



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 644 8132
Web: <http://www.gpsbc.org.za>

JURISDICTIONAL RULING

Panellist/s: Asnath Sedibane

Case No.: GPBC1264/2024

Date of Ruling: 17 February 2025

In the matter between:

PSA obo RAJ Fourie

(Union / Applicant)

And

Department of Education

(Respondent)

Union/Applicant's representative: Ms Pamela Letebele

Respondent's representative: Ms Friedah Rieger

JURISDICTIONAL RULING

BACKGROUND TO THE DISPUTE

- [1] The matter was set down for arbitration on the 10th of February 2025 at the offices of the Department of Education in Ermelo, at 09h00.
- [2] Both parties were present. The applicant, Mr RAJ Fourie was represented by Ms Pamela Letebele, an official of the Public Servants Association(PSA). The respondent, the Department of Education was represented by Ms Friedah Rieger from the respondent's Employee Relations unit.

NATURE OF THE DISPUTE

- [3] The applicant declared a dispute for unfair labour practice relating to promotion, in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995.

PRELIMINARY POINTS

- [4] The applicant raised a preliminary point that the respondent has failed to comply with the subpoena that the GPSSBC has issued in this matter. The respondent has objected to the subpoena and following this objection, the council issued a directive, directing the respondent to comply with the subpoena.
- [5] The respondent reiterated their objection to the subpoena and submitted that the issuance of the subpoena was premature as there was no conciliation or pre-arbitration in the matter. The respondent referred to the Labour Court judgement in **Motloung v Malubane & others, JR 1149 (2022) [2024] ZALACJHB 230** where it was held that the necessary procedure must be followed before issuing a subpoena.
- [6] The respondent raised a preliminary point, that the council lacks the jurisdiction to arbitrate the matter. The respondent submitted that the applicant has referred an unfair labour practice dispute relating to promotion when the position in question has not been filled. Jurisprudence indicates that for a dispute to qualify as unfair labour

practice related to promotion, there must be a completed promotional process resulting in an appointment. In the absence of an incumbent, there is no promotion and no adverse employment decision.

- [7] The applicant, in response to the respondent's point in limine, submitted that a vacant position was advertised, the applicant was shortlisted and attended an interview. Recommendations were made but there was no appointment. The respondent is acting *ultra vires* by not complying with the Public Service Regulations which provide that a vacant post must be advertised within six months of it being vacant and it must be filled within six months of the interview process.

EVALUATION

Jurisdiction

- [8] The applicant's case is premised on unfair labour practice relating to promotion. Section 186(2) (a) of the Labour Relations Act 66 of 1995 provides as follows:

'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 reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

- [9] The respondent has objected to the jurisdiction of the GPSSBC to arbitrate the dispute and has submitted that the council lacks jurisdiction as the position being contested has remained unfilled. The respondent has contended that the referral by the applicant is therefore premature. The applicant on the other hand, has submitted that the matter is correctly before the council and that the respondent's decision not to fill the position in question is *ultra vires*.

- [10] The Labour Court in **Malatji v City of Tshwane Metropolitan Municipality and others (JR 654/17) [2020] ZALCJHB 300** held that it is trite that a promotion for the purposes of section 186(2)(a) involves a move by an existing employee to a higher rank or position that carries greater status, responsibility, and authority. It is common cause in this matter, that the applicant is an existing employee of the respondent, that he applied for a position that is on a higher rank and carries greater status, responsibility and authority. The applicant was shortlisted and interviewed for the position but was not appointed. It is further common cause that his appointment in the position would have constituted a 'promotion'.

- [11] In **Department of Justice v CCMA and others (2004) 25 ILJ 248 (LAC)** it was held that an employee who complains that an employer's decision in not appointing him constitutes an unfair labour practice must first establish the existence of such a decision or conduct. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. It is common cause in the current matter that the position that the applicant is challenging was not filled and that it is this decision not to fill the position, that the applicant's claim for unfair labour practice is based on.
- [12] In **NEHAWU obo Manyana and Another v Masege NO and others (JR363/2012) [2014] ZALCJHB 124**, the Labour Court considered an arbitration award which involved a case where the applicants had declared an unfair labour practice, promotion dispute when the positions being contended had not been filled due to budgetary constraints. The court found that the dispute was indeed unfair labour practice relating to promotion but that the applicants did not succeed in proving that the decision by the employer not to fill the positions constituted an unfair labour practice.
- [13] Another case which involved an unfair labour practice, promotion where there was no appointment, is **Department of Rural Development and Agrarian Reform v GPSSBC and others [2020] 4 BLLR 353 (LAC)**. The Labour Appeal Court in that case upheld the Labour Court's judgement that found that the commissioner's finding that the employer committed an unfair labour practice relating to promotion, by not appointing the employee to the position. What stood out for me from that case is the fact that the commissioner had ordered the appointment of the employee even when the employer had not concluded the appointment process.
- [14] Having considered the submissions on this point and having taken into consideration the provisions of the LRA and the case law cited above, it is my conclusion that the GPSSBC has the requisite jurisdiction to arbitrate the dispute.

Subpoena

- [15] The applicant has raised the issue of the subpoena that has been issued by the council and which the respondent has not complied with. The respondent has contended that the subpoena has prematurely been issued by the council. I have already issued a directive with regards to the subpoena and I will therefore not revisit this issue, save to say the applicant should request the council to re-issue the subpoena for the next set down date of arbitration.

RULING

[1] The GPSSBC has jurisdiction to arbitrate the dispute.

[2] Case Management is directed to reschedule the matter for arbitration.

DATED AT MBOMBELA ON THE 17TH OF FEBRUARY 2025.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

GPSSBC PANELLIST