



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in KIMBERLEY

Commissioner: PHOLO, GMP (Dr)

Case No.: GPBC2053/2019

Date of Award: 15 April 2021

In the Dispute between:

PSA obo GRONDT

(Union/Applicant)

and

DEPARTMENT of TRANSPORT, SAFETY AND LIAISON

(1st Respondent)

and

NDLELA, VUYO (MR)

(2nd Respondent)

Applicant's Representative: Mr HA Thomas

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1st Respondent's Representative: Ms Pam Ben

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2nd Respondent's Representative: Mr K Williams

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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This is an arbitration award in the matter between Mr E Grondt (applicant) and the Department of Transport, Safety and Liaison (1st respondent) and Mr V Ndlela (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 (LRA). The arbitration was held at the offices of the 1st respondent at Kimberley on the 11th November 2020 and on the 20th January 2021 respectively.
2. The Applicant was represented by Mr Harry Thomas (PSA Union Official), the 1st respondent was represented by Ms Pam Ben (Labour Relations Practitioner), and the 2nd respondent was represented by Mr K Williams (PSA Union Official).
3. The parties exchanged documents and handed me their merged set of documents marked exhibit A, B, C, and D.
4. At the end of the arbitration, all the applicants agreed to submit their written closing arguments by the 3rd February 2021. However, I must indicate that the applicant and the 1st respondent did submit their closing arguments in time but the 2nd respondent did not submit at all

THE ISSUE IN DISPUTE

5. To determine whether the 1st respondent acted fairly by transferring the 2nd respondent from the ministry to the position of the Assistant Director: Francis Baard District without adhering to the Recruitment and Selection Policy and/or the applicable legislations.

BACKGROUND TO THE DISPUTE

6. The office of the Executive Authority transferred the 2nd respondent from the ministry to the promotional position of "Assistant Director: Francis Baard District office.
7. The applicant felt aggrieved by the transfer of the 2nd respondent as referred to in paragraph 6 above, and subsequently filed the grievance with the employer (see Exhibit C, page 9-10). When the applicant did not receive any joy from the grievance procedure he then referred the matter before the Council for conciliation and arbitration respectively.
8. In his application to Council the applicant ensured to include Mr Ndlela as the 2nd respondent in his referral.
9. Accordingly, the first arbitration process was held the 11th November 2020 and the parties agreed that the arbitration be postponed to the 20th January 2021. Furthermore, parties also concluded that the terms of



reference has to include that ***“whether the 1st respondent acted fairly by transferring the 2nd respondent the position of the Assistant Director: Francis Baard without advertising the post” as summarised in paragraph 5.***

10. On the 20th January 2021 proposed that the matter be argued on paper and I accordingly acceded to the request.

SUMMARY OF ARGUMENT

The Applicant Argues that:

11. The position of “Assistant Director: Francis Baard District” within the Department was not advertised as required by item 9(A) of the Recruitment and Selection Policy of 2018.
12. This position as existed in the organisational structure had its unique job requirements and qualifications, and the same were not met by the 2nd respondent.
13. The Executive Authority transferred the 2nd respondent to the position as referred to in paragraph 11 without observing item 9(A) of the Recruitment and Selection Policy (2018).
14. The Executive Authority have the regulated executive powers to appoint in his/her Department but those powers are not open for abuse.
15. The Regulations that ***“an Executive Authority must advertise any other vacant posts than that of the Senior Manager within the Department as minimum, but may also advertise such post (a) elsewhere in the public service, and (b) outside the public service either national wide or locally”***. Accordingly, these rules are not designed for the chosen few.
16. The Executive Authority erred in all respect in the transfer of the 2nd respondent because:
 - 16.1. the position was to be advertised, and
 - 16.2. the 2nd respondent did not meet the requirements,
17. The applicant is of the view that this automatic transfer and/or appointment of the 2nd respondent was unlawful and thus prejudiced him in that he possessed all the requirements including the qualifications for the position.
18. Therefore, the applicant demanded that:
 - 18.1. the post be nullified and be re-advertised, and/or alternatively



18.2. he be compensated with the salary for the period of six (6) months

The Respondent Argues that:

19. The 2nd respondent was employed in terms of section 9 of the Public Service Act (1994). Accordingly, the Act dictates that ***“the Executing Authority may appoint any person in his or her Department in accordance with this Act, and in such manner and such as may be prescribed”***. Therefore, the Executive Authority was within the ambit of his powers to appoint/transfer the 2nd respondent.
20. In line with paragraph 19 above, the procedure was observed by the Executing Authority requesting the Head of Department (HoD) to transfer of the 2nd respondent within the Department. Therefore, the request justify section 9 of the Public Service Act (1994). Be that as it may the movement of the 2nd respondent did not impact on the applicant.
21. The movement of the 2nd respondent was internal and there was no need to advertise the position because he was absorbed into the existing position.
22. The Recruitment and Selection Policy (2018) also dictates ***“officials within the offices of the Executive Authority may be absorbed into a Department in a substantive post, on condition that they meet the requirements of the position they are being appointed/absorbed ...”***. Therefore, the transfer was made in accordance with item 9(D)(iv) of the Recruitment and Selection Policy.
23. The decision of the Executive Authority should not be interfered with because the transfer was the managerial decision. In ***Dlamini v Toyota SA Manufacturing (2004) 25 ILJ 1513 (CCMA)***, it was declared that the Court or CCMA must be hesitant to interfere with the managerial decision unless there is evidence of gross unreasonable or bad faith.

ANALYSIS OF ARGUMENTS

24. The act of the employer in relations to the transfer of the 2nd respondent encroached the prescripts of legislations including the Constitutions (Act 108 of 1996), and therefore, such act constitutes an unfair labour practice.
25. In line with the above paragraph, item 9(A) of the ***“Recruitment and Selection Policy”*** dictates that any funded position, be it permanent or fixed-term contract ought to be advertised. The intention of doing so, is to lure ***“... the entire pool of potential applicants ...”***. The employer ignored



this compliance and opted to fill the position through the transfer with the person who does not meet the inherent requirements of the position.

26. The Policy as reflected above does not necessarily prohibits the transfer. However, it demands that such appointment/transfer need to comply in so far as the advertisement and meeting the job requirements. Accordingly, there were shortfalls in the transfer of the 2nd respondent to the position of the “Assistant Director” and thus confirm the unfairness in the part of the applicant.
27. Let alone the Recruitment and Selection Policy, the transfer of the 2nd respondent impacted to the constitutional rights of the applicant in accordance to section 23(1) of the Constitution which demands that **“everyone has the right to fair labour practice”**. Accordingly, it is not conclusive that the applicant would have been appointed but he had the qualifications which met the post requirements as compared to the transferred person. His right to contest for the position was then denied, and more so by the unfit personnel.
28. Apart from the unfair labour practice in terms of section 23(1) as analyzed above, the concept of governing public administration by the **“democratic values and principles”** as anticipated by section 195(1) of the Constitution is to be considered a far-fetched dream. This is as the result of appointing employees who are not drawn from the pool of the best candidates. Accordingly, section 195(1)(h) simplified and quoted that **“good human-resource management and career development practices, to maximize human potential, must be cultivated”**. Be that as it may, the employer acted in contrary to manage the good human resource to maximize the human potential. Given this background, the continued breach to the constitutional rights and the applicable policies impeded the intentions of the Public Service Commission (PSC) in accordance to section 196(4)(d) in relations to the **“... recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195”**.
29. I am of the view that the Department has the duty to respect and honour its policies and procedures, accordingly, in **MEC for Health (EC) and Another v Kirland Investments (Pty) Ltd (CCT 77/1) [2014] ZACC 6** the Court held that **“there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights”**. Certainly, the



employer did not carefully in the transfer of the 2nd respondent and thus constituted the act of unfairness to the applicant.

30. The transfer of the 2nd respondent was irregular, whilst at the same time noting that the 2nd respondent did not transfer himself. Therefore, nullifying the position will not be the better solution because the act will give rise to the other unfair labour practice.

31. Therefore, it would be appropriate to compensate the applicant for the period not exceeding three (3) months for committing an act of unfair labour practice.

AWARD

32. In the premise I make the following ruling

32.1. the Employer is ordered to pay the Applicant a compensation of three (3) months' salary calculate as $R25.278.25 \times 3 = R75\ 834,75$ subject to statutory tax deductions.

32.2. the Employer to pay the compensation (31.2) on or before the 30th April 2021

Dr PHOLO, GMP (PhD)

GPSSBC Commissioner



Signature: _____