



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132
Web: <http://www.gpssbc.org.za>

ARBITRATION AWARD

Panellist/s: Mandla Nkabinde
Case No.: GPBC 569/2020
Date of Award: 18 July 2022

In the ARBITRATION between:

FN. Mtungwa

(Union / Applicant)

and

Department of Justice and Constitutional Development
(Respondent)

Jacobus Heyneke

Union/Applicant's representative

Dan Silawule

Respondent's representative

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The matter was referred in terms of section 186(2)(b)-promotion, was arbitrated virtual on 14 June and face-to-face 15 June 2022 at Bethal court. The applicant Nompumelelo F. Mtungwa was present and represented by Jacobus Heyneke, a full-time office bearer from PSA. The respondents, Department of Justice and Constitutional Development as the first and Mamiky Khoza as the second, were in attendance and were both represented by Dan Silawule, a labour Relations officer. There were on bundle/s from the applicant named A-bundle and the respondent's named R, R1 and R2. The evidence was documentary, oral, hand-written and electronically recorded.

ISSUE TO BE DECIDED:

2. I had to decide whether or not the respondent acted fair in excluding the applicant on the short list for promotional interviews, if not then award an appropriate remedy.

BACKGROUND TO THE MATTER:

3. *The applicant was employed as a principal court interpreter. She applied for a post that was advertised, she was not shortlisted hence this dispute.*
4. *She desires to be monetarily compensated. Her salary is R2801, 75 per annum. The applicant was the only witness for her case, the respondents called a witness each*

SURVEY OF EVIDENCE AND ARGUMENT:

APPLICANT

WITNESS: Nompumelelo Mtungwa

5. The respondent advertised a promotional position of a cluster manager, court interpreting, Tzaneen cluster.
 - The requirements were NQF 4/Grade 12 and National Diploma in legal interpreting.
 - Proficiency in three languages or more indigenous languages and English.
 - A valid driver's license.
 - Six years' experience in interpreting of which 3 years in should be at supervisory level.
6. The applicant met all these requirements and exceeded in language proficiency. (Xitsonga, Sepedi, iSiSwati, Isizulu and Sesotho).
7. The second respondent who made it to the shortlist had two indigenous languages and English. (Xitsonga and Sepedi).
8. The applicant wrote numerous emails asking why she was not shortlisted, there was no answer, she hears the reason for the first time at this arbitration.
9. The applicant sent all the required documents, amongst which a transcript of academic record, issued in 2008.

10. The respondent invited the applicant for an interview for the same position in Malamulele a settlement offer, she did not take it as it meant relocating, removing kids from one school to another.
11. Versions put to applicant:
 - Her CV did not have her degree attachment.
 - she did not have the experience required
 - The second respondent is proficient in more than two indigenous languages.

RESPONDENT

FIRST WITNESS: Mamiky

12. The second respondent met all the other requirements, but she disclosed that she was proficient in two indigenous languages.
13. She could fairly express herself in Tshivenda but did not add that in the application.
14. *She was aware the advert required proficiency in three or more indigenous languages.*
15. *She had no influence on the panel of interviewers.*

SECOND WITNESS: Paul Napaine Makhobotloane

16. *He is a provincial manager languages in Limpompo.*
17. *He recruits, trains, develops and supply interpretation service, Limpompo.*
18. *He chairs the shortlisting and interview panel.*
19. *All candidates were internal, and he personally knew the applicant and the second respondent just like his own daughters.*
20. *The applicant had the required experience just like the second respondent.*
21. *The applicant was not shortlisted because of the suspicion around her degree qualification. (authenticity, amidst the prevalence of fraudulent qualifications).*
22. *Her application did not have the copy of her degree qualification.*
23. *The second respondent does interpretes Tshivenda though poorly so, she is used with limitations, used in quasi-judicial processes and postponements.*
24. *Second respondent did not meet the requirements in terms of languages.*
25. *Verification is done by HR on recommended candidates, not all applications.*
26. *He asked the HR about his suspicion but does not remember her response.*

ANALYSIS OF EVIDENCE AND ARGUMENT:

27. *The applicant has allegedly not made it the shortlist for the following reasons: Her CV did not have her degree attachment, suspicion of fraudulent degree, she did not have the experience required and her language proficiency did not meet the required lingo of the province.*
28. *The language/lingo proficiency and experience were met in terms of the evidence of the chairperson of the shortlisting committee, although the shortlisting committee wrote a comment that the language proficiency was not met. This is then a mistake by the committee.*

29. The degree attachment is also said not to have been attached. The transcript of the academic record was received by the respondent. The transcript is having the years of study, the qualification studied for, subjects/modules, percentage obtained, a pass/fail remark and a statement "Satisfied the requirements for the degree Bachelor of Arts with effect from January 2008. The degree will be conferred during the next graduation ceremony." The stamps and signatures are on this transcript. The information on the transcript is way more than what the copy of the degree would show. The applicant is an internal candidate, who grew within the department, the HR is having her employment record and the HR is part of the shortlisting team. I find the applicant to have given the shortlisting team enough information with regard to her BA degree.
30. The respondent's witness also testified that the shortlisting committee had suspicion about her academic records, BA degree. This suspicion is too general, it does not point to a specific thing/s that trigger it. The problems the committee had with the applicant's application it wrote them on top of one of the pages. The fact that that the suspicion was not, not raised, not written, not discussed or even followed, and she was later shortlisted for the same position in a different area is telling.
31. The applicant asked on three emails for the reasons why she was not shortlisted, no reason was given by the respondent. The shortlisting committee wrote two reasons on her documents, the chairperson conceded that the one reason is not correct. The chair added another reason in his oral evidence. I infer the reasons are an after thought hence they were not spontaneously given and keep changing/adding.
32. *The respondent also conceded that the language proficiency or lack thereof of the appointed candidate is limiting her in interpreting services.*
33. The appeal court in **Ncane v SSSBC and others DA 27/15 others (DA 27/15 [2017] ZALAC** said:
 - (a). An Employer must abide by the law and objective standards and criteria that it has set for promotion including eligibility for the post and
 - (b). Ensure that an eligible employee has a fair opportunity to compete for the post. It is usually said that this leg of promotion process must be procedurally fair. As the aim of a fair process is to achieve fair substantive results. Procedural unfairness may result in the final decision itself being substantively unfair.
34. The minimum requirements were set by the respondent. The second respondent did not qualify to be shortlisted but was shortlisted. The respondent failed to abide by its own standard.
35. In **Noonan v SSSBC and others [2012] 33 ILJ 2597 (LAC)** the court held that there was no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post. I am not convinced why the applicant was not shortlisted or allowed to compete for the position.

REMEDY

The applicants desired to be compensated at 12 months salary. The monetary compensation is a competent remedy for an unfair labour practice. I find a six-

months salary is just and equitable under the circumstance, this unfair conduct does not have permanent consequences. Six-months salary on her R280 019, 75 annual salary is R140 009, 86.

AWARD:

1. I order the respondent to pay the applicant R140 009, 86 (one hundred and forty thousand rand and nine rand forty cents) as a monetary compensation.
2. I order the respondent to pay the amount on or before 15 September 2022.



Mandla Nkabinde
Name (Arbitrator)

GPSSBC
(Council name)