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# ARBITRATION AWARD

Panellist/s: Leonard van Leeuwen  
Case No.: GPBC1662/2022  
Date of Award: 13 November 2023

**In the ARBITRATION between:**

PSA obo Menyuka, Tamsanga Douglas  
**(Union / Applicant)**

and

Department of Water and Sanitation  
**(Respondent)**

## **DETAILS OF HEARING AND REPRESENTATION:**

1. The Arbitration Hearing into an alleged Unfair Labour Practice Dispute, referred in terms of Section 186 (2)(a) of the Labour Relations Act 66 of 1995, as amended ("LRA") was held virtually on 01 and 02 November 2023. The Award is issued in terms of Section 138 (7) of the LRA and is a summary of the evidence I considered, with brief reasons for my findings and is not intended to be a verbatim record of the proceedings.
2. The Employee, Mr Douglas Tamsanga Menyuka (hereinafter referred to as the Applicant), was present and represented by Mr Flip van der Walt, a Union Official from the PSA. The Employer, Department of Water and Sanitation (hereinafter referred to as the Respondent), was represented by Mr Derick Mitileni.
3. Written closing arguments were submitted on 06 November 2023 as agreed by parties.
4. The Hearing was held in English and was both digitally and manually recorded.

## **ISSUE TO BE DECIDED:**

5. I must determine whether the Respondent committed an Unfair Labour Practice in terms of Section 186 (2) (a) of the LRA by not promoting the Applicant from principal driver, salary level 5, earning R14 692,00 per month to Chief driver, salary level 6 with a monthly salary of R17 643,00 as from 01 July 2021.

## **BACKGROUND TO THE MATTER:**

6. The Applicant is currently employed as a principal driver on salary level 5 stationed at their construction East site in Standerton.
7. The Applicant was informed in August 2022 that he was not to be promoted to the position of chief driver, salary level 6 as he did not have the required experience of 6 years. Being aggrieved with the outcome, he on 28 October 2022 referred a dispute to the Bargaining Council. The matter was set down for conciliation on 23 November 2022. The matter however could not be resolved and as a result a certificate indicating that the matter remained unresolved and could proceed to arbitration was issued

whereafter he on 09 January 2023 submitted a request for Arbitration to the Bargaining Council. Hence the matter was set down for arbitration before me on 01 and 02 November 2023.

8. As to relief, the Applicant requested that he be retrospectively promoted to the position of Chief Driver salary level 6 with effect 01 July 2021.

## **SURVEY OF EVIDENCE AND ARGUMENT:**

### **Evidence**

#### **Documentary**

9. Both parties submitted documentary evidence in support of their respective case. The Respondent's bundle was marked Bundle "R" and that of the Applicant was marked Bundle "A".

#### **Applicant's Evidence:**

**The Applicant, Tamsanga Douglas Menyuka, after having been sworn in, testified as follows:**

10. He has an EC drivers' licence and drives heavy duty vehicles.
11. He had been employed on a fixed term contract with the Respondent between 2013 and 2014. In 2016 he was permanently appointed.
12. Between 2001-2006 he was employed as an EC driver by Strategic Transport and thereafter by Phumuzame Transport between 2007 until 2012.
13. Page 20 of bundle "A" is an extract from the Respondent's RDR policy. In terms of the policy, one needs to have a class 1 merit assessment and 6 years appropriate experience to be promoted to a Chief driver.
14. Appropriate experience according to him means one must have experience as a driver which he has as he had been an EC driver since 2001.
15. His merit assessment document for the 2020-2021 financial years as contained on page 15 of bundle "A" indicates that he has 4 years Departmental service and 8 years previous experience which gives him a total of 12 years' service.
16. During cross examination he agreed that the RDR policy is only applicable to employees employed by the Respondent. He agreed the period between 2013 to 2014 in which he was employed on a fixed term contract amounts to one year.

17. He confirmed that it is CV contained on pages 21 to 24 of bundle "A" and that it does not indicate that he was an EC driver between 2001 to 2012.
18. He disputed the Respondent's statement that he was not employed as a heavy-duty vehicle driver between 2001 and 2012. He also disputed the statement by the Respondent that when he was employed on the one-year fixed term contract he was not allowed to drive heavy duty vehicles on long distance routes as he indeed did drive regularly on routes between Pongola and Standerton or between Pongola and Potchefstroom.
19. The requirement to have been able to apply for the permanent position of and EC driver was that he needed to have at least of 5 years' experience.
20. He denied that in terms of the RDR he needed to have 6 years' experience in the employment of the Respondent.

**Respondent's Evidence:**

**Micheal Mahlaole, (Mahlaole), after having been sworn in, testified as follows:**

21. He started working for the Respondent in 2011 and is currently employed in the position of senior foreman and is the Applicant's supervisor who was responsible for his assessment for the 2020-2021 financial year.
22. He did not recommend the Applicant for promotion as he did not meet one of the requirements namely that of the number of years appropriate experience as he only had 4 years' experience as he was only employed permanently in 2016. In terms of the RDR policy he needed to have 6 years appropriate experience as a heavy-duty long-distance driver.
23. Project based drivers only operate on the site and not allowed to undertake long distance routes.
24. During cross examination he stated that according to him appropriate experience referred to in this instance is having experience as a driver but that according to him it is experience as a driver while in the employment of the Respondent.
25. He later agreed that should he apply for an external position or post somewhere else he would be able to make use of previous experience acquired such as his experience with the Respondent.
26. Although project-based employees are not allowed to drive heavy duty vehicles long distances he cannot dispute that it indeed occurred while the Applicant was employed between 2013 to 2014 as he did not work under his supervision.

27. He further agreed that the Applicant's merit assessment document as contained on page 15 of bundle "A" indicated that he had 8 years previous experience and 4 years' experience while employed with the Respondent.
28. Appropriate experience does also include previous experience.

## **Argument**

### **Applicant's Arguments**

29. The Respondent's only argument as to why the Applicant was not promoted is that the appropriate experience referred to in the RDR policy is only applicable to the experience an employee has gained while permanently employed with them and in this regard referred to the matter of ***Ncane v Lyster No and others (DA27/15) [2017] ZALAC 1;(2017) 38 ILJ 907 (LAC); [2017] 4 BLLR 350 350 (LAC)***
30. The South African Labour Guide stated the following. *"Under common law, employees do not have a legal right entitlement to be promoted to a higher level, unless they can prove a contractual right or legitimate expectation". The refusal or failure to promote an employee does not fall within the definition of an unfair labour practice unless the failure to do so is unfair".* In the present matter the Respondent has a RDR policy that gives employees the right to be promoted." *If the employer takes irrelevant criteria into consideration when choosing between two or more candidates, the failure to promote the better qualified candidate will be unfair'.*
31. The exclusion of the Applicant's previous experience as an EC driver since 2001 for promotion by the Respondent was grossly unfair and in support referred to the matter of ***Christiansen v University of KwaZulu- natal [2006] 12 BALR 1200 (CCMA) and SAPS v Safety & Security Bargaining Council & Others [2010] 8 BLLR 892 (LC).***
32. Where a procedure is laid down in legislation, collective agreement, policy established, equity plan or directive, then an employer is bound to follow such procedure. Deviation from such procedure is only permissible where the employer can show a good and sufficient reason for such deviation as held in ***NUTESA v Technikon Northern Transvaal 1997 4 BLLR 467 (CCMA) and George v Liberty Life Association of Africa Ltd 1996 17 ILJ 571 (IC).***
33. In ***Monyakeni v SSSBC and others (JA 64/13) [2015] ZALAC*** the Court stated there are two components to a complaint reading a failure to promote an employee as an unfair labour practice. The one relates to the

procedure followed by the employer and the other to the substantive merits, and it concerns the suitability of the candidate for promotion to the post in question.

34. The present matter only relates to the substantive merits in relation to the appropriate experience. The question is whether the Respondent had applied the term correctly. According to the Applicant and the testimony of the Respondent's witness the Applicant had 12 years' appropriate experience as an EC driver.
35. The Respondent in the present matter based its discretion and argument with regards to the recognition of appropriate experience on the wrong principle as they only recognize current experience as all appropriate experience and referred to the principles as held by the Court in **Arries v CCMA and others (2006) 27 ILJ 2324 (LC)** as well as **Ncane v Lyster No and others (DA27/15) [2017] ZALAC 1;(2017) 38 ILJ 907 (LAC); [2017] 4 BLLR 350 350 (LAC)**. The Respondent's decision not to recognize previous years of appropriate experience is irrational as their own witness stated that he would want his previous experience to be recognized.
36. The Applicant also referred to section 23, 185 and 199 of the LRA and held that the RDR policy which sets the requirements for promotion forms part of the employment contract and that both parties are bound by this contract and if the Respondent wants to deviate from such, they should change the terms and conditions of an employee, that can only be done by means of consultation.
37. The Respondent had failed to proof that only experience gained in terms of the current employment contract is recognized as appropriate experience.

### **Respondent's Arguments**

38. The Applicant failed to give a plausible explanation as to why his CV does not indicate that he was previously employed as an EC driver. It is further their submission that he was not driving long-distance heavy-duty trucks during this period and as such that period cannot be used as having previous experience.
39. It was Mahlaole's testimony that when people are employed on project-based contract, they are not allowed to drive heavy duty trucks long distances but only on site and as a result he only has 4 years' experience when he was assessed during 2020-2021 financial year and not 6 years as required to be promoted.
40. The RDR is intended for internal use only and as such one cannot be promoted in terms of the RDR policy based on previous experience obtained while not in the employment of the Respondent.
41. Their decision not to promote the Applicant was neither irrational, unreasonable or malicious and in support of this submission referred to the matter of **Ncane v Lyster No and others (DA27/15) [2017] ZALAC 1;(2017) 38 ILJ 907 (LAC); [2017] 4 BLLR 350 350 (LAC)**.

## ANALYSIS OF EVIDENCE AND ARGUMENT:

42. Section 185 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that every employee has the right not to be unfairly dismissed or to be subjected to an Unfair Labour Practice.
43. The meaning of Dismissal and Unfair Labour Practice is found in Section 186 of the Labour Relations Act (LRA) 66 of 1995 as amended.
44. In Unfair Labour Practice dispute, the Applicant bears the onus to prove on a balance of probabilities that the Respondent's conduct amounted to an Unfair Labour Practice.
45. The list of Unfair Labour Practices as contained in Section 186 (2) of the LRA, is a closed list. This entails that only actions that fall within the scope of the four categories, expressly listed in Section 186(2)(a)-(d), could be an unfair labour practice.
46. Unfair Labour Practice as per Section 186(2)(a) of the LRA is defined as any unfair act or omission that arises between an employer and employee relating to promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee.
47. The present matter refers to the failure of the Respondent in not promoting the Applicant to the position of Chief Driver on salary level 06. "Promote" is defined in the New Shorter Oxford Dictionary as "advance" or "raise to a higher rank or position."
48. In coming to a finding, I have taken into consideration the oral and documentary evidence as well as the closing arguments submitted by the parties during the Arbitrations.
49. In ***IMATU obo Visagie V Mogale City Municipality (JR 86/15 [2017] ZALCJHB 4323*** (handed down on 20 November 2017) it was held that the law requires the Employee to show the existence of the conduct or decision complained of. Therefore, the onus rests with the employee. It follows that if the employee is challenging the process and that the decision or conduct by the employer is not established by the employee, that is the end of the matter. In this instance it is common cause that his supervisor did recommend promotion to the position of Chief driver, salary level 6 as he allegedly did not meet the requirements for promotion as determined by the RDR policy.



50. In ***Monyakeni v SSSBC and others*** (JA 64/13) [2015] ZALAC 17 (handed down on 19 May 2015) the LAC stated 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. The present matter relates to the substantive merits in not promoting the Applicant.
51. In terms of the RDR policy as contained on page 20 of bundle "A" one must meet the following requirements to be promoted to the position of Chief driver.
- Class 1 merit plus 6 years appropriate experience
- Class 2 merit plus 8 years appropriate experience
- Class 2 merit plus 8 years appropriate experience
52. In the present matter it is common cause that the Applicant had received a class 1 merit. It is however the Respondent's contention that the Applicant at the time of assessment did not have the 6 years appropriate experience but only 4 years as he was only employed permanently in 2016. According to the Respondent the term appropriate experience refers to experience gained while employed permanently with them.
53. It is the view of the Applicant that the Respondent is incorrectly interpreting the term appropriate experience to only refer to experience gained while employed with them but in fact also includes experience gained during previous employment.
54. Although the Respondent categorically stated that it only refers to current work experience with them, they then also contested the Applicant's submission that he does have previous experience as an EC driver as his CV that is contained on pages 21 to 24 does not mention he has any experience as an EC driver but only as a driver. I find the fact that they disputed that he had any previous experience quite odd since they indicated that this is not relevant for purposes of promotion in terms of the RDR policy.
55. According to the Applicant he had been previously employed as a EC driver namely between 2001 and 2006 at Strategic Transport and between 2007 until 2012 by Phumuzane Transport. It is, however, correct that his CV does not indicate he had been an EC driver during this period. It is however then also common cause that he was employed as an EC driver by the Respondent on a project between 2013 and 2014 which was a period of 1 years. According to the Respondent this period is also not recognized as people employed on project-based contract as stated by Mahlaole are not to undertake long distance trips but only operate on site. He however could not dispute that the Applicant did during this period had undertaken trips between Pongola and Standerton and Pongola and Potchefstroom. I find it irrelevant whether he only drove heavy



duty vehicles on site or undertook long distance trips as he during this period had indeed operated and or driven heavy duty vehicles.

56. What I find quite surprisingly is that the Applicant's merit assessment form that is contained on page 15 of bundle "A" in the top left-hand corner indicates that he has 4 years' service and 8 years previous experience which in total according to the said document gives him a total of 12 years' service. This is a clear indication that they recognized his previous experience as it is included in his total years of service. In the absence of any other submission or argument, one can only conclude that it refers to previous experience as an EC driver, which was the position he is employed in and as such he has more than 6 years' experience as an EC driver.
57. One, however, must determine if the phrase appropriate experience includes or excludes previous experience which is the contention of the Respondent in the present matter.
58. The RDR policy, which is not disputed, only states 6 years appropriate experience. It does not categorically state it must be 6 years appropriate service gained while permanently employed with the Respondent in his or her current position. There is also no foot note in the policy which gives a further explanation of what is meant by appropriate experience, nor was I referred to any definition section contained in the policy which gives a definition of what is meant by appropriate experience. Mahlaole initially stated it referred to experience gained while permanently employed but during cross examination conceded that should he apply for a position outside of the Respondent he would want this experience he gained while working for the Respondent to be recognized.
59. The Collins dictionary states that previous experience is knowledge or skill in a particular job or activity, which you have gained because you have done that job or activity for a long time. It further defines appropriate experience as being experienced gained by a person demonstrating the ability to perform the relevant service through previous work experience.
60. The Oxford dictionary states that appropriate experience refers to the knowledge or skill that a person has gained through doing something for a period.
61. I subsequently I find that appropriate experience would include previous and current work experience as an EC driver.
62. In ***Pamplin V Western Cape Education Department C1034/2015*** [2018] ZALCCT (handed down on 9 May 2018) the Court emphasized that whilst in unfair labour practice disputes relating to promotion the onus is on the Employee to demonstrate that the failure to promote was unfair, the Employer, in the same token, obliged to defend the challenge on the substantive and procedural fairness, if it wishes to avoid a negative outcome. According to the Court, there is an obligation on the Employer to provide evidence that it acted fairly and in good faith during the promotion exercise.

63. In the present matter I find that the Respondent has failed to prove that they acted fairly by not promoting the Applicant as I find their conclusion that appropriate experience only means experience gained while permanently employed to be irrational.
64. I subsequently find that the Applicant had successfully discharged the onus by proving on a balance of probabilities that the Respondent had acted unfairly by not promoting him to the position of Chief driver with effect 01 July 2021.

### **Relief**

65. As to relief the Applicant requested to be promoted retrospectively to the position of Chief driver with effect from 01 July 2021.
66. In the present matter promotion as already stated is regulated by the RDR policy. In terms of the said policy promotion would have automatically occurred if the Applicant had met the minimum requirements which as I have already stated I found he did meet and as a result I see no reason in the absence of any other evidence as to why I should not comply with this request.
67. The Applicant's back pay / area salary had been calculated as follows: **R17 643,00** (monthly Salary level 6 as at 01 July 2021) - **R14 692,00** (Applicant's salary at level 5 as at 01 July 2021) = **R 2 951,00** (deference in salary) x **28** (number of months as from 01 July 2021 until date of arbitration)=**R82 628,00**
68. I subsequently make the following Award:

### **AWARD:**

01. The Respondent, The Department of Water and Sanitation, is ordered to promote the Applicant, Tamsanga Douglas Menyuka, to the position of Chief driver, salary level 6, and pay him the remuneration and benefits applicable to that position and level.
02. The promotion referred to in the preceding paragraph shall operate with retrospective effect from 01 July 2021.
03. As a result of the retrospective operation of the promotion the Respondent, The Department of Water and Sanitation must pay the Applicant, Tamsanga Douglas Menyuka, arear salary/ back pay to the amount of **R82 628,00** (Eighty-Two Thousand Six Hundred and Twenty- Eight Rand) minus such amounts as the Respondent is in terms of law obligated or entitled to deduct.
04. The Respondent, The Department of Water and Sanitation must pay the Applicant, Tamsanga Douglas Menyuka the amount referred to in the above paragraph by no later than 30 November 2023.

Signed and dated at **Emalahleni** on this the **13<sup>TH</sup>** day of **November 2023**.



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**Name: Leonard Van Leeuwen**

**(General Public Sectoral Bargaining Council) Arbitrator**