



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Joyleaf Boase
Case No.: GPBC294/2022
Date of Award: 1 August 2023

In the ARBITRATION between:

PSA obo Lekabe T.G

(Union/Applicant)

Department of Employment and Labour – Potchefstroom

(Respondent)

Union/Applicant's representative: Mr Kabelo Moalosi

1st Respondent's representative: Ms Theron Makuya

2nd Respondent's representative: Mr Nyameko Sibewu

DETAILS OF HEARING AND REPRESENTATION

- 1) The arbitration hearing took place on the 16th and 17th February 2023 at the respondent premises in Potchefstroom, the Department of Employment and Labour. The proceedings were electronically recorded. The applicant, Mr T.G. Lekabe was represented by PSA union official, Mr Kabelo Moalosi. The 1st respondent, the Department of Employment and labour and 2nd respondent, Mr Nyameko Sibewu (not in attended as relocated to Gauteng Labour Centre) were represented by Ms Theron Makuya from Labour Relations.
- 2) Both parties agreed to submit the last set of closing arguments on the 02 March 2023 before close of day.

ISSUE TO BE DECIDED

- 3) I must decide whether the non-promotion of the applicant on the post advertised while he met all inherent requirements of the post constitutes an unfair labour practice with a relief sought of protected promotion.

NARROWING OF ISSUES

- 4) It was common cause that the applicant did apply for the advertised posof Assistant Director: PES Administration.
- 5) Disputed issues were that for the applicant not to be considered for the post advertised was that he did not have the relevant qualifications.
- 6) The applicant party submitted Bundle A and the respondent bundle submitted bundle R.
- 7) The applicant was the only witness who testified while the respondent also called in Ms Lindiwe Nkiwana.

BACKGROUND TO THE MATTER

- 8) The applicant is employed by the respondent on salary level 08, notch R384.00 per annum and on the 30th of April 2021 he applied for an advertised post, reference No: HR4/4/10/44 on salary level 10 with a closing date of the 10th of May 2021. The requirements of the post advertised was 3 years relevant tertiary qualification in Social Science (Psychology; Public/Business Administration, 2 years supervisory experience, 2 years functional experience in Public Employment/Public Administration/ Management Services knowledge: ILO Conventions, Financial Management, Human Resource Management, Social Plan Guidelines Skills, Presentation skills, Interpersonal skills, Report writing skills, leadership, and Networking.
- 9) The respondent did not consider the application or shortlist the applicant since he did not possess the 3-year relevant qualification as stated by the advert but only having a Postgraduate Diploma in Public Administration which is a 12

month's qualification. The applicant later lodged the grievance on the 28th of September 2021 with an outcome dated the 19th of October 2021 but still not resolved, and he referred the matter to the GPSSBC (the Council) in terms of section 186(2)(a) on promotion of the Labour Relations Act of 1995 (the Act) as amended. On the 28th of March 2022 the matter was conciliated and remaining unresolved, and on the 07th of April 2022 was referred for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant Evidence and Arguments

1st Witness: Mr Lekabe testified as follows under oath: -

- 10) that he's on salary level 08 and the dispute arose when he was not shortlisted after an advertised post of Assistant Director: PES Administration in Mmabatho with salary notch R470 040.00 per annum.
- 11) He read from page 21 bundle 'A' mentioning that it is he's qualifications the national diploma he received in Marketing Management, 2006 B-tech in marketing, 2021 Postgraduate Diploma in Public Administration. He clarified that he's overqualified when comparing his qualifications and the job requirements on the advert, on page 03 which for one is a tertiary qualification: explained that to study post graduate diploma one needs to have a degree to be administered. The job advert requirement was looking for 3-year relevant qualification in Social Science, Psychology: Public or Business Administration and putting together his Postgraduate Diploma in Public Administration to say all these documents were very sufficient for him to be considered for the position.
- 12) He further clarified that according to his knowledge if he did not have Postgraduate Diploma in Public Administration he would have not qualified because he would not be possessing the relevant qualifications by the advert and then be possessing marketing which was not required: it's in that basis that for him to have a junior degree with one subject being technology that he qualified or administered to do postgraduate in public administration. He read page 32 'A' a document from website showing the table levels of qualification by South African Qualification Authority (SAQA) which is a division of Department of Higher Education and Training (DHET) that regulates levels of qualifications. He further explained that the job requirements on page 3 'A' on the position of Assistant Director that is on level 06 by mentioning the 3 years national diploma wherein relation to his qualifications he's on level 08 meaning is higher than level 06 and 07. This illustrated to him that he's having more than what the job requires based on qualifications, work experience where he should've been given an opportunity to be a possible candidate for the post. In the current stage the Department of Employment and Labour gave him a bursary which is already approved to study master's in business administration which is on the National Qualifications Framework (NQF) level 09. On page 31 'A', linking with page 03 'A', the requirement was 2 years supervisory experience and already having 10 to 11 years supervisory meaning he does meet the requirements.
- 13) On **cross examination** he was asked to read page 03 'A', with a follow up question that "do you have 3 years tertiary qualification" were he replied that he has honours which is more than what was required by the advert. He was taken to bundle R on

page 19, paragraph 06, (c) which is Recruitment and Selection policy (R and S) as follows - the selection criteria shall be based on the inherent requirement of the job to find a suitable qualified candidate. The most suitable qualified candidate shall be selected from the pool of candidates who meet the minimum requirements of the job and has demonstrated potential. Selected candidates will be supported by skills development and career management program: in the response he said the paragraph is contradictory to the advert as he talks about minimum requirement and the advert is talking about 3 years and its silence by not mentioning the minimum requirements is what disadvantaged him and he really qualified, and do not have the 3 years, but having the NQF which is higher.

- 14) According to his understanding on page 23, paragraph 6.3.1.1.1- shortlisting criteria must be in line with the job contents and job requirements as stipulated in the advert: EE profile should be considered, however it should not be used as the 1st criteria when shortlisting and in the response he said it's clear and does not agree with the statement is having lot of contradictions to say if the candidate possess more qualification than what is required is disadvantaged. He's understanding to 6.3.1.1.3 - shortlisting must only be conducted based on information provided in the Z83, CV and qualifications: he mentioned that it means no additional information can be added after applying or shortlisting is according to what is provided. He's national diploma in marketing is relevant because it was used as a qualification when submitting for admission study the postgraduate in public administration and this comparison is not only done by education institutions, that's why it was relevant. the B-tech marketing issued by Vaal University of Technology is 1 year qualifications equivalent to the degree was also relevant in taking notice of his postgraduate diploma in public administration was way more than relevant and he took 1 year to complete it and he agreed the advert was saying 3 years relevant tertiary qualification.

Respondent Evidence and Arguments

1st Witness: Ms Lindiwe Nkiwane testified as follows under oath: -

- 15) **Ms Lindiwe Nkiwane** mentioned that she is employed by respondent as Director Public Employment Services in Mmabatho with responsibilities to oversee the implementation of public employment services. She confirmed that the post advertised in 2021 is on page 31 on the R bundle where she was a chairperson of R and S to complete the shortlisting with an explanation that they were guided by the advert issued to them stating the 3 years relevant tertiary qualification in social Science, Psychology; Public/Business Administration, 2 years supervisory experience and 2 years functional experience and by comparing the applicant qualifications on page 32 as the reason why he was not shortlisted because he did not meet the post requirements. On page 37 the applicant qualifications on 3 years relevant qualification is not in Social Sciences then due to the criteria based on the advert they needed not to change or relax the criteria, indicating again that the applicant B-tech in Marketing qualifications also is not in Social Science but a postgraduate diploma in public administration which she's not sure how educational institution rate them but in terms of the advert it was clear what they were needed to consider which only was National Diploma.

- 16) She clarified that page 19, paragraph 06 (c) the panel member followed it as it states: page 23 paragraph 6.3.1.1.1, also they considered it including 6.3.1.1.3 and to narrate that there is nothing they bridged on the policy. She read page 32 to say the advert never said anything about Postgraduate it only mentioned 3 years relevant qualifications which the panel followed and making the panel aware that the applicant does not qualify to be shortlisted for the position, and as far as she can remember there is no candidate who was shortlisted only with a postgraduate but having a plus 3 years Diploma which assisted the panel to arrive at a decision to shortlist or not. She emphasised that there was no unfairness done on the applicant by not shortlisting him as the panel only followed the guide on the advert.
- 17) On **cross examination** she stated after being asked to confirm her qualifications that she has a master's in business administration as the highest qualification, National Diploma in Public Management and agreed that her master's qualifications are not Public Administration qualifications or 2 different things. She confirmed that she considers National Diploma as a 3-year qualification that's why the panel followed the advert on 3 years with a version put to her that national diploma is 1 year and 08 months. It was put to her that after attending the Further Education and Training (FET) on 18 months practical's and 18 months on theory studies and deliberated to her to say that's why the panel couldn't apply the same principle in this matter. She rebutted that the panel interpreted anything wrongly, and not aware if a person with a degree can do honours in psychology. She responded that she could not recall if shortlisted candidates including the 2nd respondent were having more than 2 years in supervisory experience. In conclusion she said that the advert never mentioned anything about minimum requirements, but it said 3 years and that's how the panel acted.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 18) **In terms of Section 186(2)(b) '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.
- 19) **The South African Constitution, Act 109 of 1996, Section 23(1)-** pledges to everyone the right to fair labour practice. In the employment context, this constitutional right is narrowed down in Section 185(b) of the Act unequivocally guarantees that every employee has the right not to be subjected to unfair labour practice.
- 20) **In terms of the Labour Relations Act 66 of 1995, Section 213 - Collective Agreement** means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade, on the one hand and, on the other hand -
- (a) one or more employers;
- (b) one or more registered employers' organisation; or

(c) one or more employers and one or more registered employers' organisations;

- 21) It is trite law that he/she who alleges unfair labour practice must prove. The Applicant party in this matter alleges that the respondent's failure to shortlist him for the position of Assistant Director: PES Administration in Mmabatho provincial office, constitutes unfair labour practice relating to the promotion as contemplated by the provisions of Section 186(2)(a) of the Act.
- 22) The Applicant challenged the procedure followed by the panel members as denying him an opportunity to be appointed by not shortlisting while he meets all minimum requirements of the advertised post.
- 23) **In SAPS v Security Sector Bargaining Council & Others [2010] 8 BLLR 892 (LC) the court stated -**

"The decision to promote or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonableness or bad faith or where the decision relating to promotion is seriously flawed, the court and arbitrator should not readily interfere with the exercise of the discretion..."

- 24) The Applicant is challenging the decision made by the panel members after they responded to him on the 19/10/2021 after lodging a grievance on the 28/09/2021 on that the Human Resource Management was consulted to establish the reasons why he was not shortlisted while acknowledging that he had supervisory and functional experience in Public Employment/Public Administration/Management Services as what he possess is not the one on the advertised post which establish that he has Postgraduate Diploma in Public Administration which is 12 month's qualification and post required 3 years relevant tertiary qualifications in Social Science, Psychology; Public/Business Administration. I took note that what the post sought was strictly the 3 years full time study to complete which the Applicant did not have during the period of the advertisement.
- 25) The Applicant further rebuts this explanation because he believes he's way more above qualified comparing to what the advert listed, he mentioned that this position he was applying for is on level 6 as listed in the SAQA website, on page 32, written NQF - subframe works and qualification types from level 01 to level 10. In total even when the Applicant was having the supervisory experiences, but it is a known factor that one cannot in a one-year postgraduate diploma in a specific field acquire all the academic knowledge that one would acquire in a 3-year full time study or diploma but can be possible through the progression of time. My example in these instance one can have Master degree in Law (LLM) which require 2 years full time study and rated as higher NQF level than Bachelors in Law (LLB) that takes 4 years full time study to complete: universities would permit any person without LLB to register for LLM provided one has experience in labour law mainly that a person having LLM does not have the basic knowledge of law that is taught to LLB person, in which for a person to be admitted as an attorney or advocate must have LLB if only having LLM because is higher on levels will not, better to have both, my emphasis.

- 26) In assisting in this dispute, I looked for dictionary meaning in commencing, **In Maskew Miller Longman, South African School Dictionary - Pearson: Diploma** is an official document that you are given when you have successfully finished a course of study. **Postgraduate** - someone who is continuing their studies at university, after getting a degree. **NQF** - is the abbreviation of National Qualifications Framework a set of standards used by teachers to measure learners progress and to allow people of any age to gain a national recognised qualification.
- 27) I accept that the Applicant as clarified by the chairperson of the R and S for shortlisting was that they followed what the advert was mentioning which abled the committee to arrive at a decision not to shortlist because it was clearly stated that 3 years relevant tertiary qualification which is Diploma not a Postgraduate Diploma, to the testimony provided is that these is 2 different things that's why the postgraduate diploma was not considered. In addressing the above is that the Applicant was not shortlisted or interviewed for the post which was going to be easy for me especially for the supervisory post subjective to the impression made during the interviews be taken to an account. In relation to these the Applicant cannot prove that he was the best or deserved the post as he was never part of the proceedings also to the effect that I do not agree with the relief of protected promotion as relief because is not defined in our common law or the legislations. **In Department of Justice v Commission for Conciliation, Mediation & Arbitration & Others (2001) 22 ILJ 2439 (LC)** court held that protected promotion once existed and was defined in the public services regulations only and that it was only the Public Service Commission that had jurisdiction to grant it.
- 28) In taking the parties' evidence in totality and duly applying my mind to the facts and merits of the case before me, is that the Applicant has never been shortlisted and interviewed, and he could have been shortlisted wherein the 1st Respondent is ordered to repeat shortlisting's and set aside the appointment of the joined 2nd Respondent, Mr Nyameko Sibewu.

AWARD

- 29) There was an unfair labour practice effected on the applicant.
- 30) The First Respondent, the Department of Employment and Labour is directed to repeat the recruitment and selection process for the position of Assistant Director: PES Administration for shortlisting.

Name:

Joyleaf Boase

GPSSBC PANELLIST

