



ARBITRATION AWARD

Case No: **PSHS431-20/21**

Commissioner: **Victor Madula**

Date of award: **3 August 2021**

In the matter between:

PSA OBO SBONGISENI BLESSING FORTUNE VILAKAZI

Applicant

and

DEPARTMENT OF HEALTH- MPUMALANGA

1st Respondent

SFISO KOROMBO MAHLANGU

2nd Respondent

Details of hearing and representation

1. This award is rendered in accordance with the provisions of Section 138 (7) of the Labour Relations Act, 66 of 1995 (the Act). The hearings took place at Witbank Hospital, Emalahleni, Mpumalanga Province on 24 June, 15 and 16 July 2021 at 9:00AM. The applicant, Sbongiseni Blessing Fortune Vilakazi was represented by Flip van de Walt from Public Servants Association (PSA), while the 1st respondent, Department of Health- Mpumalanga and 2nd respondent, Sfiso Korombo Mahlangu

were represented by Maxwell Sithole, one of its officials. The proceedings were digitally voice recorded and conducted in English.

Application for my recusal

2. At the commencement of the arbitration hearing the respondent made an application for my recusal. The reasons for the application advanced by the respondent were that I failed to rule in favour of the 1st respondent after it raised a jurisdictional point at the beginning of this matter. The 1st respondent felt that its submission in terms of the jurisdictional point was clear and I should have ruled in their favour. The other reason was that the 1st respondent would like to have a senior Commissioner to arbitrate this matter. In response the applicant submitted that the merits of the matter were not dealt with and he does not see any biasness from me. The 1st respondent was just not happy with the jurisdictional ruling issued by the Commissioner and it should have invoked section 145 of the Labour Relations Act, 66 of 1995 as amended.
3. Ruling: I ruled that I was not going to rescue myself from the matter. The reason being that the 1st respondent in its submission for my recusal did not put a reasonable reason. The fact that I ruled against the 1st respondent during the jurisdictional ruling does not satisfy the test of a reasonable apprehension of bias. It is not the responsibility of the 1st respondent to determine the level of a commissioner who should arbitrate its matter, but the Council has the authority and power to appoint Commissioners. The apprehension of biasness by the 1st respondent was not reasonable (refer to in *President of the Republic of South Africa and others v SARFU* (CCT16/98) [1999] ZACC 9; 1999 (4) SA147; 1999 (7) BCLR 725).

Issues to be decided

4. The dispute was about the applicant's alleged unfair labour practice related to promotion. I must decide whether the 1st respondent has committed an unfair labour practice by failing to appoint the applicant to the advertised post of Assistant Director: Corporate Service, Witbank TB Hospital or not. To determine an appropriate relief, if it is found that the 1st respondent has committed an unfair labour practice.

Background to the dispute and common cause issues

5. The applicant applied for the post of Assistant Director: Corporate Service. The post was advertised on 03 September 2019 with a closing date of 13 September 2019. The applicant was shortlisted and interviewed on 13 December 2019. Thirty-Seven (37) candidates applied for the post including the applicant. No suitable candidate was found, and the employer decided to re-advertise the post. The post was re-advertised on 13 March 2020 and the closing date was 27 March 2020, Reference number MPDOH/MARCH/20/40. Hundred and Thirteen (113) candidates were not shortlisted including the applicant. The applicant is currently employed as a Chief Personnel Officer and earning a salary of R29 299.50 per month. The applicant sought Protected Promotion to the same level (level 10) he applied for or Compensation.

Survey of the applicant's evidence and argument

6. The applicant submitted bundles of documents marked BUNDLE A and BUNDLE AA. One witness, the applicant himself testified. He testified under oath and in English that:
7. He is currently employed at Barberton TB Hospital as a Chief Personnel Officer since 2011. He applied for the post of Assistant Director: Corporate Services at Witbank TB Hospital. Post number MPDOH/MARCH/20/40. He referred to page 11 of Bundle A, which was an attendance register which was proving that he submitted the application for employment forms (Z83) in respect of the two advertised posts of Assistant Director: Corporate Services at Witbank TB Hospital and Piet Retief Hospital. Those two applications were submitted on 17 March 2020 at Nkangala District Offices. Pages 12 and 13 of Bundle A was a respond from Nkangala District Director, which according to him was a confirmation that he did applied for the post of Assistant Director: Corporate Services at Witbank TB Hospital. Page 33 of Bundle B was the second confirmation that he has applied for the post in question, because his application for Witbank TB Hospital was profiled and it was number 26. He does not know the letter which was the second response to his application for the Witbank TB Hospital post

from the 1st respondent. The letter was withdrawing the first response as per pages 12 and 13 of Bundle A. The heading of this second response also confirmed that he has applied for Witbank TB Hospital post. He met all the requirements of the advertised post of Assistant Director: Corporate Services at Witbank TB Hospital. The advertisement was as per page 8 of Bundle A. He has been a supervisor since 2009 when he was appointed Principal Personnel Officer (salary level 7). The 2nd respondent has been a supervisor since November 2018 when he was appointed Chief Personnel Officer. He was not sure of the records on the Curriculum Vitae of the 2nd respondent, because the records are not from PERSAL system. He has eight years' experience at salary level 8 post, while the 2nd respondent had one year and few months. From the qualifications he has, experience and training he attended he felt the 1st respondent was unfair not to give him chance to compete for the post.

8. During cross examination the applicant testified that the shortlisting panel together with Human Resources would go through all the applications and profiling and if there is an application which did not belong there, it would be put aside. The Witbank TB Hospital post application was submitted together with the Piet Retief Hospital's application. In terms of the advertisement of the two posts, they were supposed to be submitted to the same building next to Piet Koornhof Building, Nkangala District Offices. He was the best amongst the 116 candidates when he compared his experience with that of the 2nd respondent. He was aware that the 2nd respondent has a post graduate Diploma in Public Management which he does not have. He did short cause on Human Resources Management. By the time he applied for the post of Assistant Director: Corporate Services at Witbank TB Hospital, he was still under study. Even if he did not make it during the first advertisement, he should have been given a chance to compete in the second advertisement.

Survey of the 1st respondent's evidence and argument

9. The 1st respondent handed in bundles of documents I marked BUNDLE B, C, D, E and F. Two witnesses testified for the 1st respondent. The 2nd respondent did not testify. The first witness of the 1st respondent was Betty Zwodwa Mthembu. Betty

Zwodwa Mthembu testified under oath and in English that:

10. She has been employed for thirteen years as a Personnel Officer (salary level 5). Her duties include recruitment and selection. Page 8 of Bundle A was the advertisement of a post of Assistant Director: Corporate Services at Witbank TB Hospital, reference number MPDOH/MARCH/20/40. Page 9 of Bundle A was the advertisement of a post of Assistant Director: Corporate Services at Piet Retief Hospital, reference number MPDOH/MARCH/20/41. The applications for the advertised posts of Assistant Director: Corporate Services at Witbank TB Hospital, Administration Clerks and Assistant Director: Labour Relations were in the boxes which were written the names of the centers they were supposed to be submitted. Then the posts were profiled and thereafter taken to the panel members for interviews. She was not part of the shortlisting panel, but for interview panel as a scribe. Page 11 of Bundle A was the attendance register for submission of post for Nkangala District. Page 1 of B was the applicant's application for the Assistant Director's post at Piet Retief Hospital. Its reference number was MPDOH/MARCH/20/41. The interviews panel did not shortlist the applicant, because the application was for the advertised post of Assistant Director: Corporate Services at Piet Retief Hospital. The 2nd respondent applied for the correct advertised post of Assistant Director: Corporate Services at Witbank TB Hospital. The applicant did not deserve to be shortlisted and does not qualify for protected promotion, because he applied to the wrong Centre. The criterion for shortlisting was objective. Both the shortlisting and interviewing panels were appointed by the Head of Department and that was not delegated.
11. During cross-examination, Mthembu testified that the applicant would come and register before putting the application into the box. The Human Resources Unit controlled that a person who signed the register has indeed put his or her application forms into the box. This register that the applicant signed was the proof that the applicant has submitted his application. Both the applications for the two advertised posts, Assistant Director: Corporate Services at Piet Retief Hospital and Assistant Director: Corporate Services at Witbank TB Hospital were to be submitted to Nkangala District Office. The original application forms for Witbank TB Hospital post would be in

Witbank TB Hospital while the ones for Piet Retief Hospital were in Piet Retief Hospital. If there was an application forms for Witbank TB Hospital, then the application forms would be with the 1st respondent.

12. The second witness of the 1st respondent was Mamogale Kefilwe Matlala. Mamogale Kefilwe Matlala testified under oath and in English that:
13. She has been the Deputy Manager Nursing based at Witbank TB Specialized Hospital since May 1990. The 2nd respondent was appointed to the post of Assistant Director: Corporate Services at Witbank TB Hospital in July 2020. She was one of the panel members for shortlisting and interviews in respect of only the post in dispute. The applicant applied for the post of Assistant Director: Corporate Services at Piet Retief Hospital. The applicant's application forms for the post was as per page 1 of Bundle B. The application forms in respect of the post in dispute were taken from the District Offices to the shortlisting panel by the Human Resources Unit. The applicant's application forms were for Piet Retief Hospital post and not the one in dispute. Page 11 of Bundle A indicated that the applicant registered two applications, for the post in dispute and the one at Piet Retief Hospital. There was no proof that the applicant put his applications for the post in dispute into the receiving box. The panel could not have shortlisted the applicant for the post in dispute, because the applicant did not apply for it. She was aware that the applicant had a Degree in Public Health and it was going to be unfair not to shortlist the applicant if he had applied for this post in dispute.
14. During cross examination, Matlala testified that she was not at the Nkangala District Offices where the applications for the two posts were submitted. She does not understand why the applicant could register two applications and dropped one into the receiving box.

Analysis of the evidence and arguments

15. The testimony of the applicant was that he applied for the two advertised posts of Assistant Director: Corporate Services at Witbank TB Hospital and Piet Retief Hospital. The reference numbers for the posts were MPDOH/MARCH/20/40 and MPDOH/MARCH/20/41 respectively. He submitted the application forms (Z83) in

respect of the two posts to the Nkangala District Offices, Piet Koornhof Building, Emalahleni on 17 March 2020 as directed by the advertisement. Both the applications were recorded in the register provided by the 1st respondent. To confirm that he did not apply for Piet Retief post only, the 1st respondent sent him a response in respect of the Witbank TB Hospital post. The 1st respondent in its response written by the District Director: Nkangala District Offices referred to the post of Assistant Director: Corporate Services at Witbank TB Hospital. Even the second response from the Head of Department also referred to the same post in dispute. The 1st respondent has again confirmed that the applicant has applied for the post in dispute by including his name on the profiling list of the post in dispute. His profile number was 26. The applicant went further to testify that he met the minimum requirements of the post in dispute. He compared his curriculum vitae with the one of the 2nd respondent and found that he has been a supervisor since 2009, while the 2nd respondent was since 2018. He had eight years' experience as Chief Personnel Officer salary level 8, while the 2nd respondent had one year and few months. He felt that because he had minimum qualifications required for the post, experience, and the trainings he attended, he should have been given chance to compete for the post.

16. The 1st respondent's testimony was that the applicant did not apply for the post in dispute, Assistant Director: Corporate Services, Witbank TB Hospital, Ref; MPDOH/MARCH/20/40. The only post that the applicant applied was a post of Assistant Director: Corporate Services, Piet Retief Hospital, Ref; MPDOH/MARCH/20/41. The application forms (Z83) in respect of this post was submitted to Witbank TB Hospital instead of Piet Retief Hospital. It was a mistake for the 1st respondent to have profiled the applicant for the post in dispute, instead of the Piet Retief post where the applicant applied for, Piet Retief Hospital. It was discovered during shortlisting process that the applicant has submitted his application for Piet Retief Hospital to a wrong place, Witbank TB Hospital. The 1st respondent could not have shortlisted the applicant because he did not apply for the post in dispute. Had the applicant applied for the post in dispute, the respondent would have shortlisted him.

17. The applicant has through his testimony proved on the balance of probabilities that he applied for this post of Assistant Director: Corporate Services at Witbank TB Hospital, reference number MPDOH/MARCH/20/40. The attendance register which he completed at the 1st respondent's premises while submitting two applications (Z83) on 17 March 2020 proved that he submitted. The applicant's application forms in respect of the post in dispute was profiled. This also confirmed that his application could have been there. The two letters the 1st respondent wrote to the applicant referred to the application in respect of the post in dispute. There was nowhere in those letters that the 1st respondent spoke of one application, Piet Retief Hospital's post. It is not probable that the applicant might have registered two applications but submitted one. The testimony of the respondents did not prove on the balance of probabilities that the applicant did not apply for the post of Assistant Director: Corporate Services at Witbank TB Hospital. The fact that the 1st respondents handed in only application forms (Z83) in respect of the post of Assistant Director: Corporate Services at Piet Retief Hospital (page 1-29 of Bundle B) does not convince me that the applicant did not apply the other post. My inference is that the 1st respondent might have misplaced the applicant's application for the post in dispute. It is unbelievable that from the 117 applications only one, which was belonging to the applicant was missing and in respect of the post which is in dispute. I therefore find that the applicant has applied for the post of Assistant Director: Corporate Services at Witbank TB Hospital.
18. Coming to the failure by the 1st respondent to shortlist the applicant, it was testified by the 1st respondent that the applicant was not shortlisted, because he did not apply the post in dispute and even if he could have applied he was not going to be the best candidate for the post. It is common cause that the applicant was shortlisted and interviewed for the same post in 2019. The 1st respondent did not get a suitable candidate then and decided to re-advertise the post in 2020. The 1st respondent through its second witness testified that had the applicant applied for the post in dispute, it was going to be unfair not to shortlist him. Since it is my finding that the applicant has applied for the post in dispute, he should have been shortlisted to give

him chance to compete with others. Therefore, the conduct of the 1st respondent in failing to shortlist the applicant was procedurally unfair. However, the conduct of the 1st respondent in failing to promote the applicant was substantially fair, because the applicant was neither shortlisted nor interviewed.

19. My finding is that the applicant has proved on the balance of probabilities that the 1st respondent has committed an unfair labour practice by failing to shortlist him for the post in dispute. However, the applicant failed to prove on the balance of probabilities that he was the best candidate for the post. Therefore, the conduct of the 1st respondent was procedurally unfair but substantively fair. The relief sought by the applicant is protected promotion or compensation. In terms of Section 193 (4) of the Labour Relations Act, 66 of 1995 as amended, an arbitrator appointed in terms of this Act may determine any unfair labour practice dispute on terms the Arbitrator deems reasonable. Considering this, I believe that the appropriate relief in these circumstances would be compensation. I have taken into consideration the fact that it was only the issue of the 1st respondent failing to shortlist the applicant when I decide on the amount of compensation.

Award

20.I find that the conduct of the 1st respondent of failing to shortlist the applicant constituted an unfair labour practice.

21.I order the 1st respondent to compensate the applicant in the amount of R58 599.00 (Fifty-Eight Thousand Five Hundred and Ninety-Nine Rand), less applicable statutory deductions, being two months' salaries calculated at R29 299.50 per month.

22.The whole amount of R58 599.00 must be paid to the applicant on or before 01 September 2021, failing which it will earn interest in terms of Section 143 (2) of the Act.

23.I make no order of costs.



V. Madula