



ARBITRATION AWARD

Panelist: Dr GMP Pholo
Case No.: GPBC637/2021
Award Date: 28 March 2024

In the ARBITRATION between:

PSA obo van WYK
(Applicant)

and

DEPARTMENT of EMPLOYMENT & LABOUR (NC)
(1st Respondent)

and

NDIMANDE, S
(2nd Respondent)

Applicant's representative: Mr. Russle Bindeman
Union/Applicant's address: PSA (Northern Cape)
Telephone:
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1st Respondent Respondent: Ms. Andiswa Mbovane
Respondent's address: 157 Schroder Street, Upington
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2nd Respondent Representative: Mr. Henry Thomas
Union: PSA (Northern Cape)
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. This is the arbitration award in the matter between Mr Bertwin Peter van Wyk (herein referred to as **the applicant**), the Department of Employment and Labour (herein referred to as **the 1st respondent**), and Mr S Ndimande (herein referred to as **the 2nd respondent**).
2. The referral was made in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995 as amended from time to time (herein referred to as **the Act**).
3. The arbitration was held at the offices of the 1st respondent (Upington) on 5-6 February 2024.
4. The applicant was represented by Mr Russle Bindeman (PSA - Labour Relations Officer), the 1st respondent was represented by Ms Andiswa Mbovane (Assistant Director: Labour Relations), and the 2nd respondent was in absentia represented by Mr Harry Thomas (PSA - Fulltime Shop Steward).
5. Each party submitted a set of documents. The applicant's documents were marked "bundle A", the 1st respondent's documents were marked "bundle B", and the 2nd respondent's document was marked "bundle C".
6. The arbitration proceedings were electronically recorded, and the recordings are filed with the General Public Services Sector Bargaining Council (herein referred to as the Council).
7. The arbitration was conducted in English.

ISSUE TO BE DECIDED

8. To determine whether the 1st respondent acted unfairly by not shortlisting the applicant to contest for the promotional position, and
9. To determine whether the alleged action as detailed in paragraph 8 above, breached the prescripts of section 186(2)(a) of the Act.

BACKGROUND OF THE DISPUTE

10. The applicant is employed by the Department of Employment and Labour as the "**Employment Services Practitioner**" (level 3).

11. The 1st respondent advertised the position of the “**Deputy Director: Labour Centre Operations**”, and the applicant applied for the position.
12. The 1st respondent conducted its appointment process and appointed the 2nd respondent to the post. In doing so, the 1st respondent did not shortlist the applicant to contest for the position.
13. The applicant believes he should have been shortlisted. On the other hand, the 1st respondent believes the applicant did not meet the requirements of the post to be shortlisted.
14. The applicant submitted the grievance procedure, and he was not satisfied with the outcome. As the result, he referred the dispute to the Council for conciliation and arbitration. The matter was not successfully conciliated, and the matter was then scheduled for arbitration on the 5-6 March 2024.
15. On the 1st day of the arbitration proceedings, all parties were present but the 2nd respondent. His representative appeared on his behalf and handed in a letter which declared that “**there is no contestation of the applicant’s promotion ...**”. As the result, the representative opted to recuse himself from the proceedings.

SUMMARY OF EVIDENCE AND ARGUMENTS

The Applicant Evidence

Mr. Bertwin Peter van Wyk testified under oath that -

16. She is employed by the **Department of Employment and Labour** as the **Employment Services Practitioner** (level 3), and he is based at Uppington.
17. He started the employment with the Department on the 11 May 1998, and he is currently responsible for the public service unit as the supervisor. He is also responsible for the inspection, enforcement, compensation fund, unemployment insurance fund, public employment services, management support services, assets & resources, discipline, PFMA compliance, budgets, setting and achieving the set targets.
18. He is also acting as the **Deputy Director: Centre Manager** effective from 16 February 2024 until further notice, and thus has all the delegations of the Deputy Director. Apart from acting, he was still expected to perform his duties as the “**Employment Service Practitioner**” (level 3).

19. He supervises the Admin Clerks, Employment Services Practitioners (level 2), and the entire Unit. His annual salary is R617 622.00, and the monthly salary is R53 159.88 (p. 100, A) and his salary difference for acting is R290 880.00.
20. He acted in the senior position (Deputy Director) on most occasions. These actings (p. 42-85, A) were sanctioned by different management. During his acting in the local office (Upington) which employs more than 50 personnel, he reported to the Chief Director (Mr Zolile Albanie).
21. During his career with the employer, he served under six (6) Deputy Directors and four (4) Directors. He was the only employee in the Northern Cape to have been chosen to represent the Department in Cuba to learn more about the employment practices.
22. In 2015, the Department advertised the position of Deputy Director in the Upington local office. He applied but he was not shortlisted due to the shortfall of the experience, and he accepted the decision.
23. The appointee left the position and in 2020 the position was advertised again. He applied again with confidence in that he gained necessary experience. He acted into the position and in terms of Public Service Act (2016). The person appointed to act into this position must meet all the requirements for that position. In this case, he consecutively acted in the same position. He was still not shortlisted to contest for the position. He was informed that he did not meet the requirements due to the qualifications.
24. He filed for the grievance, and subsequent to that he received the letter from the Chief Director (Mr Albanie) dated 9 December 2020 demanding (a) the compliance to the HRM Circular D1 of 2019 which provides the guidelines on appointing the officials on an acting positions, and (b) his termination from the acting position effective from December 2020 until he meets all the requirements to act into the position of the DD:LCO.
25. After a week and half of receiving the directive from the Chief Director, another person with the similar qualification was appointed to act into the same position. The same person did not meet the requirements of the post. As such, he was not supposed to be acting in terms of Circular D1 of 2019 and the instruction from the Chief Director (p. 5, A). Therefore, there was no need for the Chief Director to have stopped his acting for not meeting requirements.
26. It was unfair that he was not shortlisted to contest for the position. He met the requirements of the position, and the reference could be made to the advert for the same position at other centres (p. 25, 27 & 33, A). The Department only have one (1) standardised job profiles; therefore, it cannot have the different requirements for the same position at various centres.

27. He should have been shortlisted to contest for the position because he met the requirements for position, and this exclusion was merely because the Upington advert (p. 25, A) was differently designed as opposed to the different advert from the other centres, e.g., Graaff-Reinet (p. 27, A) and Ficksburg (p. 33, A).
28. He was unfairly treated because the employer considered only one factor of qualification and ignored other factors. Section 20(3)(a-d) of the Employment Equity Act, 55 of 1998 (p. 89, A) as embodied by the "Recruitment and Selection" policy, it includes more than one factor to be considered, and the 1st respondent used only one factor of "qualification" to eliminate him. This act defeated the definition of "suitably qualified candidate" by the policy.
29. The employer created an expectation that he meets the posts requirements by appointing him to act on the position for the period exceeding eleven (11) months. If there was no person meeting the requirements in the centre (Upington), they could have appointed the qualifying person from the other centre.
30. In terms of the Employment Equity targets in the Northern Cape province, the coloured males were under-represented (p. 111, A). Therefore, he was also favoured by the stats for the targets, but employer went ahead to ignore the targets and appointed the over-represented black male.

The 1st Respondent Evidence

Mr Zolile Albanie testified under oath that -

31. He is the **Chief Director: Operations Management** in the **Provincial Office** (Northern Cape) for the **Department of Employment and Labour**.
32. He was the chairperson of the panel (committee) which appointed the then incumbent to the position of the Deputy Director: Labour Centre Operations for Upington (Labour Centre).
33. At the time, the position becomes vacant and is approved, the submission for the advertisement is made to the **Chief Operations Officer** (COO), and when the approval is obtained, then the Human Resources (HR) takes over the process.
34. The advert of the DD: Labour Centre Operations (p. 12, B) contains the full details of the position, and entire process is then overseen by the "Organisational Development" (OD). There is no Organisational Development in the province, it is only located at the "national office" because the Department of Employment and Labour is a national department.

35. The advert is developed along the specific job description of the position, and he has no role in the development of the advert.
36. The applicant (Mr van Wyk) completed the Z83 application form (p. 21, B) to apply for the position. The application form which bears the details of the same position (DD: LCD) was accompanied by the "curriculum vitae" (CV) of the applicant (p. 22-34).
37. The panel (committee) concluded that the applicant does not meet the requirements of the post. Hence, he was not shortlisted, it is not true that the applicant is denied the opportunity to contest for the position.
38. The application form (p. 21, B) contains some endorsements of the developments of the Recruitment and Selection process. The endorsement of 182 represent the total number of the applications received, and the endorsement of 1 represent the legend (i.e. reasons supplied for non-shortlisting). The applicant was allocated legend 1 in accordance with item 3.27, which means that the 103 of the total 182 applicants did not meet the requirements, and as such, were not shortlisted (p. 15, B).
39. The interview process was not only managed by the panel (committee), but it also included the members of Labour, therefore, it cannot be a biased process.
40. The office of the Chief Director received the number of complaints from the internal staff that the requirements of the advertisement for the DD: LCD for the Upington (Labour Centre) were too restrictive, and thus, made it difficult for the locals to be considered.
41. Given the complaints, there was a discussion around the restrictive qualifications, and as the result thereof, the Department agreed to change the requirements, more especially the qualifications to be accommodative and to be more like the requirements of Graaff-Reinet (p. 27, B).

ANALYSIS OF THE SUBMISSIONS AND ARGUMENTS

42. The 2nd respondent decided not to participate in the arbitration proceedings by submitting the withdrawal letter, and therefore, my analysis will not include his submissions in the award.
43. The dispute before me concerns the unfair labour practice (promotion) insofar as section 186(2)(a) of the Act. The applicant believes the 1st respondent erred by eliminating him during the process of shortlisting. His elimination denied him an opportunity to contest for the position. On the other hand, the 1st respondent insisted that they acted fairly by eliminated him from the contest because he did not meet the set requirement of the post.

44. The promotional post referred to in paragraph 43 above, is that of the **Deputy Director: Labour Centre Operations** (Upington) which was advertised on 17 February 2020.
45. The filling of the vacant post (including the shortlisting process) by the Department is regulated. The regulator thereof, is the “**Recruitments and Selection**” policy which incorporated some other legislations as listed in item 1.1. Accordingly, these documents will serve as the determining factor to the claim of the applicant against the 1st respondent. Furthermore, the documents together with the evidence presented before me, will form the basis for the response to paragraphs 8 and 9 of this award.
46. I agree with the arguments in the matter between **Monyakeni v SSSBC and Others (JA64/13) [2015] ZALAC 17** (handed down on 19 May 2015) that “**there are two components to a complaint regarding a failure to promote an employee as an unfair labour practice. The one relates to the procedure followed by the employer. The other relates to the substantive merits, and it concerns the suitability of the candidate for promotion to the post in question**”. Insofar as this matter is concerned, this dispute is confined to the “**procedure**” alone. The substance is not in contest, therefore, the suitability to promote the applicant becomes mute. In the same sense, because none of the parties presented credible evidence that the 2nd respondent nor the applicant were suitable for the appointment. The fact that the applicant was unfairly eliminated from contesting for the position does not make him the suitable candidate for the appointment.
47. In line with the above paragraph, it is for the same reason that I fully agree with the 1st respondent’s argument that, the “... **applicant does not have an automatic right to promotion but only a fair chance to compete**”. Therefore, the 1st respondent’s shortlisting process ought to be fair, if not, then the “**fair chance to compete**” will be denied. With reference to same, the “**Recruitment and Selection**” policy made provision for the shortlisting process. In its item 6.3.1.1.3, the policy demanded that “**shortlisting must only be conducted on the basis of the information provided in the applicant's form (Z83), CV and qualifications as per advert requirements**”. Be that as it may, the 1st respondent did not comply with the 3 policy demands on the consideration of “the application form (Z83), CV and qualifications”. They ignored the other component of the experience (CV) and solely focused on the qualification. Given such, the spirit of item 6.3.1.1.3 of the policy is breached. Therefore, the shortlisting process employed by the 1st respondent to eliminate the applicant from contesting for the position was unfair.

48. I do not agree with the applicant's arguments that the 1st respondent acted unfairly by advertising the Uppington position with different requirements to the other centres. The outputs of the post might be similar, but it remains the prerogative of the employer to design the needs for a particular centre. The 1st respondent cannot be penalised for the differing adverts requirements.
49. The **"Recruitment and Selection"** policy dictates that the term **"suitably qualified candidate"** refers to **"a person contemplated in sections 20(3) and (4) of the Employment Equity Act or a person with any one of, or any combination of the following: (a) formal qualifications, (b) prior learning, (c) relevant experience, or (d) capacity to acquire, within a reasonable time, the ability to do the job"**. Furthermore, the **"policy"** declares that **"when determining whether a person is suitably qualified, an employer must (a) review all the factors listed, and (b) determine that person has the ability to do the job in terms of any one of, or any combination of those factors"**. Accordingly, the 1st respondent was somewhat reckless in the application of its own policy.
50. The applicant argued that he acquired the necessary experience of the position, he was even permitted to act into the position, and this evidence is not disputed. As the result, I have no reason to doubt the evidence of the applicant. Accordingly, item 3(w) of the **"Recruitment and Selection"** policy dictates that a **suitably qualified candidate** means **"... any one of or combination of the following ..."** as listed in the paragraph above. In terms of the definition, the applicant supposed to have been shortlisted to contest for the position based on his **"relevant experience"** as captured on the applicant's CV (p. 24, B). Accordingly, the applicant's relevant experience is narrated under the heading **"further training & exposure"** (p.24, B) in that he was appointed to act in same position since 2007 to date. If this information was not included in the CV, it could have meant that the panel had no information at their disposal.
51. Furthermore, the advert demanded for **"three years functional experience in business / organisational / services"**, and on the other hand, item 6.3.1.1.1 of the **"Recruitment and Selection"** policy declares that **"shortlisting criteria must be in line with the job content and job requirements as stipulated in the advert ..."**. In this case, the 3 years' experience is indicated in the applicant's CV (i.e., acting in the same position since 2007 and the post advertised in 2020). However, my argument does not insinuate that the applicant was the best candidate for the post, I only find that the applicant qualified to be **"shortlisted"** as a **"suitably qualified candidate"** in terms of item 3(W)(c) of the **"Recruitment and Selection"** policy, therefore, his elimination from the race to contest for the position was unfair.

52. The Court's arguments were accurate in the matter between **National Commissioner of the SAPS v SSSBC and Others [2005] 26 ILJ 902 (LC)** in that **"the complainant must prove that there is a causal connection between the unfairness complained of and the prejudice suffered"**. In this matter, the applicant proved the unfairness for being denied an opportunity to contest for the position. However, the applicant could not prove the connection between the unfairness and prejudice suffered. It was not proven that if the applicant was given the opportunity to contest for the position, he could have been the best candidate for the post.

53. The non-shortlisting of the applicant was unfair and not made in accordance with the 1st respondent's Recruitment and Selection policy.

AWARD

In the circumstances, I make the following award:

54. The failure by the 1st respondent to shortlist the applicant to contest for the position was unfair.

55. The applicant met the requirements of the post to be shortlisted in accordance with the Recruitment and Selection policy.

56. The appointment is declared null and void, and

57. The 1st respondent is ordered to re-advertise the position.



Dr GMP Pholo

(GPSSBC) Arbitrator