manager.
- [7] In his CV where there was a dispute that he didn't show the knowledge of civic and immigration services, he stated that the duties that are listed there are covering both aspects of the immigration and civic services and the fact that he is occupying a managerial post where these functions are under his care is another indication of the knowledge of the subject. He further made a reference to Ms Masondo who was shortlisted and appointed in Bronkhorspruit Office whilst she only had experience from South African Social Security Agency SASSA not civic and immigration knowledge as per the Respondent's claim.

RESPONDENT'S CASE

- [8] The Respondent led its evidence through witnesses and Ms Ndalisa Jele was called in. she testified under affirmation that she is the Provincial Manager for the Respondent. She stated that she was the chairperson of the selection committee and when they did the selection they checked candidates who were meeting the requirements for the position of the large office manager.
- [9] In doing so, they followed strict measures in ensuring that only candidates meeting minimum requirements as per the dictates of the advert are being shortlisted. Amongst the application there was the CV of the Applicant Mr Nkosi, despite knowing him and his responsibilities, she could not recommend her for shortlisting because his CV didn't show civic and immigration experience.
- [10] During cross-examination when she was directed to the CV of the Applicant in bundle A1 page 31 on knowledge where it states the acts he knows and the experience thereof, her response was that this is not comprehensive, and it doesn't show the required experience. When shown the CVs of other candidates like Sabelo Ngxitho who showed no civil and immigration experience in their CVs and that of Siphokazi Roto who also didn't have experience and knowledge of civic and migration experience, her response was evasive and rather defensive which couldn't make any sense in the proceedings.
- [11] The Respondent further called Ms Nompumelelo Ndlangisa the Provincial Head of human Resources who was asked about Mr Sabelo Ngxitho's CV that made it to the shortlist despite being received after the closing date and there was a circular that was issued by the department that under no circumstances late applications should be considered. She stated that the circular was a matter of weeks issued and this application would have possibly delayed in the post as it was coming from Eastern Cape.

ANALYSIS OF ARGUMENTS AND EVIDENCE

- [12] Section 186(2)(a) of the Labour Relations Act prohibits unfair labour practice against an employee on issues pertaining to promotion, training and/or demotion. Here I am expected to determine whether the failure to shortlist the Applicant by the respondent does constitute unfair labour practice if it does, what should be the remedial action.

- [13] it is common cause that the Applicant was meeting the minimum requirements for the post, academically and experience is not in question. The issue here is his CV that doesn't show the required civic and immigration experience that is required. The argument of the Respondent is that they are not allowed to use their knowledge of the Applicant but they must look at what the CV is saying.
- [14] However, the Respondent managed to consider what should be considered as recognition experience on candidates like Ngxitho and Roto who, despite not showing the experience and knowledge in civic and immigration and not even having worked in similar role or environment were considered for shortlisting. To me, this is unimaginable and serious disregard to procedures and recruitment process which seem to be deliberate as the Respondent continued to be hell-bent that there is no civic and immigration experience shown by the Applicant despite being pointed out to her.
- [15] The Respondent's action of not shortlisting Mr Nkosi despite his comprehensive CV showing his experience and knowledge, the Respondent not only knew that Mr Nkosi acted from more than two consecutive years as District Manager overseeing the same office that he is applying for, the CV of the Applicant showed that and the CV met all the requirements in the advert to be shortlisted, however, for reasons known to the Respondent he was disregarded.
- [16] The actions of the Respondent are dishonest and disadvantaging to aspiring job applicants in the department. The CV of Mr Nkosi was in line with the advert as it outlined all the necessary skills and requirements for the post and the panel decide to deliberately overlook this as the panel's chair testimony alluded to not consider what is written the CV under knowledge part.
- [17] The Applicant sought a maximum of 12 months' salary as a compensation for this transgression. However, the courts have cautioned on enriching individuals on the basis of the errors committed by the employers and as a result, a corrective approach should be applied when dealing with such matters taking into consideration that the Applicant lost no income and the process was at very initial stage of shortlisting, of which, even if shortlisted there was no guarantee of a promotion. It is therefore my view and conviction that 2 months' salary will be just and equitable compensation for this transgression.

AWARD

[18] In light of the above deliberations in make the following order:

1. The Respondent's actions of not shortlisting the Applicant constitutes unfair labour practice.
2. The Respondent is ordered to pay the Applicant a compensation of two months' salary amounting to **R51, 468.50 x 2 = R102,937.00** less statutory deductions by no later 30 days after the issue of this award.
3. No cost to order is made.

Sivuyile Tshingana



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GPSSBC Arbitrator