



# ARBITRATION AWARD

Panelist/s: NTATE JOSIAS MABILO  
Case No.: GPBC552/2021  
Date of Award: 23 AUGUST 2021

## In the ARBITRATION between:

PSA obo R Motebu

(Union / Applicant)

and

Department of Justice and Constitutional Development

(Respondent)

**Union/Applicant's representative:** Flip van der Walt of PSA \_\_\_\_\_  
**Union/Applicant's address:** P O Box 282 \_\_\_\_\_  
Nelspruit 1200 \_\_\_\_\_  
**Telephone:** \_\_\_\_\_  
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**Respondent's representative:** DI Silawule \_\_\_\_\_  
**Respondent's address:** Department of Justice and Constitutional Development \_\_\_\_\_  
Nelspruit 1200 \_\_\_\_\_  
**Telephone:** \_\_\_\_\_  
**email:** \_\_\_\_\_

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## ARBITRATION AWARD

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

- 1.The arbitration of the unfair labour practice dispute between R Motebu (applicant) and Department of Justice and Constitutional Development (Respondent) was held under the auspices of GPSSBC, on the following dates: 17 June 2021, 7 July 2021 and 10 August 2021. The hearing on 17 June 2021 was held physically and the remainder of the sessions were held virtually.
- 2.The applicant was represented by Flip van der Walt of PSA and the respondent was represented by DI Silawule, an employee of the respondent.
- 3.The proceedings were recorded both manually and electronically.

### **ISSUE TO BE DECIDED:**

- 4.I am required to determine whether the assessment and non-payment of 2017/2018 performance bonus to the applicant constituted unfair labour practice or not.
- 5.Remedy requested is to be paid performance bonus for 2017/2018.

### **BACKGROUND TO THE MATTER:**

- 6.The applicant started to work for the respondent on 1 August 2001.
- 7.She occupied the position of Administration Clerk.
- 8.The dispute was referred to the GPSSBC on 12 May 2021.
- 9.The respondent is Department of Justice and Constitutional Development.

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

### **Applicant's Submission:**

The first witness was **Ms R Motebu** who testified under oath and stated the following:

10. That during 2017/2018 she was stationed in Limpopo at Praktiseer as main Cashier. She worked for 10 months in Limpopo and 2 months in Mpumalanga.
11. That in June 2017 she was appointed cluster co-ordinator for Limpopo Province for a cluster with 6 courts. The cluster co-ordinator function was in addition to her normal duties. That once per week she would visit two or three courts to check appeals and review stats and make follow-ups. At the same time, she had to do her normal duties.
12. After assessing herself she discussed the assessment with her supervisor, Ms Nkosi R in Limpopo. They agreed on 140% with Ms Nkosi. For duties in Mpumalanga the assessment score was 107%. She received a decreased score of 110% and she was asked to motivate. She wrote the motivation and sent to the former supervisor in Limpopo, who signed and sent it back.
13. When asked why is she saying that the assessment was unfair she replied that she did extra work and visited courts and sometimes came back very late, doing work extra to her normal duties. She further said that she did follow-ups to High Court and she expected to get a bonus.
14. Under cross-examination the performance management policy was referred to and the witness was asked whether she was familiar with it and she answered that she was not familiar with it. She did not dispute that it was a performance management policy. She also agreed that performance assessment is confirmed with the actual performance measures.
15. In re-examination the witness agreed that in performance assessment both her normal duties and extra duties are taken into account.

The second witness was **Sungelaphi Refilo Nkosi** who testified under oath as follows:

16. That she was the applicant's supervisor while the applicant worked at Praktiseer in Limpopo.
17. That in applicant's 2017/18 assessment she rated her 4 and 5. She said the applicant was a hard worker and performed above expectation. Even the cluster selected her and she used to work overtime without being compensated for it.
18. When asked whether the employer ever came to her for motivation, she answered that the applicant wrote the motivation and she signed it. She admitted that she made a mistake and used wrong words in describing the applicant's performance. She insisted that the wrong words that she used should not disadvantage the applicant as according to her she performed above expectation and deserved a bonus. She said where she wrote fully effective should have been above expectation.
19. That the applicant was hardworking, came to work before 07:30 and worked 3 to 5 hours overtime at times without requesting compensation for it. She stated further that the applicant should not be disadvantaged because of her mistake.
20. In cross-examination she was asked whether she was familiar with the PMDS policy and she replied that she was familiar with the policy.
21. When asked whether overtime entitles a person to get a bonus she replied that the applicant did extra work above her duties and deserved a bonus. And that the overtime was not paid for.
22. It was put to the witness that the moderation team only worked with the limited information on the assessment and she agreed.
23. When asked again whether she did write above expectation anywhere in the assessment or motivation she answered that she made no other comments other than fully effective on the motivation.
24. The witness was asked to explain the applicant's work at cluster level and she said, the applicant performed her normal duties and extra work at the cluster, attending meetings and preparing reports to the High Court.

25. The witness agreed that registers and summons were normal duties and added that she agreed but when working even after hours it was optional and voluntary.

26. When asked in re-examination whether according to her she would recommend a performance bonus she answered that she would as the applicant performed exceptionally well.

### **Respondent's Submission:**

The first witness, **Bongi Jennifer Masilela** testified under oath and stated the following:

27. That she worked for the respondent as Deputy Director Learning, Performance Management and Employee Wellness.

28. She explained that the moderation process takes into account the performance agreement, half-yearly review and annual assessment. That in addition motivation, the moderation team looks at what is added (original assessment compared to motivation).

29. She said the additional motivation is submitted by employee and the supervisor and both of them sign for what is added.

30. When asked whether she knew the applicant she replied that she was not sure.

31. Under cross-examination the witness was asked whether she knew what kind of a worker the applicant was and she replied that she did not know as the applicant was not under her supervision.

32. There were no questions in re-examination.

The second witness, **Cathy Venter** testified under oath and stated the following:

33. That she works for the Office of the Chief Justice and while she was still in the department her roles were that of Court Manager and deputy director Area Court Manager.

34. She said that in the moderation, they used performance agreement, the annual assessment and the additional motivation information. The performance agreement gives us a measure against actual performance, she said.
35. When asked why did the moderation committee come up with a different score, she replied that the committee saw all statements but statistics were lacking. She further stated that the committee felt that the information was not enough. The committee decided on a score of 4 which was significantly above average, she said.
36. She was asked to clarify the difference between the supervisor's rating and the moderating committee with regard to Key Result Area 3 and the witness replied that the month of February reflected in the supervisor's information was outside the period of assessment.
37. As regards the additional information the witness said it was difficult to measure and as such the committee decided on a 3 more so as the supervisor had also stated fully effective.
38. Regarding Key Result Area 2 the witness stated that information was not enough and they based their decision only on what was given.
39. Regarding overtime the witness said paid overtime must have prior approval with estimated hours. If it happens to be unpaid it must reflect on a register.
40. She was asked whether she was part of the moderation of the applicant's assessment and she said only during the second part of the moderation. It was then put to the witness that she did not know the quality of work that the applicant delivers to the employer. She responded and said that the committee rely on the documents submitted and not what they had seen.
41. There were no re-examination questions asked.
42. The applicant's evidence ended.

## **ANALYSIS OF EVIDENCE AND ARGUMENT:**

22. The matter was referred as unfair labour practice in terms of sections 186 (2) (a) of the Labour Relations Act 66 of 1995 as amended. According to the LRA there are specific actions that constitute unfair labour practice and they are stated as follows:

- (a) unfair conduct by employer relating to the promotion, demotion, probation, training or provision of benefits.
- (b) the unfair suspension of an employee or any unfair disciplinary action short of dismissal in respect of an employee.
- (c) failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement.
- (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosure Act of 2000.

43. The applicant's matter is related to subsection (a) and specifically provision of benefits. In her case it is with regard to performance bonus. In unfair labour practice disputes, the onus is on the applicant to prove that the employer's conduct was indeed unfair.

44. I am required to determine whether the non-payment of a performance bonus to the applicant in respect of the financial year 2017/2018 constituted an unfair labour practice or not.

45. In *Apollo Tyres South Africa (Pty) Ltd v CCMA and others* (DA 1/11) [2013] ZALAC 3; [2013]5 BLLR 434 (LAC); 34 ILJ 1120 (LAC), the court held that the definition of benefit as contemplated in section 186 (2)(a) of the LRA was not confined to rights existing *ex contractu* or *ex lege*, but included rights judicially created as well as advantages or privileges employees have been offered or granted in terms of a policy or practice subject to the employer's discretion. There is therefore no doubt as to the matter being that of a benefit in terms of the act.

46. Before getting into the facts of the case, I need to point out that the standard of proof applied here is balance of probabilities and not proof beyond reasonable

doubt as applied by courts of law. Arbitrators are expected to resolve matters with minimal legalities.

- 117 In the current case, it is common cause that the applicant signed a performance agreement with her supervisor, Ms Nkosi for the 2017/2018 assessment year, while she was working in Praktiseer, Limpopo Province. It is also common cause that she signed another performance agreement in respect of the last two months of that assessment year. I shall not dwell on the two month's assessment done in Lydenburg, Mpumalanga Province, as it is not contested.
- 118 It is undisputed that the applicant was later asked to submit a motivation and again the motivation was agreed upon with her supervisor, Ms Nkosi. In this motivation Ms Nkosi changed her tone and said that the applicant's performance was **fully effective** instead of stating that she performed **above expectation** as in the initial submission. This, Ms Nkosi testified that it was a mistake on her part.
- 119 The evidence of Cathy Venter stated in more than one occasion that the moderation committee did not have enough information and relied on what was given and also because the supervisor had said she was fully effective. The supervisor's comment that the applicant was only fully effective seem to have made the moderation's work easier.
- 120 The supervisor, Ms Nkosi stated that she made a mistake and repeatedly said the applicant performed exceptionally well. She did not state that she made other mistakes of not noticing that information did not correlate with stats and that the information was not enough, which the witnesses of the respondent pointed out. Ms Nkosi represented the respondent at the supervisory level and her mistakes and omissions are those of the respondent.
- 121 The question is whether the respondent's actions amounted to unfair labour practice or not. Operationally the respondent worked according to what the policy required. However, they failed to point out the glaring omissions which the additional motivation would have addressed, eg. Lack of stats to support what was claimed such as three courts named while the claim is in respect of more courts.

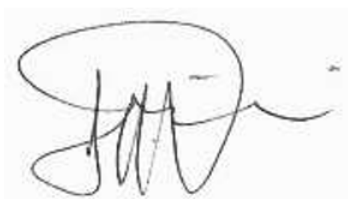


- 122 It must be noted that the applicant spent ten months out of twelve working under the supervision of Ms Nkosi, in Limpopo and her performance in that year was best known by Ms Nkosi. Ms Nkosi who forms the first level of management stated categorically that the applicant performed exceptionally well and deserved a bonus.
- 123 As a result of the above the applicant was denied the benefit which if there were no such mistakes, she would have enjoyed like other employees who performed exceptionally well. As stated above I regard Ms Nkosi as part of the first line of the respondent's management, a supervisor. Her actions and omissions were therefore that of the respondent.
- 118 In this matter, taking into account all the above, based on the balance of probabilities I conclude that the onus was discharged.
- 119 Ms Motebu's salary notch was R 192 774.00 and 4% thereof amounted to R 7711.00.

**AWARD:**

The award is as follows:

1. The non-payment of performance bonus to the applicant in respect of the assessment year 2017/18 was unfair.
2. The respondent, **Department of Justice and Constitutional Development** is ordered to pay the applicant, **R Motebu** an amount of **R7711.00** as performance bonus for the 2017/2018 year of assessment.
3. The above amount to be paid to the applicant by no later than 30 September 2021 failing which it shall earn interest from that day.



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**NTATE JOSIAS MABILO**

**(GPSSBC Panelist).**