



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in COLESBERG

Commissioner: PHOLO, GMP (Dr)

Case No.: GPBC1234/2020

Date of Award: 19th April 2021

In the Dispute between:

PSA obo MPURU

(Union/Applicant)

and

DEPARTMENT OF TRANSPORT, SAFETY AND LIAISON

(1st Respondent)

and

LUBAXA (Self)

(2nd Respondent)

Applicant's Representative: Mr S Ledibane

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1st Respondent's Representative: Mr TL Aaron

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2nd Respondent: XB Lubaxa

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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This is an arbitration award in the matter between Mr S Mpuru (applicant), the Department of Transport, Safety and Liaison (1st respondent) and Ms XB Lubaxa (2nd respondent). The matter was set down for an arbitration in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995. The arbitration was held at the offices of the respondent at Colesberg on 24th February 2021 and 29th March 2021. The arbitration proceedings were electronically recorded and the recordings are filed with the Bargaining Council (GPSSBC).
2. The Applicant was represented by Mr S Ledibane (PSA - Labour Relations Officer), the 1st respondent was represented by Mr TL Aaron (Assistant Director: Labour Relations) and the 2nd respondent represented herself.
3. The parties separately handed me their respective set of document. The applicant's documents were termed "**bundle A**" and the 1st respondent's documents were termed "**bundle B**". The 2nd respondent did not hand in any document.
4. At the end of the arbitration, the parties requested to submit their written closing arguments by the 9th April 2021.

THE ISSUE IN DISPUTE

5. To determine whether the applicant met the requirements to be shortlisted for the interview for the promotional position of Chief Provincial Inspector (CPI) at Colesberg, and if so,
6. To determine whether the respondent acted fairly by not shortlisting the applicant for the interview of the position as defined in paragraph 5 above.

BACKGROUND TO THE DISPUTE

7. The respondent advertised the position of the "**Chief Provincial Inspector**" (CPI) at Colesberg with the closing date of the 23rd November 2018, and the advertisement outlined the requirements for the position.
8. The applicant responded to the advert and applied for the position as defined in paragraph 7 above, but he was not shortlisted.
9. The applicant felt that he met the requirements for the position and should have been shortlisted to compete for the position.
10. Given paragraph 9 above, the applicant completed the grievance procedure and when the respondent failed to address the grievance, he referred the matter to the Council for conciliation and arbitration.

SUMMARY OF EVIDENCE AND ARGUMENT

The applicants' evidence

Mr Mpuru testified under oath that:

11. He was appointed by the Department of Transport, Safety and Liaison (DTSL) as a Provincial Inspector (PI) since the 1st January 2001.
12. He was promoted to the position of the Principal Provincial Inspector on the 1st July 2013.
13. The post of the Chief Provincial Inspector (CPI) vacant and was advertised, he reacted to the advert by submitting the application.
14. He met all the requirements for the post except for the one requirement of not having the tertiary qualification. He was not shortlisted nor invited for the interview.
15. His variety of qualifications were relevant for the post and are included in "bundle A" (page 18-22).
16. He acted on the position on the rotational basis with the Ms Lubaxa before the appointment was made
17. He does not contest the appointment of Ms Lubaxa but he is of the view that he was treated unfairly by not being shortlisted to contest for the position in the interview
18. He completed the grievance procedure but the respondent failed to address it. He was unfairly treated and therefore he be compensated with the twelve (12) months' salary.

The respondent's evidence

Mr Marekwa testified under oath that:

19. He is the senior human resources practitioner and assisting with the service conditions with regard to leaves, pension, overtime, persal recordings, GEPF (internally & externally), benevolent, bereavement, supervision, recruitment and selection.
20. The position was funded and it was left vacant after the departure of Mr Malgas who went on pension.
21. The post was advertised externally and he was included as the inquiry person because the advert was placed on the national newspaper. He was to provide more information regarding the position upon the inquiries because Mr Wolfe as the senior manager would not have been always available at all times.

22. There are two (2) types of qualifications, i.e. (i) attendance based qualifications, and the (ii) assessment based qualifications. The applicants were expected to have the tertiary qualifications to be shortlisted for the interview.
23. He was part of the shortlisting committee, and six (6) candidates were shortlisted but the applicant was not shortlisted because he did not have the tertiary qualification requirement.
24. The acting capacity into the position did not raise any expectation for the appointment. However, the panel considered the acting capacity only when the performance was satisfactory.
25. The tertiary qualification refers to the post matric qualification obtained from the technical colleges (TVET), Universities and Universities of Technologies. It also included institution like Mancosa, etc.
26. The Diploma in Traffic was the departure point for the relevance of the qualification before the recognition of the additional qualifications
27. The letters of regret were only sent to the candidates who were interviewed and not to the entire applicants who were not shortlisted

Closing Arguments

The Applicant Presented that:

28. The applicant have “**Basic Traffic Diploma**” which is the relevant qualification as per the advert and the Diploma itself constitutes the “**tertiary qualification**” because it was acquired post the matric and it was not obtainable without the matric certificate.
29. Mr Marekwa, the HR practitioner who compiled the advert conceded under cross-examination that the “**Basic Traffic Diploma**” was prerequisite for the shortlist and no one was shortlisted and/or interviewed without being in possession of this qualification.
30. The N4 - N6 tertiary qualification of the present incumbent (the 2nd respondent) is not relevant to the post, and therefore, the shortlisting of the 2nd respondent and the exclusion of the applicant constituted unfair labour practice against the applicant.

The Respondent Presented that:

31. The applicant changed the content of his referral which dictated that “**the respondent acted unfairly by not appointing him to the promotional post**” and during the arbitration process he changed the version to be “**not shortlisted during the recruitment and selection process**”.
32. The applicant conceded that he did not meet the requirement for the post.

33. The acting on the position did not at any means create expectation for shortlisting, interview and subsequent appointment to the position.
34. The employers are free to choose who they want to appoint in a promotional post for as long as the normal requirements of the recruitment and selection process are observed.
35. The ***“applicant was not unfairly dismissed as alleged in the referral of the dispute and during the arbitration”*** and further ***“pray that the commissioner should find as such”***.

ANALYSIS OF EVIDENCE AND ARGUMENTS

36. At the outright I must state that (i) there was no dispute about the referral ever presented during the process of the arbitration, and (ii) there was no evidence of unfair dismissal ever presented during the arbitration process as well. Therefore, this award will not reflect anything in relations to these two (2) matters.
37. The applicant conceded that ***“he met all the requirements for the post but one, which was the tertiary qualification”***. I do not agree with the applicant with his definition of the word ***“tertiary”*** and the set requirements for the post.
38. The applicant had the relevant ***“Diploma in Traffic”*** obtained on the 29th June 2001 from the Lengau Traffic Training College in the Free State province (page 20, bundle A). The very same ***“Diploma in Traffic”*** was considered the prerequisite qualification for the shortlisting and the interview.
39. There was no dispute about the other requirements of the advert, and it was common cause that the applicant was not shortlisted because it was believed that he had no ***“tertiary qualification”***.
40. The disputed qualification on the advertisement (page 9, bundle B) read thus ***“Requirements: Relevant Tertiary Qualification Diploma / Degree or Equivalent”***. The advert demanded for the relevant qualification, and in this case the ***“Diploma: Traffic”*** was the relevant qualification. Apart from that, the Diploma acquired by the applicant was the qualifying tertiary qualification because it is deemed the post matric qualification. The same was confirmed by Mr Marekwa. To be specific, the word ***“tertiary”*** is defined as ***“relating to or denoting education at a level beyond that provided by the schools”***. Accordingly, the Diploma acquired by the applicant was obtained from the specialized institution and obtained post matric. The level of education by ***Lengau Traffic Training College*** as an institution was beyond the school qualification. Therefore, the respondent erred in their interpretation of the word ***“tertiary qualification”*** and thus denied the applicant an opportunity to contest for the position through the means of an interview.

41. Furthermore, the respondent shown to be less considerate on the actions by ignoring the grievance procedure filed by the applicant. The grievance procedure is part of the collective agreement between parties, therefore, the ignorance of the grievance by the applicant was the element of avoiding to deal with the realities of their wrongful act.
42. However, I am of the view that to set aside the appointment of the 2nd respondent will be inconsistent with the plea of the applicant. In his own words, the applicant declared that he do not want to unseat the 2nd respondent, he indicated that he only need to be compensated.
43. Be that as it may, I find that the respondent acted irrational and wrongful by not shortlisting the applicant for the interview for the position of the “**Chief Provincial Inspector**” because he met all the requirements as dictated by the advertisement. The irrational or wrongful act by the employer denied an applicant the opportunity to contest for the promotional position of the “**Chief Provincial Inspector**”.
44. In the matter between Mbatha v South African Police Services (SAPS) under case no. JR372/13, the Labour Court argued that “**but simply awarding Mbatha compensation does address the fact that the evaluation panel committed serious irregularities in the appointment of Nkosi. Although Nkosi has occupied this position for some time now and interfering with that position is likely to cause disruptions in the running of the branch, Nkosi’s appointment was clearly irregular and it cannot be allowed to stand. Selection ought to realise that unless they apply their minds during the selection process, a Court will not hesitate to interfere with that decision**”. Given this argument by the Court which I fully agree with, I find it inappropriate to unseat the 2nd respondent on the basis that the applicant self during the evidence-in-chief prayed for the compensation only and further explained that the 2nd respondent should not be unseated. The argument to unseat the 2nd respondent from the position was the second thought which was not presented during the arbitration. The arguments to unseat the 2nd respondent was only borne from the written closing arguments and thus was not tested.
45. In line with the paragraph above, the fact that the applicant is only awarded the compensation does not necessarily mean that the shortlisting process was fair and/or appropriate. Their unfair and/or wrongful act led to the appointment of the 2nd respondent and to detriment of the applicant. However, given the demand of the applicant, the compensation for six (6) months becomes appropriate and fair.

AWARD

In light of the above, I accordingly, order as follows:

46. that the respondent acted unfairly in its process of shortlisting,

- 47. that the respondent's act of not shortlisting the applicant for the interview was unfair,
- 48. that the respondent to compensate the applicant for the amount equivalent to six (6) months' salary,
- 49. that in line with paragraph 48 above, the respondent to pay the applicant amount of R170 640,00 and
- 50. that the payment in line with paragraph 48 and 49 be paid to the applicant by the 15th May 2021

PHOLO, GMP (Dr)
GPSSBC Commissioner



Signature: _____