



**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL**

**Held in KIMBERLEY**

**Commissioner: PHOLO, GMP (Dr)**

**Case No.: GPBC2161/2019**

**Date of Award: 17<sup>th</sup> February 2021**

**In the Dispute between:**

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**PSA obo MASIMINI**

(Union/Applicant)

and

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**DEPARTMENT of TRANSPORT, SAFETY AND LIAISON**

(1<sup>st</sup> Respondent)

and

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**NDLELA, VUYO (MR)**

(2<sup>nd</sup> Respondent)

Applicant's Representative: Mr HA Thomas

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## **PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

1. This is an arbitration award in the matter between Mr N Masimini (applicant) and the Department of Transport, Safety and Liaison (1<sup>st</sup> respondent) and Mr V Ndlela (2<sup>nd</sup> respondent). The matter was set down for an arbitration in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995 (LRA). The arbitration was held at the offices of the 1<sup>st</sup> respondent at Kimberley on the 6<sup>th</sup> November 2020 and on the 18<sup>th</sup> January 2021. The arbitration proceedings were electronically recorded and the recordings are filed with the Bargaining Council (GPSSBC).
2. The Applicant was represented by Mr Harry Thomas (PSA Union Official), the 1<sup>st</sup> respondent was represented by Ms Pam Ben (Labour Relations Practitioner), and the 2<sup>nd</sup> respondent was represented by Mr K Williams (PSA Union Official).
3. The parties handed me their respective set of documents. The applicant documents were termed "bundle A" and the 1<sup>st</sup> respondent's documents termed "bundle B". The 2<sup>nd</sup> respondent did not hand in the documents.
4. At the end of the arbitration, all the applicants agreed to submit their written closing arguments by the 1<sup>st</sup> February 2021. However, I must indicate that the applicant and the 1<sup>st</sup> respondent did submit their closing arguments in time but the 2<sup>nd</sup> respondent did not submit at all

## **THE ISSUE IN DISPUTE**

5. Accordingly, on the 6<sup>th</sup> November 2020 the parties agreed on the following terms of reference:
  - 5.1. whether the position in which Mr Ndlela was transferred to by the Executive Authority was advertised or not, and
  - 5.2. whether the transfer of Mr Ndlela as detailed in paragraph 5.1 above, breached the prescripts of the "Recruitment and Selection Policy, 2018" and/or the applicable legislations,

## **BACKGROUND TO THE DISPUTE**

6. The office of the Executive Authority within the Department of Transport, Safety and Liaison (Northern Cape) transferred the 2<sup>nd</sup> respondent from the ministry to the promotional position of "Assistant Director: Francis Baard District office.





7. The applicant felt aggrieved by the transfer and engaged the respondent through the use of the official internal communication mechanisms which did not receive any joy and he finally referred the matter before the Council for conciliation and arbitration respectively.
8. The applicant's referral to the Council included Mr Ndlela as the 2<sup>nd</sup> respondent to this matter.
9. The first arbitration set on the 6<sup>th</sup> November 2020 and all parties were present and represented, and at the commencement of the arbitration process the parties requested that the matter be conciliated ahead of the arbitration proceedings.
10. At the end of the conciliation process, the parties further agreed that the arbitration proceedings be continued on the 18<sup>th</sup> January 2021.
11. On the 21<sup>st</sup> January 2021 and at the start of the arbitration process, the parties proposed that the arbitration process be argued on paper because the matter is a "factual dispute" informed by the possible breach of the policy and the applicable legislations. Accordingly, I acceded to the request.

## **SUMMARY OF ARGUMENT**

### **The Applicant Argued that:**

12. There was an existence of the funded vacant position for the "Assistant Director: Francis Baard District" within the Department and this post was not advertised as required by the Recruitment and Selection of 2018.
13. This position like any other position within the existing organisational structure had its unique job description (requirements) and qualifications needed to be met before the appointment can be made.
14. The Executive Authority transferred the 2<sup>nd</sup> respondent to this position as referred to in paragraph 12 above, and without observing the prescripts of the Recruitment and Selection Policy, 2018 as dictated in paragraph 13.
15. The Executive Authority have the executive powers to appoint in his/her Department. However, the same executive powers are regulated, and as the result thereof, the Executive Authority needed to observe the regulations put in place.
16. The Executive Authority is bound by the Regulations in that "***in terms of the public service Regulations Chapter I, Part VII, C2 & 4 an Executive Authority must advertise any other vacant posts than that of the Senior Manager within the Department as minimum, but may***



***also advertise such post (a) elsewhere in the public service, and (b) outside the public service either national wide or locally***".

17. The Executive Authority erred on three (3) counts on the transfer process of the 2<sup>nd</sup> respondent, in that:

17.1. the position must have been advertised, and that

17.2. the 2<sup>nd</sup> respondent did not meet the set requirements for the post

17.3. there was no selection committee appointed to make recommendations on the appointment as recommended by the Public Service Regulations in Chapter 1, Part VII, D1

18. The applicant is of the view that the irregular automatic transfer and/or appointment of the 2<sup>nd</sup> respondent to the position prejudiced him in that he possessed all the requirements including the qualifications for the position and thus disadvantaged. The applicant further argued that the 2<sup>nd</sup> respondent did not meet the inherent requirements of the position transferred to.

19. Therefore, the applicant demanded that:

19.1. the post be nullified and the necessary processes guided by the policy and the applicable legislations to fill the position be observed, and/or alternatively

19.2. he be compensated with the salary equivalent to the period of six (6) months for the damages as the result of the unfair labour practice committed by the employer

#### **The Respondent Argued that:**

20. The 2<sup>nd</sup> respondent was employed in terms of section 9 of the Public Service Act, 1994 as amended from time to time. Accordingly, the Act dictates that ***"the Executing Authority may appoint any person in his or her Department in accordance with this Act, and in such manner and such as may be prescribed"***. Furthermore the respondent argued that the Act stipulates that ***"subject to subsections (2), (3), (4) any employee may be transferred (a) within the Department, by the Executing Authority"***.

21. In line with paragraph 20 above, the procedure was observed in that the Executing Authority requested the Head of Department (HoD) to effect the transfer of the 2<sup>nd</sup> respondent from his office to the Department. Therefore, the nature of the request (letter) justifies section 9 of the Public Service Act (1994). Be that as it may the movement of the 2<sup>nd</sup> respondent did not change anything that impacted on the applicant.





22. The movement of the 2<sup>nd</sup> respondent was within the Department and as such there was no need for the Executing Authority to advertise the position because he was just absorbed into the position.
23. The Recruitment and Selection Policy (2018) also dictates “**officials within the offices of the Executive Authority may be absorbed into a Department in a substantive post, on condition that they meet the requirements of the position they are being appointed/absorbed ...**”. As the result, the transfer of the 2<sup>nd</sup> respondent to the position of the Assistant Director: Francis Baard District was made in accordance with section D(iv) of the Recruitment and Selection Policy (2018).
24. There should be no interference to the managerial decision in the transfer of the 2<sup>nd</sup> respondent as dictated in ***Dlamini v Toyota SA Manufacturing (2004) 25 ILJ 1513 (CCMA)*** which declared that “**the Court or CCMA must always be hesitant to interfere with the managerial unless there is the evidence of gross unreasonable or bad faith**”.

## **ANALYSIS OF ARGUMENTS**

25. Accordingly, this award has no intention to resolve part of the dispute by creating another on its face value considering that it has more than one (1) respondents.
26. I find item 5.1 of this arbitration as more a common cause that the issue to be decided. However, the facts may differ from the departure points of the parties. The applicant insisted that in terms of the Recruitment and Selection Policy and the Regulations, the position had to be advertised whilst on the other hand, the 1<sup>st</sup> respondent argued that the advertisement was not necessary because the movement was just a departmental transfer. Be that as it may, the reality of the matter remains that indeed the position was supposed to have been advertised to comply with the prescripts of the legislations.
27. Apart from the advertisement as discussed in the above paragraph, the Recruitment and Selection Policy further demanded that the person to be transferred had to meet the requirements of the position when they are appointed and/or absorbed and in this case it was not contested that the 2<sup>nd</sup> respondent did not meet the inherent requirement at the time of his appointment. This conflicted the expectations of the Recruitment and Selection Policy as paraphrased in paragraph 23 and thus constituted the unfair labour practice. I must indicate that the policies and rules are created in form of the collective agreements to be observed by all the parties and not one party only.



28. The inconsistent application of the Rules and Policies may lead to the disturbance of the labour peace and ultimately impact negatively on the other employees who aspire to grow themselves within the Department. The negative appointment and/or transfer done by the employer impacted negatively on the applicant because he felt confident that he matched the inherent requirements of the job. Therefore, the automatic transfer which was also illegal hindered his opportunity to compete for the position. The situation is even made worse by the fact that the 2<sup>nd</sup> respondent did not meet the set requirements.
29. In the unreported case between the ***Department of Health Western Cape Provincial Administration v Mgumane NO unreported C484 (LC)***, the Court ruled that “***if the employer is bound by statute to appoint persons with certain qualifications it cannot waive such requirement***”. Therefore, in line with paragraph 28 above, the appointment and/or the transfer of the second respondent conflicted the collective agreement (Recruitment and Selection Policy) because the second respondent did not meet the set requirements (qualifications) for the post as opposed to the applicant.
30. In ***Mashegoane and Another v University of the North [1998] 1 BLLR 73 (LC)***, the Court held “***in general, the complainant should exhaust internal remedies before launching the proceedings***”. Accordingly, the applicant complied with the grievance procedure which did not bear any results, and therefore, cannot be faulted by referring the matter to the Council.
31. Be that as it may, the transfer of the 2<sup>nd</sup> respondent was irregular, it must be noted that the Mr Ndlela did not transfer himself but was transferred by the Executive Authority. Therefore, to nullify his position will not provide any sound solution except to create another unnecessary dispute which will be to the detriment of the 2<sup>nd</sup> respondent. As the result, the actual culprit will not even note its malpractices since the suffering will be transferred from one employee to another.
32. Therefore, I find that the compensation of the applicant to be the more appropriate sanction to equate this level of unfair practice.

## **AWARD**





33. I therefore find that:

- 33.1. the transfer of the 2<sup>nd</sup> respondent to the position of the Assistant Director: Francis Baard District to be unfair,
- 33.2. the employer compensate the applicant with the six (6) months' salary which equate to R102 299,62
- 33.3. the employer to pay the amount as dictated in paragraph 33.2 above, on or before the 15<sup>th</sup> April 2021.



**Signature:** \_\_\_\_\_

**PHOLO, GMP (Dr)**

**GPSSBC Commissioner**