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ARBITRATION AWARD

Case Number: GPBC1207/2024
Commissioner: Nowethu Sangqu Ndiki
Date of Award: 20 December 2024

PSA obo CT Bramwell
(Union/Applicant)

And

Department of Transport 1st Respondent

Mthembeni Mbaleni 2nd Respondent
(Respondent)

Union/Employee's representative: Mr B. Benson

Employer's representative: Mr M Nxele

DETAILS OF HEARING AND REPRESENTATION

1. Arbitration process was scheduled and heard on 03 December 2024 at the premises of the Department of Transport in King William's town, under the auspices of the GPSSBC. Alleged unfair labour practice dispute was referred to the council, a certificate of non resolution was issued and LRA 7.13 form referring a dispute to arbitration was received by the council. Hence this award .
2. The Applicant, Ms CT Bramwel appeared represented by Mr B Benson, a union official of a registered trade union PSA. The 1st Respondent was represented by Mr M Nxele from its Employee Relations Department. Mthembeni Mbaleni who was cited as the 2nd Respondent failed to appear, no correspondence was received with regard to his absence. Having checked if all parties were properly notified of the arbitration, I was satisfied that the 2nd Respondent was properly served even though he failed to appear. In the circumstances, arbitration continued in his absence.
3. The proceedings were electronically recorded, handwritten notes were taken. The proceedings were conducted in English.

ISSUE TO BE DECIDED

4. I am required to determine whether the Respondent committed unfair labour practice by failing to shortlist and or interview the applicant based on lack of qualification.

BACKGROUND TO THE DISPUTE

5. The Applicant is employed by the Department of Transport for more than 42 years. He is currently serving as a Deputy Director law enforcement. He is earning R66830.81 per month. The witness has, for several times acted as a Director and appointed to do so by the Department of Transport. The Director's post became available and it was advertised. The Applicant along with other interested candidates applied for the post. He was not shortlisted or interviewed for this post even

though he has always acted on the post. He was aggrieved by the actions of his employer as he thought that he was good enough for acting in the position and not good enough to be employed in the same position. The Applicant will testify as the only witness and a bundle of documents will be used to substantiate oral evidence in this arbitration. The Applicant does not wish to be appointed on the position which is already filled, he seeks maximum compensation for unfair Labour practice committed by the Respondent.

6. The Respondent will argue that it did not commit any unfair labour practice by not shortlisting and interviewing the applicant. The Applicant did not meet the minimum requirements in that he did not have a degree as required by the advert. The Applicant had a Diploma in Traffic Management. Two witnesses will demonstrate that no unfair labour practice was committed. A bundle of documents will be submitted to substantiate this contention.
7. The Respondent ended up calling only Ms Nyamakazi to testify and did away with the second witness. It felt that the evidence as tendered by Ms Nyamakazi was enough.
8. Both parties submitted closing arguments in time as agreed during the arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant's Version

9. Mr Bramwell testified as the only witness for the Applicant under oath as follows: He was employed and served the Department of Transport for over 42 years. At the time of this arbitration, he was serving as a Deputy Director at the head office earning R101894.00 pa. He felt aggrieved that the Department of Transport failed to shortlist and interview him for the position of a Director when it became available.
10. Bramwell said that he has acted in the position of the Director in the absence of the Director. He acted in this position without remuneration for 47 days in total. He further acted in the position with remuneration for 18 months. The 18 months is made up of the following periods: 01 February 2022 - 01 August 2022, 01 August 2022 - 01 January 2023 and 01 June 2023 - 30 November 2023. At all material times he got an appointment letter signed by the Director to act with remuneration. He gave his all to doing this work as a trusted employee of the Department.
11. The Applicant said that he was once recognized as the best traffic officer in the country. He was also the longest serving traffic officer in the Eastern Cape. He said that should he have been granted an interview to convince the panel of his skills, the panel would have chosen him to

become the Director. It was his submission further that he also acted as the chief director at some stage, he was surprised that he would not be shortlisted in order to sell his skills to the panel.

12. Bramwell said that the Department followed its policy in appointing him to act, the policy indicates that one can not act in a position if is not qualified. At all material times, he used his Traffic Management Diploma as his qualification.
13. It was his submission that the post was advertised on 21 October 2022 and he applied. It was further advertised on 19 April 2023 with added requirements which included a qualification recognized by SAQA at level 7. In both advertisement he applied and was not shortlisted.
14. Referring to the policy of the Department on acting in higher positions, Bramwell said that one can not be allowed to act in a higher position without being qualified for such.
15. During cross examination he was asked about his acting as the Chief Director, to which he said indeed he acted as Chief Director on 09 - 10 March 2017.
16. He was further asked if he understood the requirements of the advert on page 4 of the applicant's bundle. Bramwell said he fully understood.
17. He was asked if he possessed the qualification on level 7 as recognized by SAQA. His answer was that he possessed a 3 year Traffic Management Diploma.
18. When it was put to him that the Diploma he had did not qualify as level 7, he said he had been applying using his qualification and was appointed. He acted on a higher position using his qualification, he gave due diligence to the work he was trusted with. He also referred to the document attached on page 32 of the applicant's bundle which is a document from SAQA indicating that his diploma's old level was 6 and the new level assignment was pending.
19. He was asked to confirm if there was any requirement of past acting on the advert to which he responded to the negative. He further added that even though it was not in the post, it should be taken into consideration as an internal candidate who have acted and gave it his all.

Respondent's version

20. Nomasabatha Nyamakazi was the Respondent's only witness. She testified under oath as follows: She said that she received Mr Bramwell's application for the advertised post appearing on page 1 of the applicant's bundle. Mr Bramwell was not shortlisted because he did not meet the minimum requirements as appearing on the advert. The advert required NQF level 7 and Mr Bramwell had Diploma being NQF level 6.
21. She said that the Human Resource Development verified the qualification of Mr Bramwell and it was level 6.

22. The witness was referred to page 4 of the applicant's bundle where it indicated the requirements of the job in the advert as issued in October 2022. She also read page 1 of the same bundle which is the advert that gave rise to this arbitration. She also read for record the requirements of the job to be met in order to shortlist a candidate.
23. The witness confirmed that she did not call or write to the applicant to indicate why he was not shortlisted nor interviewed. She said that the advert makes provision for this in that, it indicates that communication would be limited to shortlisted candidates.
24. She confirmed that the bundle of documents submitted by the Respondent only indicated two candidates on its page 3 because the master list was not attached and it was too much to attach.
25. During cross examination she confirmed that master list was not amongst the documents submitted for arbitration.
26. She further confirmed during cross examination that the advert required NQF level 7 as recognized by SAQA.
27. She read paragraph 16 sub paragraph (iii) on page 53 as well as sub paragraph (vi). She said that she agrees that it was on the Respondent's policy that elimination of candidates should be done in a justifiable manner and the reasons must be documented. She further agreed that the policy makes provision that, educational requirements alone must not predetermine suitability unless so required by professional bodies that regulate that profession.
28. Commenting on the policy, she said that the policy was recently amended, but she could not say what the amendments were.

ANALYSIS OF EVIDENCE AND ARGUMENT

29. In this case, I have considered all evidence as tendered by the parties to make my finding. I may not have repeated the evidence verbatim but captured all relevant submissions. The closing arguments that were submitted by the parties have also been considered in arriving to the finding below.
30. Section 185 of the LRA stipulates that, every employee has a right not to be unfairly dismissed or subjected to unfair labour practices. The current definition of "unfair labour practice under Section 186 (2) of the Labour Relations Act no 66 of 1995" reads as follows:
*LRA 186(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;*
- (b) *the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.*
- (c) *a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and*
- (d) *an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”*

- 27. It is common cause that the applicant held a Diploma in Traffic management. It is also common cause that the Applicant has no desire to be appointed in the position which has already been filled.
- 28. The Applicant is challenging the Respondent's failure to grant him an opportunity to showcase his skills and suitability after failing to shortlist and interview him due to lack of qualification even though he acted on the advertised position several times.
- 29. It must be noted that the applicant does not wish to be appointed in the position he applied for, he is merely aggrieved that the Respondent eliminated him from the shortlisting process. He said that he was hoping to showcase his skills to the interview panel in confidence as he has acted in the post for some 18 months.
- 30. The Applicant further relied upon the Recruitment and Selection Policy of the Respondent saying that, the policy makes provision that the elimination of candidates must be done in a justifiable manner and the reasons must be documented. In his case elimination was not justifiable and it was not even documented. The Applicant said that Respondent acted unfairly and unjust by eliminating him solely on qualification.
- 31. The Respondent on the other hand argued through its only witness that the applicant lacked the qualification as stated in the advert. The qualification required was B Degree NQF level 7 as recognized by SAQA. Mr Bramwell's application was considered but he could not be

shortlisted after verification of his qualification. He possessed a Diploma in traffic management which was equal to NQF level 6. he might have met all other requirements but his qualification was level 6 and not level 7 as required by the advert. When the witness was confronted by the policy attached on page 53 of the Applicant's bundle, she said that she recognized the policy but she was not sure because there were amendments on the policy. She confirmed during cross examination that communication was limited only to the shortlisted candidates. There was no communication of any kind with Mr Bramwell in this regard.

32. The Respondent's Recruitment and Selection Policy attached on page 53 of the Applicant's bundle states that:

"16. SHORTLISTING

(i) Shortlisting forms an important part of the overall selection process. It entails the identification and application of a specific set of criteria, the drawing up of shortlists and obtaining approval for the outcome of the process

(ii) If not addressed explicitly, the door is left open for discrimination, corruption, nepotism and favouritism.

(iii) The elimination of candidates must be done in a justifiable manner and the reasons must be documented."

(iv) Shortlisting may only be concluded on the basis of information provided in the application form (z83 and CV of the candidate)

(v) The shortlisting process should be guided by the inherent requirements of the job as per advert. The qualifications considered should be relevant to the post.

(vi) Educational requirements alone must not predetermine suitability unless so required by professional bodies that regulate that profession.

(vii) The shortlisting process should consider the Employment provision of the department."

32. Having regard to the above policy of the Respondent, I am of the view that the Respondent should have observed its own policies and processes when deciding not to shortlist Bramwell. I am mindful that the decision to promote whoever you feel is suitably qualified rests with the Respondent, however, such decision must be arrived at fairly. It is the road leading to the end result that is being contested in this arbitration. In so doing, the Applicant challenges the Respondent who overlooked its policy on Recruitment. This action of the Respondent was not explained when the Respondent was given the opportunity to defend itself from the allegations. The evidence and the policy as submitted was not refuted. Instead, the Respondent's only witness acknowledged the policy. She further said the policy was

amended but could not substantiate that. She did not defend the Respondent when it comes to sub paragraph (iv). She accepted that she did not communicate the decision not to shortlist as well as reasons to the Applicant.

33. The bundle of documents submitted by the Respondent is merely emails confirming that the qualification was that of level 6 and not level 7. The witness also testified that the only reason not to shortlist was that the Diploma held by Bramwell was level 6 while the advert required B Degree level 7. The Applicant is contesting that he was eliminated solely on qualification while the policy makes provision for this. The Respondent failed to dispute this submission. In fact the Respondent confirmed that the Applicant was eliminated solely on lack of qualification. Following this, the Respondent failed to convince me that its actions were directed by the professional body that regulates the profession.
34. The policy states that Educational requirements alone must not predetermine suitability unless so required by professional bodies that regulate that profession. This was put to the Respondent through its witness and she agreed that, indeed the policy states that but, she was not sure if the policy has changed in that regard. The Respondent failed to refute the allegations that it acted unfairly.
35. I have further considered the closing arguments where the Respondent is referring to the DPSA directive which informed the qualification required by the contested post. The Respondent failed to put this forward for consideration and to be scrutinized during arbitration, not even attach the document for consideration. I am of the view that the Applicant's version is more probable than that of the Respondent.
36. On a balance of probabilities, I find that Respondent's failure to observe its own policy on Recruitment and Shortlisting has led to the non-shortlisting of the Applicant, such actions amount to unfair labour practice. As such, the Applicant succeeds in proving the unfair labour practice as alleged.
37. Having found that the Respondent has committed unfair labour practice, I now have to decide on the just and equitable compensation as directed by Sections 193 and 194 of the Labour Relations Act no 66 of 1995 as amended. I have considered the Applicant wishes to be paid a maximum compensation in the event that the unfair labour practice is proven. I am of the view that the parties before me still have a working relationship, I do not wish to spoil the

existing relationship. The Applicant stated categorically that he did not wish for any protected post, this to me shows maturity because someone has already been appointed. The Applicant is still earning his salary from the same Respondent who has to pay the compensation. Shortlisting and or interview does not necessarily mean he was going to be appointed. Having considered these points, I am of the view that two months' compensation is fair and equitable.

38. In the premise, I order the Respondent, **Department of Transport** to pay to the Applicant CT Bramwell two months compensation as follows: **R1 105 383.00 pa / 12 months = R92 115.25 x 2 months =R184 230.50**(one hundred and eighty-four thousand two hundred and thirty rand and fifty cents.)

AWARD

39. The Respondent **Department of Transport** committed unfair labour practice by failing to shortlist the Applicant based on his qualification alone.
40. The Respondent **Department of Transport** must pay the Applicant **C.T Bramwell** compensation equal to two months' salary.
41. The Respondent **Department of Transport** must pay **2 months** salary to the value of **R184 230.50** (one hundred and eighty-four thousand two hundred and thirty Rand and fifty cents) to the Applicant C.T Bramwell on or before **15 February 2025**.
42. The above stated amount on paragraph 41 is subject to any legal deductions as governed by the law of South Africa.
43. I make no cost order.

Signature:



Date: **20 December 2024**

Commissioner: **Nowethu Ndiki**

Sector: **Public Service**