

ARBITRATION AWARD

Case No: **PSHS562-21/22**

Commissioner: **Hassina Docrat**

Date of award: **13 November 2023**

In the matter between:

PSA obo Olivier Zambuko

Applicant

and

Department of Social Development- National

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an arbitration hearing by the PHSDSBC and heard on 04 November 2021, 2 December 2022, 11 February 2022 and finalised on 2 November 2023. The hearing took place via Microsoft Zoom.
2. Mr Olivier Zambuko (hereinafter referred to as "the applicant") was represented by Mr. Mashaba, an official from PSA. Department of Social Development- National, (hereinafter referred to as "the respondent") was represented by Ms. P Mokoka ("Mokoka").
3. Several documents were submitted into evidence and utilized during the arbitration hearing, Marked Bundle A1 to A7 and Bundle R.
4. The hearing was conducted in English and digitally recorded.

5. The matter was finalized on 2 November 2023 whereafter the parties agreed to submit their closing arguments in writing on 8 November 2023.

ISSUE TO BE DECIDED

6. This matter is brought in terms of section 186 (2)(a) of the Labour Relations Act 66 of 1995, as amended (LRA) and relates to the issue of Conduct (the interview process was flawed, and the Applicant was not shortlisted).
7. The applicant's dispute emanates from the fact that he was not shortlisted and given an opportunity to compete for the advertised post of Director Population Policy Strategy, Monitoring and Evaluation Social Development.
8. I am therefore tasked to determine whether the respondent committed an unfair labour practice relating to promotion when not shortlisting applicant for the final interview process. The applicant bears the onus of proof in this matter.

BACKGROUND TO THE ISSUE

9. The applicant is employed as a Deputy Director Population Policy Strategy, Monitoring and Evaluation Social Development by the respondent and has worked for the respondent since 2009.
10. It is common cause that the applicant applied for the position Director Population Policy Strategy Monitoring and Evaluation Social Development. It is common cause that the applicant was not shortlisted for the position of Director. It is common cause the applicant is in possession of a permanent resident permit. It is common cause that the applicant followed all internal remedies before referring the dispute.
11. The issue that is in dispute is that the applicant was not shortlisted for the final interview process and the respondent's conduct was unfair in respect of same. The applicant is challenging the respondent's interview process claiming it to be flawed and is seeking protective appointment and or compensation.

SURVEY OF EVIDENCE AND ARGUMENT

12. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me even though all evidence and arguments were considered. I have summarised the evidence that I found to be the most relevant to decide in this dispute.

Applicant's case:

13. The applicant's representative submitted that they are challenging the conduct of the respondent in that the applicant was treated unfairly based on the fact that the applicant complied with the minimum requirements of the advertised post and criteria.
14. On realising that he was not shortlisted the applicant tried to engage the respondent. His emails were ignored, and the respondent failed to respond to the applicant's concerns and or emails. The applicant was left with no option but to lodge an internal grievance.
15. The grievance remained unresolved the applicant referred his dispute to the council via PSA. The applicant attended the scheduled Conciliation, the respondent failed to attend.
16. The applicant will show that the conduct of the respondent was unfair, and the process was flawed.
17. The applicant will be called to testify on his behalf.
18. The relief sought is should the commissioner find in the applicant's favour the respondent be directed that the process that is currently finalised be kept in abeyance in order the afford the applicant an opportunity to compete with the other candidates for the position of Director.
19. The applicant testified he joined the respondent as a Deputy Director on 1 December 2009. He first joined as a researcher. In June 2013 a new directorate was constituted for Strategy Monitoring and Evaluation. The applicant was appointed to pioneer that directorate. He is still currently in that position.
20. The applicant was recruited in South Africa as a lecturer in KZN. The applicant arrived from Zimbabwe to join the university. The applicant obtained a scarce skill permit. With the changes that took place in the Department of Home Affairs, he was advised to apply for a

permanent residence permit, which he duly did. He held a permanent resident permit in 2012 and is currently applying for naturalisation in South Africa. He is married to a South African partner and his children are born in South Africa.

21. The applicant held the deputy director position since 2009 just in different directorates.
22. The position for which he applied for entails him to manage the nation population strategy and coordinate all the structures that ultimately fit into these structures. It entails managing the development of planning documents for the chief directorate, annual performance plans, operational plans, risk registers, monitor the implementation of these policies. International commitment (SADC, BRICKS etc), manage, coordinate, facilitate, monitor, and report in respect of this directorate. Monitor and evaluate the implementation of the population policy within the country, amongst other things.
23. He does not believe there is much difference between his current position and the director position he applied for. They should look first at internal candidates and their job functions and the responsibilities. If one looks at his current responsibilities in comparison to the advert, he should be shortlisted. It is exactly what he does as per Pg. 22 of Bundle A1. All of the job functions and responsibilities listed in the advertised post are the same functions performed by him both nationally and provincially.
24. The applicant testified that he applied for the position and submitted his application and was not shortlisted. The applicant testified that he was talking to his Chief Director when he was asked why "he was not interested in the director position" and "why did he not apply". The applicant informed him that he did apply and followed up with HR (Human Resource) who informed him that he did not apply. The applicant testified that he was apparently not on the list.
25. On further investigation, it subsequently became evident that the applicant signed a register on submission of his application, but there was no feedback from HR, and no one could explain where the applicants, application was. The applicant was annoyed as there was no follow up by HR. The applicant was asked to resubmit, which he duly did. He informed his chief directorate of his application.

26. During this time HR was quiet and there was no further feedback from them. The applicant testified that a former student called to ask him for tips on how to proceed with her interviews for the same position the applicant applied for. She was shortlisted and on the verge of attending her interview.
27. The applicant proceeded to send emails to his seniors enquiring that interviews were taking place, and he was not called for the interviews. There was no response. The applicant approached his union.
28. The applicant on 1 July 2021 lodged a grievance a response on 13 July 2021 was received, which stated that the applicant's application was rejected as he was not a "suitable candidate". The response came from the applicant's chief director. The applicant requested further details on 18 July 2021. There was no reasonable explanation for not being shortlisted and no transparency on the process of shortlisting.
29. On 5 August 2021 the response that was received was that the "panel found him unsuitable". On this basis the applicant referred the dispute to council.
30. On Pg.28, Bundle A1, appears the correspondences between the applicant and the respondent's seniors on this issue.
31. The applicant submitted that as per the submission requirements as per Bundle A4, a signed Z83 Application Form, CV with two contactable references, recently certified copies of all qualifications, SAQA verification, applicant's I.D., certificate of entry into SMS and sign in the register book.
32. The applicant complied with all of the requirements as per the advert as per the Respondent's bundle R1.
33. The applicant testified that he has acted as a director in his directorate when his director would travel. In his current position he does not see a difference between his position or the Directors position. He is at the centre of strategy and responsible for the coordination of all provinces.

34. The applicant testified that currently the four deputy directors are being rotated into the acting Directors position on a 6-month basis and paid accordingly. This includes the applicant. The deputy directors still maintain their jobs and attend to the additional tasks in terms of attending management meeting, signing off on certain tasks and functions etc.
35. The applicant testified he has never received any complaints from his Chief Director when acting in this role.
36. The applicant testified that he is qualified in Bachelor of Arts, Bachelor of Science (Honours Sociology) and Masters in Population Studies. The applicant believes he has sufficient qualifications.
37. The applicant believes he was not given a tangible, reasonable explanation for his non appointment and for not being shortlisted.
38. The applicant testified that he was not given a fair and equal opportunity to present his candidacy as per Pg.11-12 Bundle A3 (Social Development Policy). He feels aggrieved by the process of selection and final interview selection process. The respondent acted in contravention and contradiction of their own selection policy. It became clear that HR did not capture and document his application as he had to resubmit as it was missing. No one can account for his missing application.
39. The applicant testified that he was never communicated too regarding the fact that he was an unsuccessful candidate. It was him that had to pursue his candidacy and application of same. There was no transparency in the process. There was no satisfactory communication from the respondent.
40. The applicant testified that as per Bundle A5, he obtained his permanent resident permit which makes him an equal to a South African citizen in respect of employment purposes.
41. In terms of the SMS handbook Clause 8.1 bundle A2, HR must check/ screen that all basic criteria's are complied with. If there are any doubts on any information, additional information can be requested, but the criteria's cannot be changed.

42. In terms of Bundle A6, Public Service Act Regulation, Clause 64 and 65, the applicant testified, that in terms of this clause no candidate should be unfairly discriminated against. A foreign national can be employed on a permanent resident permit and or relevant document.
43. The applicant believes he was treated unfairly by the respondent. They further failed to divulge on what requirement the candidates were shortlisted on. The applicant believes he met all the core requirements and is sufficiently competent in his current position and as an acting director position. He feels excluded from the process. There was no clarity or reason given why he was not shortlisted.
44. The applicant seeks that the interview process be rectified, and he be given a fair opportunity to compete for position of Director.
45. Under cross-examination, the applicant confirmed his application. The applicant confirmed his job functions. The applicant believes he is competent and has the management skills and all other skills as stated per Pg.34, Bundle R.
46. The applicant believes he has financial management skills, as they are inherent requirement skills that is why interviews are important to unpack certain skills. He monitors the budget of his directorate.
47. On Pg. 44, Bundle R, the respondent submitted that the panel shortlisted candidates as per a certain criterion. The applicant believes that the criteria should not discriminate against any one employee.
48. The applicant believes that no viable reasons were given why he was not shortlisted. There was no transparency.
49. The respondent version is that the applicant failed to possess certain skills. The applicant submitted that this was never canvassed with him. What skills is the respondent referring too, where are the minutes or discussion documents related to such set of skills and criteria.
50. The applicant testified that in terms of the advert he meets all of the requirements, criteria, and competencies as Per Annexure A1, Pg1 to Pg2.

51. The process of shortlisting is when a group of people are identified who are competent to carry out the job function as per advertisement. This is the duty of the panel who are guided by a legislative framework. On Pg. 10 to 14 SMS handbook Annexure A2, the applicant believes he fulfils the criteria's to be shortlisted. The panel has not given him a reason why he was not shortlisted as per his CV and hence he referred the dispute. The applicant believes his CV demonstrates he can do all 17 competencies.
52. The Applicant testified that he is currently doing all that is required as per the job function advertised as on many occasions he acts in the position of the Acting Director position, specifically where it relates to financial indicators, performance reviews and budgetary constraints.
53. The applicant testified that according to his knowledge it was his Chief Directorate that looked at his CV and rejected same hence not shortlisting him, which is surprising as he is very aware of the kind of work the applicant does and his job functions. The Applicant should have been shortlisted at the very least. The respondent disputes this saying the panel was objective.
54. The applicant testified by being requested to act in a position, one is a pseudo, one has the competencies, knowledge, skills, qualification, expertise etc. He was always nominated to act in the Directors position. The applicant understands that acting does not confirm that one will be appointed, but at least give one an opportunity to compete fairly for the position. In his case he was not given a fair opportunity to compete for the position by virtue of not being shortlisted based on specific criteria's which he has met.
55. The applicant believes that he qualifies and meets all the requirements and skills for the post advertised. See Pg.44 Employers Bundle.
56. The applicant became aware in a corridor chat with the Chief Director that his CV was never submitted, it was then realised that his CV Application that was submitted could not be found. He was requested to resubmit his CV Application. See Emails on Pg28 Applicants Bundle A1.
57. The applicant became aware interviews were in progress when a former student contacted him for tips as she was called for the very same interview he had applied for in his directorate.

58. The applicant believes the procedure was not fair and objective as he was never told of what criteria was used to shortlist candidates. Accepted that the respondent does not have to tell him that interviews were taking place as he was not shortlisted.
59. The applicant confirmed that he was not the only one selected to act in a position. This means they are all competent and the criteria used should be fair and objective. He is the only one that does planning, and strategies for the for entire Chief Directorate as well as the co-ordination for the provinces as well.
60. Under re-examination, the applicant believes he has done so much research and he believes he is adequately qualified to be shortlisted at least.
61. The applicant believes he is adequately qualified when it comes to financial management, his CV and Pg 4 speaks to his qualifications. When one deals with projects it's a compilation different skill i.e., of financial management, human resource management, performance reviews, management of environments etc.
62. The applicant believes that the panel has not conducted the process fairly and objectively in shortlisting candidates.
63. The applicant believes his CV was detailed and met all requirements and criteria's as per the advertised post as Per Pg.44 of Employers Bundle (Respondents Policy). The respondent failed to comply by not shortlisting him and failing to give him a reasonable explanation as to why he was disqualified from being shortlisted. The respondent did not comply with their policy. The applicant stated he has extensive job-related knowledge which is one of the criteria's.
64. The applicant believes that as a potential candidate the process was unfair as due diligence was not paid to his CV. He was prejudiced and disadvantaged as it did not allow him to compete fairly for a post he worked hard towards. It was a missed opportunity to demonstrate his skills and add value to the post and an expansion to his career. His CV initially was lost and there is no evidence that it made it to the selection committee.

65. The applicant seeks that the respondent affords him an opportunity to compete fairly for the post or a protective appointment (enjoy the benefits of the director but maintains his status of Deputy Director). However, the applicant believes he will not be treated by the panel fairly after lodging this dispute as he has been victimised by certain individual in his directorate.

Respondent's case:

66. Ms. Mokoka submitted that the process that was followed in the shortlisting of the candidates was fair. All internal processes were followed in terms of the grievance process and the applicant was responded to, but not to the satisfaction of the applicant.

67. There was no element of unfairness in the decision taken by the respondent. The respondent will prove that in terms of the recruitment and selection policy it allows for the employer to consider various criteria's in shortlisting an employee.

68. The provision of the SMS (Senior Management Service) Handbook will be used in proving the Respondents case as it details the requirements for shortlisting appointment of senior management.

69. The respondent will be calling two witnesses as well as the application submitted by the employee and other documentary evidence in refuting this dispute.

70. The respondents called their first witness Mr Jacques Van Zuydam, Chief Director for Population and Development. He is responsible for the overall management of national population unit. The applicant is known to him as they work in the same directorate.

71. The applicant applied for the position of Director Population Policy Strategy Monitoring and Evaluation Social Development. The witness was chairperson of the panel for shortlisting.

72. In the initial shortlisting the applicant's application was not part of the process. Two weeks later he was contacted by human resources and informed that the Applicants CV had gone into the wrong batch, but the application was received timeously.

73. The panel was specially reconvened on 5 May 2021 to reconsider the Applicants CV as it was common cause that his CV was placed in the incorrect box but was timeously submitted.

74. The role of the shortlisting committee convenes after the applications have been received. The human resource management team makes available the applications and the panel decides on what criteria's they would be looking at for shortlisting. On this basis the committee goes through the applications and sees if all requirements and criteria's are met. The same criteria's were used and applied when looking at the Applicants Z 83 application.
75. The Applicant was not shortlisted to the post. The reason for this was because in terms of Pg 44, Bundle R, Clause 6.2.3 , the Applicant failed to meet the requirement for Skills (Hard and Technical) and Job-related Knowledge within the context of the post, high level policy development and monitoring skills and international liaison skills at a high level. Proven management and leadership and communication skills within the population policy environment. These are minister level structures and the director is responsible for managing what gets reported, gets negotiated and working closely with the minister when he/she represents internationally.
76. When one talks of policy development skills it is within a political and parliamentary level. One needs strong strategic and analytical skills, to manage HIV Aids, Teenage Pregnancies etc. It became clear that the applicant lacked these skills.
77. On the implementation level one looks at programmes and project and management skills planning and organising skills. This is what was being looked for in the candidates that applied for the post.
78. The applicant's experience does not relate to the deputy director position only, which is submission of quarterly reports, organised planning session, completed documents that needed to be submitted as quarterly report. A lot of what is listed in his CV does not relate to the position applied for. There is no evidence that he has produced any country report to international audiences or has demonstrated technical and writing skills. Draft reports on behalf of South Africa to be tabled at the United Nations and African Union etc. There was no indication of Financial Management Skills.
79. There was no evidence in his CV of production of Analytical report, which once again dealt with international experience.
80. These were the 5 reasons the Applicant was found not to be a suitable candidate.

81. The post of Director has been vacant for some time, there is an Acting Director. The Applicant has not done any work for BRICS, United Nation, SADAC and African Union. Has not produced any reports that the directorate is responsible for producing internationally.
82. The Applicant has acted in the Directors position, but this was to give the 4 deputy directors an opportunity to act as Acting Director for three months over a 1year period. It was a short period, and it was to assist in convening directorate meetings. Coordinate that people don't go on leave at the same time etc. This does not automatically qualify him for the Directors position.
83. The Acting provision was then shortened to six weeks, this was not conducive. Later the Acting provision was changed to allow for remuneration for these positions.
84. Under cross-examination the witness testified that he takes the responsibility of submitting reports, speeches etc for the Minister.
85. The applicant reports currently to the Acting Director, he reported to the witness when he acted as an Acting Director.
86. The applicant CV as per Bundle A1 Pg.22 to Pg.28 sets out the applicants' duties. The panel is very knowledgeable on what specifically is required. The applicant does not write and produce the documents he collates the documents, edit, and finalises the documents. He cuts and pastes the inputs from the 4 different directorates to make for an easier read of the document. He did not manage, he facilitated and coordinated certain functions. He organises meetings. This is a lower lever activity as opposed to manage.
87. When one unpacks the applicants CV it is clear that he has not assumed management positions but has facilitated and coordinated. The applicant is misleading his job functions as per his actual activities were not at the level of the Director post. It was for this reason he was not shortlisted.
88. The applicant enjoyed the Assistant director job function and was passionate about the work and he took it on when the funding was lost and could not be recovered.

89. The witness testified that the panel was requested to reconvene as the application was misplaced, which they duly did to rectify any prejudice.
90. The witness confirmed that a special shortlisting meeting was reconvened to look only at the applicant's CV. The Applicant had the relevant qualification and relevant 5-year experience, this is the reason his CV passed the first shortlisting process by HR. In the shortlisting meeting it was found that there is nothing in his CV that indicates that he has knowledge of the relevant act i.e., PFMA, Constitution where it related to Population and or Public Service Act. The witness is aware that the applicant has an SMS entry programme certificate.
91. The Applicant never conveyed that he had any Financial Skills and there was no evidence of same in his CV. There was no evidence of sound financial management skills. The applicant disputes same as the applicant did obtain certain qualifications as per Pg.24 to Pg.26 of applicants CV.
92. The witness confirmed that the applicant does not do management activities they are operational activities. The applicant does not have anyone that reports to him.
93. The planning and organising that is required by a director is at Cabinet level.
94. In respect of the PPD (Partners in Population Development), an inter-governmental initiative. The witness is in charge of the PPD, and the applicant has assisted him in collating and packaging documents. The documents that had been drafted by the applicant had been of a poor standard that had to be rewritten by the witness.
95. The interpretation that the Applicant's representative is trying to portray in terms of the applicant's CV is not what is required in respect of the position.
96. The PPD is a 27-member country, reports are being written by the witness as the applicant writes such poor reports and as a result the witness has to intervene as they cannot submit such substandard reports. His writing skills are poor.

97. The witness testified that he is aware that the applicant does not have the international liaison skills that is associated to the director's post.
98. The applicant has never been responsible for planning for the directorate, maybe for his own work but not for the entire directorate.
99. The applicant does deal with individuals outside the directorate, client liaison.
100. The applicant was not shortlisted as he did have the required experience for specific high-level liaison, development and production of high-level analytical reports that can be sent to international bodies and or cabinet.
101. The witness testified that the monitoring and evaluation skills in the context of this position has not been demonstrated by the applicant. He does not have the skill requirement for international standard. It does not help that one attend 10 training sessions and say they are qualified one must see a demonstration of these skills.
102. The witness disputes that the applicant produced the Nigerian report he collated a report by information given to him by his different colleagues. They have provided the input and research and the applicant put it together in a sensible manner. The applicant did not research, the information and neither did he put together a methodology. The applicant has had some joint publications with other academics. But he has not published any policy documents. He is able to collate, coordinate and complete template as received from different directorates.
103. Many of the CVs received, candidates have had publications, but it does not speak to the inherent requirement to the post.
104. The applicant has no Policy Development Skills or made policy recommendation to Cabinet on Population development. Has not written any Analytical reports. Once again, the witness reiterated that it was the panels opinion that large part of the applicant's CV was not at the level they were looking for and according to his CV he hardly had any financial management skills.

105. The applicant has demonstrated certain research skills. The witness testified that in terms of the advert there are a few essential criteria's that the applicant did not meet, which he has testified above.
106. The witness testified that just because the word coordination is used, it does not involve your average coordination of training meetings etc. It involves coordination of high-level meetings between international stake holders and cabinet ministers. The applicant does not have international experience.
107. The witness disputes that he informed the applicant he will not hire the applicant as they don't share similar views on Abortion and or LGBTQIA etc. A response was given around reproductive health. This issue was never discussed or raised by the selection panel. The selection was based on the CV's submitted.
108. The witness disputes knowing of an organisation called PADARE which means (Let us have an open discussion).
109. The position has been filled, by Human Resource Office. The witness cannot respond to why the position has been filled.
110. The witness has been with the Respondent for 22 years.
111. The reason Thandeka Gumbeni was the suitable candidate. Was because she demonstrated the experience that was required as well as the required skills and criterions as per the advert.
112. The witness confirmed that the applicant has more years of service, but it is the experience that is relevant to this post that was used to shortlist for the post. Years of experience was 5 years of experience as most candidates had it as Deputy Director. The applicant did not meet the experience requirement for this post, specifically as outlined as above.

113. It is common cause the Applicants CV was not initially there, but the panel was reconvened, and the applicant's CV was reconsidered. HR properly constituted a meeting on 5 May 2021 to consider the applicant's CV.
114. The witness testified that qualification is only one aspect there are other criteria's that favoured the incumbent held a bachelor's degree in Population Studies, minimum qualification requirement as advertised for the post. All candidates had 5 years' experience and more in senior or middle management experience. There were certain Competencies that were looked for. She was comfortably the best candidate.
115. The applicant had no experience in drafting of Country report, no International Experience, Limited budget skills, he did not produce any analytical report, he did not demonstrate any Analytical and research and policy development skills. The three candidates that were shortlisted had the years of experience and qualifications in addition they also had this type of relevant experience that was asked for in the advertisement.
116. It is not disputed the applicant had the experience, the qualification, middle management experience but he failed to make the shortlist on the basis of the relevant experience. His CV did not speak to the experience the panel was looking for. The Analysis of Population Dynamic in relation to policy matter, drawing conclusions and making recommendation to high level audiences, Director generals of departments, Ministers, and Full Cabinets.
117. The witness testified that those publications as per Pg. 26 of the bundle, submitted by the applicant, are not policy papers. This document was written by a consultant for the department. In the course of his work, the applicant has not produced Analytical reports to the level to justify such an appointment. We produce reports to United Nations (UN), African Union (AU) annually and ongoing reports to our ministers. The applicant has not produced such a report neither was it reflected in his CV. He has contributed to certain reports and publications but not on the level required. He did not produce a report.
118. The witness testified that they had no reason to ask for more information from any of the candidates. They shortlisted according to the information that was submitted via the CV. The applicants CV pack was 33 pages long.

119. There were two shortlisting dates, 12 February 2021, and 5 May 2021, to only consider the applicants CV. The applicant did not produce the Nairobi commitments. As Chief Director of Population Department he has not seen the production of such documents by the applicant.
120. Under re-examination the witness testified that in terms of the SMS Handbook A2, of Bundle A, there was no doubt raised and hence the shortlisting committee did not need to request further supporting documents from the applicant or any other candidate. In fact, the applicant's CV was closely scrutinised and discussed more in detail as a special shortlisting meeting was convened on 5 May 2021 to look at the applicant's CV only as it was missed at the last shortlisting meeting on 12 February 2021.
121. It is an unwritten rule to consider internal candidates, to go deep into the Application of internal candidates but also not to prejudice the external candidate at the same time.
122. The witness disputed the applicant's version that there was no consideration of his CV. This is disputed a special shortlisting meeting was held after his CV was lost and found and considered and discussed in detail.
123. The second witness called is Samuel Boshielo, employed as Senior HR Practitioner- Recruitment and Selection. He duties are to recruit and select employees and certain administrative duties.
124. On Pg 36 of Bundle R appears a Policy document on selection and recruitment process guided by Public Service Act.
125. When a request is received for a position to be advertised. An advert is drafted and sent to the relevant department to see if it is in line of what is required. Certain time frames are put in place of when adverts open and are closed and what time is allocated in receiving CV's. Once the advert is closed, CV's, are captured and sifting of Applications begin. One will look at whether the CV complies with the minimum requirements of the advert.
126. Once the sifting is completed the shortlisting meeting will take place. A pre-approved panel is constituted before the post is advertised. The panel will come up with a shortlisting

criteria and all CV's will be tested against these criteria's. A selection of candidates will be shortlisted.

127. Interviews will be scheduled with candidates as per who was shortlisted, based on a criterion that the panel has agreed on. All candidates will be subjected to the exact same questions. Depending on how all candidates perform a recommendation will be made on the names of the candidates selected.
128. All verification will be done on those candidates and compiled.
129. Candidates not shortlisted can assume that they did not make the shortlisting. There will be no communication further. The CV must comply with advert. All qualifications must be certified.
130. The Applicant's CV was submitted and was in compliance with the requirements of the advert.
131. The witness testified that his role is to support the process in an advisory and secretariat way . They ensure that panel complies with the recruitment and selection policy. Drafting recommendation reports and taking minutes. The role of the panel is to interview and make a recommendation.
132. In the applicant's case the process was followed. There is a list of a candidate shortlisted according to a competency list/ criteria.
133. After the post was closed it was found that the applicants CV was allegedly lost or submitted in the incorrect tender box. It was found that he did sign the register on submission of the CV but maybe the CV was placed in the incorrect box. When this came to HR's attention that the CV was not found and captured after all CV's were collected and captured. The applicant was asked to re submit his CV. A special shortlisting meeting was held by the panel and it was considered by the selection committee, and he was not shortlisted.
134. Under cross-examination the witness confirmed he was aware of the post advertised and the criteria. His role is to accept and sift through the applications and look at the minimum

requirement check that the Z83 is signed, and that all supporting documents are certified and submitted. This is the reason the Applicants CV was sent to the panel for shortlisting.

135. He was not part of the selection panel in respect of the shortlisting, it was another HR practitioner.

136. No re-examination.

ANALYSIS OF EVIDENCE AND HEADS OF ARGUMENT

137. It is the applicant's case that he applied for the advertised post of Director Population Policy Strategy, Monitoring and Evaluation Social Development. HR failed to confirm his application. The applicant is currently a deputy director in the same directorate. He applied for the position of director. He was not shortlisted and or informed, given reasons why he was not shortlisted. The respondent failed to adequately address his grievance and or concern's. The applicant acts in the position of Acting Director from time to time. He cannot understand on what criteria he was not shortlisted and given an opportunity to be interviewed and compete for the post.

138. In essence it is the applicant's case that the respondent committed an unfair labour practice relating to conduct (interview process was flawed and the applicant was not shortlisted) in terms of section 186 (2)(a) of the LRA. The LRA states that an employer is guilty of an unfair labour practice if it commits any form of unfair conduct relating to the provision of conduct to an employee. Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving s186(2)(a) of the LRA, *i.e.*, "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". Unfair labour practice disputes of rights, rather than interest, a dispute over benefits must amount to a dispute of right to be classified as such. It is trite law that disputes of right arise *ex contractu and ex lege*.

139. The question that arises from the above analysis and application of law is whether the respondent acted unfairly in exercising its discretion. "Unfair" implies a failure to meet an objective standard and may be taken to include arbitrary, capricious, or inconsistent conduct, whether negligent or intended. It is common cause that the applicant did submit his CV

timeously however due to human error it was realized that the CV was not captured and collected with the other CV's as it might have been placed in the incorrect submission box and lost.

140. It is further common cause that this was rectified by HR when brought to their attention and he was asked to resubmit his CV after the closing date. It was testified by the Chief Directorate who was the chairperson of the selection committee that a special shortlisting meeting was convened to evaluate the applicant's CV. Detailed discussions were held on the applicant's CV and it was agreed that his CV did not meet the established criteria's set and hence he was not shortlisted and interviewed. In this instance the applicant failed to prove that the respondent acted unfairly by not shortlisting him.

141. As impressive as the applicant's CV looked it became clear that the skills required for the Directorate position was not what was required, specifically related to the international job functions, skills, representation, and experience.

142. I am not convinced that the applicant meets all of the inherent requirements. I believe an adequate and detail response was provided by the applicant's supervisor Mr Van Zuydum (chief Directorate) in explaining why the applicant was not considered as the suitable candidate in relation to relevant experience that precluded him from being shortlisted. There were certain experiences, he did not have, i.e.; no exposure in drafting any country reports, limited budget, and financial skills, has not produced sufficient if any analytical reports and failure to demonstrate any analytical research and policy development skills.

143. In *Arries v CCMA and others (2006) 27 ILJ 2324 (LC)* the Court held that there are limited grounds on which a Commissioner, or a Court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an Employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. 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 was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner. This approach was confirmed in a more recent judgment of the Labour Court in the matter of *City of Cape Town*

v SAMWU obo Sylvester and others (2013) (LC) (2013) 3 BLLR 267. The respondent's witness Mr. Van Zuydum was very clear and firm in his testimony and gave a detailed explanation why the applicant was not shortlisted for the position. He highlighted the gaps that were prevalent in the applicant's CV.

144. In considering the above analysis and the application of law, the applicant failed to dispose of the onus to prove on a balance of probabilities that the respondent acted unfairly in the exercise of its discretion not to shortlist him and allow him an opportunity to participate in the interview process. Accordingly, I order as follow:

AWARD

145. The applicant failed to dispose of the onus to prove, on the balance of probabilities that the respondent committed an unfair labour practice relating to promotion, in terms of section 186 (2)(a) of the LRA.

146. The matter is dismissed.

Signature:  _____

Commissioner: HASSINA BANU DOOROT.