

ARBITRATION AWARD

Panellist/s: Musiwalo Seth Mavhungu
Case No.: **GPBC2358/2018**
Date of Award: 26 March 2021

In the ARBITRATION between:

PSA obo T.J Mabitsela

(Union / Applicant)

and

**1st Department of Public Works,
2nd Tshepiso Boskraal**

(Respondents)

Union/Applicant's representative: Maponya P.P

Union/Applicant's address: 766 Zone 4

Seshego

Telephone: 082 880 8967

Telefax: 015 295 0508

1st Respondent's representative: Letsoalo M

Respondent's address: 43 Church street

Polokwane

0742

Telephone: 066 470 3658

2nd Respondent's representative: Boskraal T.M

Respondent's address:

Telephone: 081 394 5001

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- 1) This is the award in the arbitration between PSA obo T.J Mabitsela, the applicant and Department of Public Works (LIMPOPO), the 1st respondent and Mr. T Boskraal, the 2nd respondent.
- 2) The arbitration hearing was held on 14 August 2020 and 26 February 2021 at the offices of Department of Public Works (LIMPOPO). The hearing was manually and mechanically recorded.
- 3) The applicant was at all material times represented by Mr. P.P Maponya, a union official from PSA whereas the respondent was represented by Ms. Letsoalo M an official of the respondent. The 2nd respondent Mr. T Boskraal attended the proceeding and represented himself.

ISSUE TO BE DECIDED

- 4) Whether the respondent had committed an unfair conduct relating to the promotion in terms of Section 186(2) (a) of the Labour Relations Act (“the Act”).
- 5) If found the act by the respondent to be unfair, I must determine appropriate remedy to be awarded. The applicant wants protected promotion retrospectively from the date on which the job incumbent, Mr. Boskraal T.M had been appointed into the post.

BACKGROUND TO THE MATTER:

- 6) The applicant, Mr. Mabitsela T.J, is an employee of Department of Public Works appointed in the position of Road Worker Aid , a level 3 post. He was appointed in the Department on 01 April 2007.
- 7) The applicant applied for the position of Road Works Foreman: Capricorn District. He was shortlisted as per the attached Annexure C document on page

5. The 2nd respondent (Mr. T Boskraal) was the candidate appointed in the position. The applicant was the number one candidate in terms of the rating of scores by panel members.
- 8) The applicant lodged the grievance with the Department for his non-appointment/promotion in the post. The grievance outcome was not in his favour.
- 9) The dispute was referred to GPSSBC for conciliation on 02 November 2018 and remained unresolved.
- 10) During arbitration the parties were allowed to cross examine and re-examine the presentation of their evidence as well as present closing arguments at the conclusion of their case. For the sake of brevity, the details of this will not be repeated in the award but it should not be construed that it was not considered.
- 11) The applicant alleges that the conduct by the respondent of not promoting him amounted to unfair labour practice as the reason was about the Public Drivers Permit (PDP) which he did not have at the time of the interviews. The Public Drivers Permit will be referred to as PDP in the award.
- 12) The promotion relates to the advertised position of Road Works Foreman: Capricorn District.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence

- 13) I am required to issue an award with brief reasons. I do not wish to offer an exhaustive survey of all the arguments presented at the arbitration hearing. I have had regard to everything presented to me, and what follows is a brief summary of the arguments relevant to my findings only.

The Applicant's Submissions.

- 14) **Mr. Mabitsela T.J (“The Applicant”)** testified under oath that he is appointed by the respondent as Road Worker Aid, a position which is on level 3. He was appointed in the Department on 01 April 2007.
- 15) He applied for a post of Road Works Foreman as advertised by the respondent. As per page 5 of bundle C document he was recommended for interviews by the shortlisting panel. The post advertised required that the candidate be in the position of driver's license and PDP. At the time of the advert he did not have the PDP.
- 16) The duties of the advertised post amongst other were to supervise road work, driver operators and to conduct office administration within the Cost Centre.
- 17) The purpose of the PDP is for those required to drive heavy duty vehicles. The PDP is not an inherent requirement for a work of Road Works Foreman. In terms of the advertisement, it required PDP but the respondent shortlisted him without it.
- 18) He was interviewed together with other candidates on 02 March 2018 as reflected on page 7 and 8 of bundle C document. He was the recommended candidate as per page 21-25 of bundle B document.
- 19) In terms of the panel selection in order of preference the applicant was in position 1 in terms of the scores obtained in the interviews. As he was shortlisted he concluded that he met the requirements of the post as advertised.
- 20) He indicated that there are other employees who occupy the same post who do not have the PDP. The post requires that at times they will transport colleagues using taxis and buses of the respondent.
- 21) Under Cross-examination, the applicant indicated that there are employees in the Department who occupy the same post who do not have PDP's but those were not part of the advert he applied for.
- 22) He was informed that the requirement of the PDP is in line with the job description of the post which he denied to have any knowledge of. He indicated that if the PDP was the requirement he was not supposed to have been shortlisted.
- 23) It was indicated that the shortlisting panel deviated from the requirements of the advertisement and only made recommendations which was subject to the approval by the Executive Authority.

- 24) It was indicated that the mistake that was made by the shortlisting panel of including those who did not meet the requirements was corrected before the final decision was taken on the matter.
- 25) The Department did the right thing by not appointing the applicant as he did not meet the requirements of the post and that the appointed candidate met the requirements of the post.
- 26) Under re-examination the applicant stated that he should have been appointed in the post. He also stated that the requirement of the job description was not supposed to have been followed as that left only two candidates legible for the position.
- 27) The 2nd respondent did not ask any question to the applicant.

The 1st Respondent's Evidence

- 28) **Mr. Mbaswobeni David Munzhedzi the respondent 1st witness** testified under oath that he is appointed in the Department in the position of Senior Project Manager since April 2016.
- 29) His duties amongst others are to manage roads operators and EPWP employees. He was the chairperson of the shortlisting panel. During the shortlisting most of the applicants did not meet the required requirements as they did not have PDP's.
- 30) The candidates who had the PDP's were only two and also included those without the necessary requirement of the PDP. The shortlisting panel had hoped that the Department will relax the requirement of the post and that did not happen.
- 31) The requirement of the PDP was included because the post also supervises the driver operators and workers Aid. In order for them to go on site they need someone who will be able to transport them and that is the reason why the PDP is important.
- 32) He indicated that in other District were the posts were advertised only those with PDP's were considered. The shortlisting panel made mistake by also including those who did not meet the requirements as per the advertisement.
- 33) Under Cross-examination, he indicated that they shortlisted the candidates with the hope that the HOD may relax the requirements of the post but that did not happen.

- 34) He indicated that the PDP was an inherent requirement of the job. He indicated that the candidates shortlisted were ten (10). The applicant had the capacity to do the work but he did not have the PDP requirement. He confirmed that only two candidates had met the requirements as per the advertisement.
- 35) The candidate recommended was the one who obtained the highest scores and had PDP. The PDP requirement was crucial to the candidate to be appointed.
- 36) **Ms. L Kaseke the respondent 2nd witness** testified under oath that she is appointed by the respondent as the Director: HRD. She is currently acting as Acting Chief Director: Corporate Services.
- 37) She indicated that the role of the selection panel is to analyze the applications submitted for the position and to select the most suitable candidate for the position.
- 38) The shortlisting panel submits to Human Resource the documentation in order to process documentations for interviews. The panel that shortlisted will be the ones to conduct the interviews and recommend the successful candidate.
- 39) The role of the Human Resource is to conduct quality control. The Human Resources will check the compliance in terms of the policies. The Human Resource will also recommend to the office of the HOD for the candidate to be appointed and to check if the panel may have overlooked some of the requirements.
- 40) The applicant was the candidate recommended but was not appointed. She indicated that there are structures in place to ensure compliance and quality assurance of the final product.
- 41) The post advertised was at Capricorn District and as such they had to conduct the shortlisting and interviews at the district level. After the completion of the process they submitted documents to Head Office through the office of Human Resource in order to check compliance with regulatory framework, Public Service Act and Public Service Regulations.
- 42) Upon arrival of the submission of documents at Head Office they had to go through the office of the Acting Director; Human Resources. The Director checked

compliance with the regulations and she recommended that the person to be considered must meet the minimum requirements of the post.

- 43) The requirement to be checked was the PDP as it was crucial to the position. It was an administrative error that some of the shortlisted candidates did not meet all the requirements of the post.
- 44) The decision not to appoint the candidate who obtained the highest score was the correct one as he did not meet all the requirements of the advertised post.
- 45) In terms of page 15 of bundle A document, the public service regulation as per section 3 it indicates that "*Before making a decision on an appointment of a person additional to the establishment, an executing authority shall- (a) satisfy himself of herself that the person qualifies in all respects for the position and that his or her claims in his or her application for the position have been verified; and (b) record that verification in writing*".
- 46) Under cross examination she indicated that she was the relevant person to advise the HOD. She conceded that out of the 10 (ten) candidates interviewed only two had PDP's.
- 47) The Acting Director in Human Resource was performing her duties to check if the recommended candidate had the required qualification and met the minimum requirements of the post.
- 48) As per page 4 of bundle C documents she advised the HOD to approve for the candidate who had highest scores with PDP. She submitted that for the position at hand it was a requirement of the PDP and she is not aware of employees appointed without the PDP's. She also indicated that the reason to deviate from the recommended candidate by the panel was to appoint the candidate who met the requirements of the post.

The 2nd Respondent's Evidence

- 49) The 2nd respondent did not present anything.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- 50) Whenever considering whether or not there was unfair labour practice committed by the employer, I must take into account the provisions of section 186(2) (a) of the Labour Relations Act, 1995 (“the LRA”).
- 51) In determining the issue whether the applicant was unfairly treated or not, it is clear that I have to deal with a question of interpretation of the policy/prescripts and/or legislation together with the evidence tendered before me. This is precisely because, before me I have two contending versions or arguments.
- 52) The applicant’s version is that he was the highest rated candidate in terms of scores and as such was supposed to have been appointed. The Acting HOD was wrong in not appointing him in the post.
- 53) The 1st respondent’s version on the other hand is that, the applicant did not meet all the requirements of the post as advertised when he applied for the position. It was only discovered when the submissions were made for the appointment of recommended candidate. The respondent had a duty to comply with the requirements of the advertisement of the position.
- 54) It is acknowledged that given the nature of the Respondent’s business and the risks involved, it is crucial that it should have policies, procedures and prescripts in place. In terms of the directive the Department must ensure that the provisions contained in the Directive are complied with.
- 55) The applicant is required to prove, on a balance of probabilities, that the respondent committed unfair labour practice by not appointing/promoting him
- 56) I am required to determine whether there were irregularities when the applicant was not appointed in the position.
- 57) In determining the issue, I find the version of the applicant farfetched, unsubstantiated and without merits. My reasons are based on the applicant’s own version or lack of, including, but not limited to, the documentary evidence tendered.
- 58) The requirements of the post included valid Code 10 (C1) with PDP. Firstly, the applicant admitted that he did not possess the PDP at the time of the shortlisting and interviews. He tried to justify it by indicating that there are other employees in the Department occupying same position who do not have the PDP.

- 59) On the issues of the Requirement of the PDP the employer's witness (**Mr. Mbaswobeni David Munzhedzi**) testified that, as per the job description the person who occupies the post of Road Worker Foreman must have a PDP. He even indicated that those who were appointed before without the PDP was in the main because that requirement was not there when they were appointed.
- 60) He further indicated that the applicant together with others who did not meet the requirement when they were shortlisted and interviewed it was because they had thought the HOD would agree to relax the requirements and approve the appointment of the candidate without PDP.
- 61) In terms of the responsibilities of the post the successful candidate was to amongst others assist in transporting the Worker Aids in visiting sites and in doing so requires one to have PDP.
- 62) The respondent 2nd witness (**Ms. L Kaseke**) indicated that upon receiving the submission from the District her office realized that the recommended candidate did not meet the requirements of the advertisement. It was then accordingly indicated on the submission that the person recommended did not meet all the requirements of the post.
- 63) The case of the applicant rest on the fact that he performed well in an interview conducted by the Department. The applicant scored high and he was recommended by the interview panel as the suitable candidate. However, the Department is required to do verification on appointment. It was then at that stage discovered that the recommended candidate did not meet all the requirements of the post.
- 64) The anomaly was discovered before the applicant was appointed. In terms of **Section 5 (7) (a) of the Public Service Act** it clearly states that *"a functionary shall correct any action or omission made in terms of this Act by the functionary, if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the act or omission"*. For that reason, the action taken by the Department is in line with the above provision.
- 65) My duty is to determine whether the 1st respondent was fair in not appointing the applicant due to his failure to meet the requirements of the post as advertised. My answer is that the respondent was fair. The applicant failed to meet the requirements of the post and as such rendered him disqualified.

- 66) In ***IMATU obo Visagie v Mogale City Municipality (JR86/15) [2017] ZALCJHB 432*** (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 applicant is challenging the process and that decision or conduct by the respondent is not established by the applicant that is the end of the matter.
- 67) In the current case the applicant failed to demonstrate any of the above factors. Therefore he cannot be entitled to a relief.
- 68) **In *Arries v CCMA and others (2006) 27 ILJ 2324 (LC)*** “*the court held that there are limited grounds on which a Commissioner, or a Court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an Employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised*”.
- 69) The discretion exercised by the respondent was fairly exercised, the applicant did not meet the requirements of the post as laid down in the advertisement. It would have been improper for the respondent to appoint a candidate who did not meet the requirements of the post.
- 70) I cannot go further with this inquiry because the applicant had failed to establish that the conduct by the 1st respondent of not appointing him was unfair. From the evidence tendered before me it had been established that the applicant failed to prove that it was unfair for the employer to have followed the requirements of the post as advertised. This is the end of the inquiry.
- 71) It is my view therefore that the referral of the applicant for unfair labour practice must fail as he had failed to canvass reasonable grounds for the relief sought. Considering the evidence in totality, it is my view that the applicant had, on a balance of probabilities, failed to advance a compelling case justifying that it indeed the conduct or/and the decision of the 1st respondent was unfair and unreasonable.
- 72) The dispute referred by the applicant is therefore dismissed. The applicant is not entitled to the relief sought.

AWARD:

- 73) I find that the 1st respondent (Department of Public Works) did not commit unfair conduct in respect of the applicant, Mr. T.J Mabitsele.
- 74) The dispute is dismissed.
- 75) The applicant is not entitled to the relief.



Musiwalo Seth Mavhungu

GPSSBC Panelist