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ARBITRATION AWARD

Panellist/s: Joyleaf Boase
Case No.: GPBC1853/2022
Date of Award: 20 December 2022

In the ARBITRATION between:

PSA obo Masumbuka, JS
(Union / Applicant)

and

Department of Employment and Labour - Mmabatho
(Respondent)

Union/Applicant's representative:Ms Pamela Letebele

Respondent's representative: Ms Theron Makuya

DETAILS OF HEARING AND REPRESENTATION

1.The arbitration hearing took place on the 05 and 06 of September at the respondent premises in Mmabatho, the Department of Employment and Labour. The proceedings were electronically recorded. The applicant, Mr Masombuka was represented by PSA (Public Servants Association) official, Ms Pamela Letebele. The respondent was represented by Ms Theron Makuya from Labour Relations.

2. Both parties agreed to submit the last set of closing arguments received on the 19th of September 2022 on close of day at midnight.

ISSUE TO BE DECIDED

3. I must decide whether the non appointment of the applicant after receiving an appointment letter was fair or not, and if not the appropriate remedy.

NARROWING OF ISSUES

4. It was common cause that the applicant did apply for the advertised post of Principal Psychologist Grade 1 in Mmabatho where he was shortlisted, interviewed and given a letter of an appointment to resume duties.

5. Parties submitted documents, the applicant had bundle A and the repondent bundle R.

6. The applicant was the only witness who testified while the respondent called in 3 witnesses, Mr Mampuru, Ms Silindile and Mr Surprise.

BACKGROUND TO THE MATTER

7. On the 28th of January 2021, the applicant received a call to attend an interview after applying for the post advertised by the respondent of Principal Psychologist ("PP") Grade 1, reference HR4/4/10/11 in Mmabatho. During the time of the call he was employed by the respondent in Middleburg Labour Centre as a Career Counsellor since the 01st of September 2009.

8. On the 04th of February 2021 he attended an interview where around June 2021 the respondent informed him he past the interview; just before he could start on the appointment on the 01st of July 2021 he was informed that it is on hold as the are investigations in regard to the 3 year which was a requirement with him having less years. The applicant arrangement to be taken back by Middleburg Labour Centre as his previous position was not filled where later on lodged the grievance which he felt was not attended to, and he referred the matter to the GPSSBC ("the Council") in terms of section 186(2)(a) on benefits of the Labour Relations Act of 1995 (‘’the Act’’) as amended. On the 26th of November 2021 the matte r was conciliated but remained unreasolved and was referred for arbitration on the 04th of March 2022.

SURVEY OF EVIDENCE AND ARGUMENT

<u>Applicant Evidence and Arguments</u>

10. The applicant, Mr Masumbuka submitted that he commenced duties with the respondent since 01st of September 2009 were he is a Career Councillor, doing conselling for the clients. He got Masters Degree in Psychology and Hounors in Psychology with the expirience of 19 years. Due to his qualifications when he saw the advertised post he knew he has all the requirements meaning experience and theory to do these job. He submitted the Z83 forms, qualifications on page 27 as required, Curriculum vitae on page 31, including the registration with HPCSA on page 36. On the 28th of January 2021 after being shortlisted he received a call inviting him for an interview held on the 04th of February 2021.

11. He mentioned that he waited untill the end of June month where he was told he passed the interviews and he was more than welcome as the panel was satisfied with his interview session; and he received an appointment later on the 10th of June 2021 and the Middleburg Labour Centre under Ms Melanzi released him after a farewell function, and commencement of duties on the 01st of July 2021. On the 29th of June 2021 to his surprise in the evening the Chief Director called him about the post been putted on hold for investigations on 3 years registration he stated on his Z83. He further mentioned due to him sitting at home and of unsuccessfull follow ups with the last emails sent on the 21st of September 2021 page responses where still saying " we will get back to you". Meanwhile of this back and fourth responses he wrote back to Middleburg Labour Centre requesting to come back and he was called back for duties on the 19th of August 2021. He stated that in mid September the Chief Director called him for a meeting held at the head office where she requested him to return back to Middleburg as she was told by the panel that he was not havng the 3 years he mentioned on the Z83 forms and the applicant responded by saying " I am sorry mam i have already went back but making sure he's dissatisfaction is registered as he knows he qualify for the position and felt aggrieved and lodged the grievance on page 1 to 2 to a stage that this was unfair to him as he was shortlisted, interviewied and got the appointment letter, he mentioned that he is currently no longer willing to move to Mmabatho Labour Centre avoiding victimization, he must be left in Middleburg Centre with all the benefits he was to get when appointed to the position of PP.

12. On cross examination He agreed that he did not have the 3 years but 2 years registration with HPCSA dated the 12th of December 2021 during the closing of advertised post on page 26 while at the back of his mind he had necessary required experiences. It was putted to him that for him to be called for an interview and getting an appointment letter was an oversight from the panel members which he disagreed with as his profile needs someone with an open mind because he is qualified. He confirmed that page 12 the date on registration, 12 November 2018 is the date he was with the board and that is not to mislead the panel members he was honest, and clear to the panel. He stated again that the panel called him for an interview as he met all the requirements of the post.

Respondent Evidence and Arguments

13. Mr Boikie Mampuru, mentioned that he is doing both duties of the Acting Chief Director Provincial Operations and the Provincial Chief Inspector mainly to oversee the 10 labour centres, and the whole operations of the department on core business of inspections , administrations, finances of the whole business units.

14. He elaborated on how the post of PP in Mmabatho was advertised with requirements with masters degree, 3 years registration with HPCSA, Industrial and clinical Psychologist, financial management, recruitment, legislations, skills and that he was a panel member for the selection of the applicant for the post. He read page 28 untill page 58 mentioning that the panel shortlisted the applicant including other 6 candidates as a maximum number as per Recruitment and Selection policy ("RS"); with the chairperson of the panel, Mr Andile Makapela before leaving for pension. He mentioned that when the panel select candidates they look at their Z83 if it is filled correctly, CVs, certificate of HPCSA registration including all qualifications which was done with the applicant documents for shortlisting. On page 28 he further mentioned that the post required registration and the applicant has a masters degrees; but he explained that on face value is that this registration dated the 13th of November 2003 it looked like the applicant was having 3 years as required when he was shortlited but later on the panel found it not; the panel shortlisted the Dr R.G. Nematendana from University of Venda as the first best candidate who later declined the offer and thats how the applicant appeared as he was the second best candidate with appointment letter dated 07th June 2021.

15. He stated that the 2003 registration date of HPCSA as stated on the Z83 was different from the copy attached on qualifications dated the 12th of December 2018 which now is not 3 years, with this 2 different dates it was obvious the applicant did not meet the post requirements, the panel missed this as they used Z83 forms. On page 36 the applicant documents says Psychometrist and the department was looking for Psychologist. He stated the panel looked at this calculations which is not 3 years but the applicant was 1 years and 9 month that period they shortlisted him. The applicant wanted the panel to consider Employment Equity Act ("EEA") on his appointment but it must be noted that EEA appointments are driven by EE reports targeting people who are under represented and in the panel EE representatives are present to advise in achieving the targets and plan, as they again use it as secondary not primary as he wants; if EE wants them to deviate they must motivate but in this on Dr was a female it needs no deviation on his elaboration.

16. He stated should the panel have spotted that disjuncture the applicant was not going to be shortlisted thats why currently is unlawful for him to have the appointment letter with the information that was not accurate as emphasised on the Z83 forms. He read page 29 on declarations that the applicant declared that the information provided including all the documents is complete to the best of his ability and anything wrong could lead to his application being disqualified ; he knows and signed on the 05th of October 2020 and we spotted others who were by then even higher than him example 2 years and the panel did not shortlist them.

17. On cross examination He was reminded to say did the panel focus only on the Z83 forms which he said they looked at all documentations, holistically and that quality checks were done by the 3 panel members including the HRM as the fourth member who spotted this disjuncture later; and to say they only checked Z83 form not attached certificates is the applicant's representative's opinion but far more he acknowledge the panel members made a mistake or error. He agreed that they sent the applicant an appointment letter and later that was when the panel did the verifications of the applicants documents. He stated panel members are human being and this errors or mistakes happens sometimes and he thought the applicant was honest as his

documents collaborates with an oversight from the panel. With less years the applicant was having and should the post be advertised again he will now be qualifying as he will be having the 3 years requested.

18. Ms Silindile Kiwane, testified that she is the Director Public Employment Services of the respondent in the Northwest province, as well as head of units to oversee all programmes. She was not involved during the selection of the applicant on the post of PP but on the 01st of February 2021 she was informed about the process that is undertaken in compliting the appointment of the successful candidate. As it was now long she started making follow ups with the HRM unit and on the 10th of June 2021 she received a letter from Neto copying Mapule, Mbuizene and Magopane in regard that the applicant is accepting the offer of the position of PP; which she did sent to the coordinator and other relevant departments to prepare for the applicant arrieval.

19. On the 28th of June 2021 she received the communication in relation to the post that the applicant does not meet the post requirements and stating the applicant registration with HPCSA was short of a year from Workseeker Registration Unit Ms Lulu Matlhope; director at head office. On page 76 she read an email from the applicant who wanted to communicate with her around 12:30 in relation to commencement of duties were she responded on 30th of June 2021 that the respondet is still sorting some technicalities with the PP position he applied while she was waiting for HR, Ms Basson on the developments and she responded on the very same day saying "please note the HR unit is still investigating your appointment and please accept our apologies for an inconvienience caused, and we will speedily resolve, and will respond accordingly".

20. O cross examination she clarified that she most of the time get involved in the R and S recruitment process as she is the head of the unit, and most of subordinates from this recruitments must reports to her but on the applicants selection she was not part. She stated she would not know if it is unfair on the applicant not to have been appointed as she was not part even not having an opinion on the subject or the error made by the panel members but when the is an error employer has a right to act on the error.

21. Mr Surprise Mogakane, testified that he is currently employed by the Department of Justice and Constitutional Development as Assistant Director Services Benefits and previously he was the respondent Assistant Director HRM responsible for R and S. He mentioned he was involved on the appointment of post PP with reference to page 47, he read the appointment letter to Ms Nematandana after the interview when she accepted the offer but before she could commence she declined the offer stating personal reasons. He knows the applicant and he was not appointed to the advertised post of PP as he still work as a consellor in Middleburg on page 44, clause 2.2- your appointment will be subject to qualifications verifications, reference check and the department reserves the right if any error be covered, the HRM issued an appointment letter, and was informed some information on the application is not right thats how the applicant was not appointed to PP position.

22. On cross examination he was asked why the applicant was issued with letter of appointment while waiting for verifications and he responded to say he was the second best candidate in the interview and the offer was conditional as read on clause 2.2. He was not part of the investigations, his role was to give secretarial support and most of issues concerned can be answered by the panel members.

ANALYSIS OF EVIDENCE AND ARGUMENT

23. **In terms of Section 186(2)(b) '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.

24. **The South African Constitution, Act 109 of 1996, Section 23(1)-** pledges to everyone the right to fair labour practice. In the employment context, this constitutional right is narrowed down in Section 185(b) of the Act unequivocally guarantees that every employee has the right not to be subjected to unfair labour practice.

25. It is common cause that the applicant was called in for an interview after he was shortlisted and he came in as the second best candidate from recommendation by the panel members.

26. The applicant challenged an insunuation that he was misleading the panel as according to him he was listing the date the board issued him the registration certificate. The respondent could not rebut that version but only conceeded or kept on blaming the applicant that was it not him in writing the date the panel could have not shortlisted him and the panel members where mislead in believing that he was honest.

27. In relation to the testimony of Mr Mampuru when he was asked did they as panel members check all documents holistically he said they did but i find it difficult to accept that because he only quotes policy or the declaration only to suite him for instance he mentioned that panel members are human being they made a mistake or an error which to him is so small but I ask had they followed the policy we would not be sitting over this matter or the applicant would have not been shortlisted. It is contradictory to say they looked on all documents but missed such a crucial point. I cannot accept that had the panel members followed what guidelines wanted them to do in shortlisting the right candidates or at the interview it was impossible for the panel to have missed to spot this disjuncture as he mentioned as they were sitting with the applicant on the interview.

28. I find it difficult to accept that a letter of appointment can be issued while the whole verifications was done. The panel with HRM as stated must carry the blame of this error they committed as the applicant previous management understood as he's position was not filled by taking him back imagine if it a different sector already ushed with farewell ready to relocate an inconvinience indeed.

29. I considered the evidence of Mr Surprise from HRM unit mentioning he was not part of the investigation on this PP position but Mr Mampuru stated that he was the one who spotted this dates and in a way he is a member of this R and S process; he mentioned he was a support of the secretariat wherein that is not the correct details. The period in hand to run shortlist, interview and giving the appointment letter this

whole process indicate otherwise that had panel dedicate itself to what is before them they could have arrieved at a different results. Blaming the applicant by reading the declarations on the Z83 form is destroying or discouraging employees who came in the form of growth with the department by not agreeing to the wrong of the panel members.

30. I am persuaded by the applicant testimony that by the first time he looked at the advertisement he knew he have all the capabilities required by the position. At the same time the applicant acknowledged that he does not have the 3 years registration as required during the shortlisting and he was few months less in the fact that he did not qualify to be shortlisted, with the consideration on both testimonies that should the position be advertised in future the applicant will be currently having the 3 years registration required the will be nothing barring him from being considered for it once if he applied again.

31. In taking parties evidence in totality before me is that the applicant agreed he was short of months to have the 3 years registration required and the version that the panel shortlisted the applicant by mistake but it is not the case had they followed the guidelines provided by policies because with such decision that impact on subordinates life it can never be correct as the respondent will suffer the consequences of such errors or mistakes. I further considered that the respondent initiated to mention that for this error or mistake made we will be compensating the applicant; who declined the offer and at the same time nolonger willing to relocate to Mmabatho.

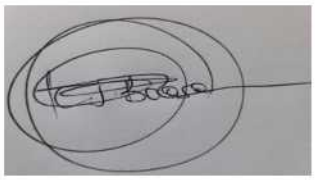
32. In conclusion is that both the applicant documents mostly the HPCSA certificate in question and the respondent panel members on dealing with the documents of the applicant were both not correct it raised expectations unneccessarily because the panel members did not do its work accordingly and I believed the applicant testimony that he did not state the date to mislead the panel. The panel must learn to be careful to follow all steps of recruitment accordingly and the applicant to be compensated as the respondent willingly stated to rectify the inconvienience that was caused on the him since from the meeting held with the Chief Director.

33. On balance of probabilities the applicant non appointment to the position of PP was unfair due to the panel members. I therefore cannot order the full benefits of the advertised post, should it be advertised nothing barring the applicant to apply but the relief of solatium for inconvinience that was not necessary as it was not intended to mislead.

AWARD

33. I therefore order the respondent, The Department of Employment and Labour in Mmabatho to pay the applicant, Mr Sipho Masumbuka currently employed with the Middleburg Labour Centre, be paid the compensation for solatium to the value of R20.000.00 (Twenty thousand rand) for unfairness of losing an income.

34. The amount must be paid on or before the 15th of January 2023.



Name: Joyleaf Boase

(Council name) Arbitrator