



ARBITRATION AWARD

Panellist/s: Mandla Nkabinde
Case No. GPBC1945/22
Date of Award: 26 July 2022

In the ARBITRATION between:

PG Shima and F Zulu
(Union / Applicant)

and

Department of Public Works Road and Transport
(Respondent)

Union/Applicant's representative: Nomfundo Mlangeni

Respondent's representative: YD Maswanganye

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The matter was referred in terms of section 186(2) (a)-dispute relating to promotion, was arbitrated virtual on 31 May 2022. The applicants, PG. Shima and TF. Zulu were present and represented by Nomfundo Mlangeni, a labour relations officer from PSA.
2. The respondent was in attendance as represented by PY Maswanganyi, a deputy director labour Relations. There was one joint bundle of the applicant. The evidence was documentary, oral, hand written and electronically recorded.

ISSUE TO BE DECIDED:

3. I had to decide whether the respondent acted unfairly by denying the applicants an opportunity to be shortlisted for promotional interviews and if this amounts to an unfair labour practice, then award an appropriate remedy.

BACKGROUND TO THE MATTER:

4. The Applicants were employed as chief works inspectors at (buildings). They applied for a post that was advertised, they were not shortlisted hence this dispute.
5. They desire to be monetarily compensated, Shima earns R373 170 per annum and Zulu earns R351 591 per annum. The Applicants representative elected to use one Applicant as a witness because their situations are similar in almost all respects.
6. The evidence was oral and documentary of the Applicant, used jointly. The documents were admitted on record to be what they purported to be.

SURVEY OF EVIDENCE AND ARGUMENT:

APPLICANT-Pholo Godfrey Shima

7. They applied for a position of controller works inspector that was advertised. They met the requirements of the position. They realised before the interviews that they are not shortlisted.
8. They raised their dissatisfaction with the respondent. The respondent sent two officials to meet them but did not resolve their problem, interviews went on without them been given an opportunity.
9. Finally, some unnamed individual was appointed (the appointed individual was not named nor joined because the applicants desired outcome is monetary compensation), who did not even meet the minimum requirement for shortlisting.
10. The requirements were as per the advertised position in terms of academic qualifications and the experience on the job. Seeing that the appointed individual was not joined, it became unnecessary to inquire into his/her compliance and or lack there off.

RESPONDENT-MASWANGANYE, a deputy director

11. The respondent at some point decided that the system of applications for advertised positions will be done electronically. At this point the promotional position of control works inspector building was advertised. Both applicants qualified hence they applied. The system that was implemented for some reasons deleted a number of applications, such that 11 grievances were lodged.
12. The department took the matter up about the system, but the report was not available till the interviews were concluded. Management knew about this problem before the interviews were conducted.
13. It was management's decision that the affected number of applicants was small compared to what the system captured, hence they proceeded with the interviews.
14. The department later resolved to revert to the old method of applications to avoid similar problems for the future.

ANALYSIS OF EVIDENCE AND ARGUMENT:

15. The respondent conceded that the applicants applied for the position, they were qualified to be shortlisted, and they were not shortlisted.

16. The applicants, on realizing that they were not shortlisted, they lodged a grievance, the respondent could not resolve it although they realized the problem was as a result of a system of processing the applications that was implemented for the first time.
17. Management knew about this system technical problem before the interviews were conducted. They could not resolve the system technical problem in time.
18. The system the respondent implemented to for the processing of applications, was the respondent's own choice hence he could change it when he realized those problems. There is no reason why the respondent could not consider the applications of the applicants and allow the applicants an opportunity to contest for the position.
19. The very fact that the respondent proceeded with a process knowing it deprives, even if it was one person, an opportunity he/she deserves does amount to an unfair conduct by the respondent. To engage in an unfair conduct, knowingly so, should have consequences.
20. **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.
21. The same logic was maintained with the necessary developments in **Ncane v SSSBC and others DA 27/15 others (DA 27/15 [2017] ZALAC** as follows:
 - (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.
22. The respondent conceded having fail to give the applicants an opportunity to compete for this position, this conduct does amount to an unfair conduct by the respondent.

REMEDY

- 22 The Applicants desired to be compensated at 12 months' salary. The monetary compensation is a competent remedy for an unfair labour practice.
- 23 I find a six-month salary is just and equitable under the circumstance, the conduct does not have permanent consequences on the Applicants 6 months' salary for Shima equals R186 185 and for Zulu R175 795, 50.

AWARD:

In the premise I make the following award.

24. The Respondent committed the unfair labour practice for failure to shortlist the Applicants.
25. The Respondent is ordered to pay the Applicants as follows: PG. Shima R186 185.00 **(one hundred and eighty-six thousand one hundred and eighty-five rand)** and TF. Zulu R175 795, 50 **(one hundred and seventy-five thousand seven hundred and ninety-five rand fifty cents).**
24. The Respondent is ordered to pay the compensation by not later than 30 July 2022.

A handwritten signature in black ink, appearing to read 'M. Nkabinde', with a long horizontal stroke extending to the right.

Mandla Nkabinde
Name (Arbitrator)

GPSSBC
(Council name)