



# ARBITRATION AWARD

Case No: **PSHS911-18/19**

Commissioner: **David Pietersen**

Date of award: **18 August 2021**

The matter between:

**PSA obo Jeffrey Moses Pillay**

Applicant

and

**Department of Social Development- Northern Cape**

1<sup>st</sup> Respondent

and

**Quiwen Jacobus Francois Naude**

2<sup>nd</sup> Respondent

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## DETAILS AND REPRESENTATION

1. The dispute between Public Servants Association of South Africa (PSA) obo Mr Jeffrey Moses Pillay (the applicant) versus Department of Social Development-Northern Cape (the 1<sup>st</sup> respondent) and Mr. Quiwen Jacobus Francois Naude (the 2<sup>nd</sup> respondent), was referred to arbitration in terms of section 186(2)(a) of the Labour Relations Act (66 of 1995 as amended) (the Act) under the auspices of the Public Health and Social Development Sectoral Bargaining Council (the Council).

2. The arbitration hearing commenced on 04 December 2020 and was postponed several times until its finalisation on 03 August 2021 at the respondent's provincial office in Kimberley. The applicant was present and represented by Mr Rodger Scholtz, an Official from the trade union PSA. The respondents were represented by Mr Fabian Borman, a Legal Advisor from the Department of Sport, Arts and Culture. The hearing was digitally recorded.

## **ISSUES TO BE DECIDED**

3. I am called upon to determine whether the 1<sup>st</sup> respondent committed an act of unfair labour practice relating to promotion.
4. In so doing, I must decide whether the 2<sup>nd</sup> respondent met the minimum requirements of the post and whether the applicant was disadvantaged who met the minimum requirements of the post.

## **BACKGROUND**

5. It is common cause that the applicant is employed by the 1<sup>st</sup> respondent since 01 October 2012 and is currently working as a Work Study Officer in its Organisational Development subsection. The applicant is on the 1<sup>st</sup> respondent's salary level 8. The dispute follows the appointment of the 2<sup>nd</sup> respondent into the position of Assistant Director: Organisational Development on 22 June 2018.
6. Aggrieved by the conduct of the 1<sup>st</sup> respondent, the applicant lodged an internal grievance with the respondent and a dispute with this Council. The matter was postponed several times until its finalisation on 03 August 2021.
7. The common cause factors are listed in the pre-arbitration minutes. I will refer to them during the analysis of evidence. The applicant wants a retrospective promotion into the position of Assistant Director: Organisational Development or 12 months' compensation as an alternative.

## **SURVEY OF EVIDENCE AND ARGUMENT**

8. This section constitutes a brief summary of the relevant evidence and arguments put forward by the parties. It is not intended to be exhaustive, but I have taken all the submissions into consideration in arriving at my conclusions.

### **Documentary evidence**

9. Applicant's Bundle: Bundle A  
Respondent's Bundle: Bundle B

### **The Applicant's case**

10. The applicant, was sworn in and he testified as the only witness in his case. He testified that one of the unions told him on the day of the interviews that the respondent is already having its people for the posts. The applicant submitted that he is having eight years' experience in the field of the post which he obtained at various governments departments.
11. The applicant testified that Job Evaluation (JE) is one of the basic functions of their unit and that the 2<sup>nd</sup> respondent does not have a certificate for JE. He stated that the 2<sup>nd</sup> respondent requested him via email<sup>1</sup> on 20 June 2018 to assist him to conduct a JE. He stated that the score cards of the 1<sup>st</sup> respondent for the post also indicates that the 2<sup>nd</sup> respondent has no relevant experience to JE's.
12. The applicant referred to his score cards<sup>2</sup> and those<sup>3</sup> of the 2<sup>nd</sup> respondent and argued that they have received the same scoring even though the comments next to the scoring differs. He also compared their quality of responses to the questions and submitted that he earned a better scoring (4)<sup>4</sup> in comparison with the 2<sup>nd</sup> respondent who earned a score of 3<sup>5</sup>.

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<sup>1</sup> Bundle A page 134

<sup>2</sup> Bundle A page 74

<sup>3</sup> Bundle A page 58

<sup>4</sup> Bundle A page 75

<sup>5</sup> Bundle A page 59

13. The applicant submitted that he finds it difficult that the 2<sup>nd</sup> respondent could receive a higher scoring than him in some instances whereas the remarks on the questions were more favourable to him. He submitted for example that the Deputy Director: Organisational Development made better remarks<sup>6</sup> for him on experience than the 2<sup>nd</sup> respondent who was held to be lacking experience.<sup>7</sup> The applicant submitted that the 1<sup>st</sup> respondent's Director: Human Resources also found that the 2<sup>nd</sup> respondent lacked practical experience<sup>8</sup> for the post.
14. In cross-examination, the applicant referred to the advertisement<sup>9</sup> of the post and submitted that the 1<sup>st</sup> respondent could not relax the minimum requirements of the job at the interviews stage. He submitted that the respondent did not comply with Criterion 3 of Chapter 3 of its policy<sup>10</sup> as far as the relaxation of the requirements are concerned at the interview stage.
15. In closing arguments, the applicant's representative submitted that all four panel members (interviewers) confirmed that the applicant met the minimum requirements for the post and had excellent experience in the field. He submitted that however, the 1<sup>st</sup> respondent opted to appoint the 2<sup>nd</sup> respondent who did not even meet the minimum requirements for the post and who should not even have been shortlisted for that matter.
16. The representative questioned how the 1<sup>st</sup> respondent could appoint someone who did not meet the minimum requirements for the job and received a higher score than the others who had more experience in the post. He submitted that both witnesses of the respondent contradicted themselves under cross-examination in that they stated on their score sheets that the 2<sup>nd</sup> respondent lacked experience in organisational development but changed to 'no experience in organisational development in the public service at arbitration'.

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<sup>6</sup> Bundle A page 80

<sup>7</sup> Bundle A page 64

<sup>8</sup> Bundle A page 59

<sup>9</sup> Bundle A page 39

<sup>10</sup> Northern Cape Premier's Strategic Plan for 2015/16 – 2019/20

17. The representative submitted that the 1<sup>st</sup> respondent's witnesses were lying under oath and that their testimonies must be disregarded. He submitted that the appointment of the 2<sup>nd</sup> respondent was both procedurally and substantively unfair in that the respondent failed to follow its own policy by relaxing the requirements of the post at interview level. The representative submitted that I should find in favour of the applicant and award protected promotion or alternatively compensation.

### **The Respondents' case**

18. Mrs Maria Myra Adams, the Deputy Director: Organisational Development, was sworn in and she testified as the first witness of the respondents. She testified with reference to the applicant's scoresheets<sup>11</sup> and stated that all the interviewees looked good on their papers. The witness stated that their findings were based on the performances of the interviewees in that the applicant gave more general answers to the questions whereas the 2<sup>nd</sup> respondent were more specific in his answers.

19. The witness testified that the applicant had no supervisory experience and would still need to be supervised if promoted whereas the 2<sup>nd</sup> respondent had supervision experience. She stated that three of the interviewees scored better than the applicant which made the applicant the fourth best candidate and the 2<sup>nd</sup> respondent the best candidate. She stated that JE is but a small part of the job and that the 2<sup>nd</sup> respondent's readiness for the job exceeded that of the applicant.

20. In cross-examination, the witness repeated most of her submissions and added that the applicant and the 2<sup>nd</sup> respondent have the same minimum qualifications and that the applicant's extra bachelor's degree in Labour Relations is outside the scope of their unit (organisational development). She confirmed that the applicant's five years' experience was obtained in the public service whereas the three years' experience of the 2<sup>nd</sup> respondent was obtained outside the public service. The

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<sup>11</sup> Bundle A pages 77-80

witness testified that the selection committee decided to accept the three years' experience of the 2<sup>nd</sup> respondent.

21. Ms Yolandi Van Dyk, the Senior Manager (Director) Human Resources, was sworn in and she testified as the last witness for the respondents. She testified that the post required five years' experience in organisational development irrespective of where it was obtained. The witness testified that the 2<sup>nd</sup> respondent was preferred because of the overall score which he obtained as well as the fact that he responded better to the questions.

22. In cross-examination, the witness confirmed that there was an oversight on their site on the experience of the 2<sup>nd</sup> respondent and that she remarked on the scoresheet of the 2<sup>nd</sup> respondent that the 2<sup>nd</sup> respondent had no practical experience in organisational development.

23. In closing arguments, the respondents' representative submitted that the applicant had no right to be promoted and that the prerogative to promote rested with the 1<sup>st</sup> respondent. He submitted that the two witnesses of the respondent were objective enough in that they preferred the 2<sup>nd</sup> respondent above the applicant who was well known to them. The representative submitted that the applicant's arguments are devoid of unfairness any act of biasness on the part of the 1<sup>st</sup> respondent.

24. The representative submitted that the applicant has failed that to prove that the conduct of the 1<sup>st</sup> respondent was procedurally and substantively unfair and that the applicant's case be dismissed with costs.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

25. This dispute relates to the conduct of the 1<sup>st</sup> respondent where, according to the applicant, the 1<sup>st</sup> respondent relaxed its own minimum requirements in order to accommodate the 2<sup>nd</sup> respondent which resulted in the 2<sup>nd</sup> respondent's appointment into the position of Assistant Director: Organisational Development. The applicant further averred that he met the minimum requirements of the post

and was a better candidate than the 2<sup>nd</sup> respondent based on the remarks of the panel members of the interview process.

26. The respondent on the other hand contended that the 2<sup>nd</sup> respondent responded better to the questions during the interview than the applicant which caused the 2<sup>nd</sup> respondent to be preferred over the applicant and the other candidates. I shall now proceed to determine this dispute by considering the evidence and arguments of the parties as it ensued during the arbitration hearing.

***Did the 1<sup>st</sup> respondent deviate from the minimum of five years' experience when accepting the 2<sup>nd</sup> respondent's three years' experience?***

27. It is common cause as revealed by the pre-arbitration minutes that the 2<sup>nd</sup> respondent only had three years' experience in organisational development at the time of the interviews. The respondents' witnesses confirmed that it was the selection committee which decided that the 2<sup>nd</sup> respondent be shortlisted for interviews, which resulted in the 2<sup>nd</sup> respondent's appointment into the position.

28. The advertisement of the post provides the following in relation to experience:

***Requirements and competencies:*** *Grade 12 certificate and a Bachelor's Degree in Industrial Psychology or equivalent tertiary qualification coupled<sup>12</sup> with at least 5 years experience in Organisational Development.*

29. There is no evidence before me that the post was re-advertised or that an *erratum* was placed in the media that the five years' experience requirement is altered by the 1<sup>st</sup> respondent. The applicant also submitted that the 1<sup>st</sup> respondent deviated from its policy when it relaxed the experience requirement without the necessary approval.

30. The Northern Cape Premier's Strategic Plan for 2015/16 – 2019/20 provides the following in Chapter 3 (Criterion 4):

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<sup>12</sup> As emphasised by the applicant under cross-examination

**Minimum advertised requirements should be met in terms of –**

- qualifications; and
- competencies (knowledge, skills and where required, experience).

*Note: Candidates who do not meet the minimum advertised requirements may be accepted for shortlisting purposes if, for example, the candidates do not have a tertiary qualification but have acquired competencies (knowledge and skills) and possess qualities that off-set this. This is in line with what is contemplated in Chapter 5 of the White Paper on HRM in the Public Service as well as Regulation VII C.1 and C.2 of Chapter 1 of PSR 2001.*

*However, the above mentioned is only permissible if –*

- approval was obtained for the relaxation of appointment requirements;
- this flexibility is provided for in the advertisement; and
- such cases are properly motivated in writing and approved by the executing authority or his or her delegate and should withstand legal scrutiny in a court of law – since it has to be considered that should the advertisement have been re-advertised with waived or altered requirements, more candidates might have applied. [my emphasis added]

31. It is clear from the policy of the 1<sup>st</sup> respondent as a provincial department of the Northern Cape Province that it is bound by the policy and that it did not obtain prior approval from its executing authority when its selection committee decided to alter the five years' experience requirement. This contention of the applicant was also not challenged during the arbitration process. From my assessment of this submission, it is clear that the 1<sup>st</sup> respondent's selection committee acted *ultra vires* when it relaxed the experience requirement without the necessary prior approval of their executing authority.

32. This deviation from the policy is by itself irregular and which is without any justifications. No evidence was also placed before me that the selection committee was empowered to relax the requirement by delegation or without the need to seek the necessary approval from the executing authority. It is my finding that the 2<sup>nd</sup>



respondent should not have made it through shortlisting by virtue of his lack of five years' experience in the field.

***Did the respondent commit an act of unfair labour practice relating to promotion?***

33. Section 186(2)(a) of the Act provides the following:

**186 Meaning of dismissal and unfair labour practice**

*(2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-*

*(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.*

34. The evidence before me is that the applicant complied with the five years' experience requirement whereas the 2<sup>nd</sup> respondent did not comply. In addition to that, the applicant also had a bachelor's degree which the 2<sup>nd</sup> respondent did not have. The remarks of the individual panel members of the panel also favours the applicant more than it is the case with the 2<sup>nd</sup> respondent. It is quite contradicting that the scores of the panel members are inconsistent with their remarks on the two candidates.

35. In *Arries v CCMA and others*<sup>13</sup> the Court held further that an Employee can only succeed in having the exercise of a discretion of an Employer interfered with if it is demonstrated that the discretion capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner.

36. It is my finding that an interference into the discretion of the 1<sup>st</sup> respondent is warranted in these circumstances based on the biasness displayed by it from the shortlisting stage up to the appointment stage. The failure of the 1<sup>st</sup> respondent to adhere to its policy as well as the fact that the applicant's credentials seem to

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<sup>13</sup> (2006) 27 ILJ 2324 (LC)

outweigh that of the 2<sup>nd</sup> respondent proves that the 1<sup>st</sup> respondent was bias and that its conduct amounts to unfair labour practice.

## RELIEF

37. The applicant requested to be awarded a protected promotion plus translation fees or alternatively 12 months' compensation. The 1<sup>st</sup> respondent contended that no unfair labour practice took place, and that no relief should be granted to the applicant.

38. Section 193(4) of the Act provides the following:

***193 Remedies for unfair dismissal and unfair labour practice***

*(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.*

39. Having found that the 1<sup>st</sup> respondent has committed an act of unfair labour practice, it then goes without saying that the applicant is permitted to seek a relief in accordance with section 193 of the Act. It was submitted during the arbitration process that two other candidates were listed as the second and third best candidates above the applicant. No evidence was led to show whether the credentials of the applicant were better than those of the other two candidates or not.

40. It is on this basis that I cannot agree to a protected promotion as such a decision might lead to more disputes being lodged in relation to this post of Assistant Director: Organisational Development. I shall concur that a compensation order will serve fairness in these circumstances. I shall as a result order that the 1<sup>st</sup> respondent must pay five (5) months' compensation to the applicant for its failure to adhere to its own policy and for having acted unfairly when appointing the 2<sup>nd</sup> respondent into the position. This shall be the applicant's monthly salary of R27 878.75 x 5 months = R139 393.75.

41. In the premise, I make the following award:

**AWARD**

42. The 1<sup>st</sup> respondent committed an act of unfair labour practice relating to promotion towards the applicant.

43. The 1<sup>st</sup> respondent is ordered to pay compensation in the amount of R139 393.75 to the applicant for the unfairness which he had to experience.

44. The amount and payment in paragraph 43 must be made into the applicant's bank account by no later than 31 August 2021.

45. There is no order of costs.



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David Pietersen