



ARBITRATION AWARD

Case No: **PSHS396-23/24**

Commissioner: **Allan Kayne**

Date of award: **21 November 2024**

In the matter between:

PSA OBO SIPHIWE MARCIA MFUSI

Applicant

and

DEPT OF SOCIAL DEVELOPMENT – NORTHERN CAPE & 1 OTHER

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servants Association of South Africa (“PSA”) referred an unfair labour practice dispute on behalf of the applicant to the Public Health and Social Development Sectoral Bargaining Council (“the Council” or “the PHSDSBC”) in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995 (“the LRA”). The arbitration proceedings took place in Upington on 16 May 2024, virtually on 02 July 2024, and in Kimberley on 20 August 2024, 21 August 2024, 08 October 2024, 04 November 2024 and 05 November 2024.
2. Russle Bindeman, a PSA official, represented the applicant, while Junaid Tswaile appeared for the first respondent during the May 2024 sitting and Kagisho Mokgothu thereafter. The second respondent, Godfrey Mjezu, was physically present during the August and October 2024 sittings and, thereafter, appeared virtually.

3. Each party submitted bundles of documents to be used during the arbitration proceedings. The proceedings were digitally recorded, with the record being filed with the Council's administration.
4. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his outcome.

BACKGROUND

5. The parties agreed in a signed pre-arbitration minute that the following facts were common cause:
 - 5.1. The applicant is employed by the first respondent as Deputy Director: Corporate and Finance at the ZF Mgcawu ("ZFM") District Office.
 - 5.2. On 20 November 2022, the first respondent advertised the position of ZFM District Director, after it had been vacant since 01 February 2021.
 - 5.3. Ms Mfusi and Mr Mjezu were shortlisted, interviewed and subjected to competency assessments.
 - 5.4. On 08 March 2023, the first respondent presented its Organisational Functionality Assessment ("OFA") report at the Corporate Services Consultative Forum meeting in Uppington, indicating that the representation of women at the Senior Management Service ("SMS") level was not compliant in terms of the department's Employment Equity plan and that at least three females needed to be appointed at that level.
 - 5.5. Equity is the fourth criterion under selection principles stipulated in the SMS Handbook of the Public Service.
 - 5.6. The first respondent appointed the second respondent to the position of District Director: ZFM, effective 01 April 2023.

ISSUE/S TO BE DECIDED

6. I must determine whether the respondent subjected the applicant to an unfair labour practice relating to promotion in terms of section 186(2)(a) of the LRA, and if so, to what relief she is entitled. The applicant seeks either promotion to the post, a protected promotion or compensation.

SURVEY OF EVIDENCE AND ARGUMENT

- The following constitutes a summarised version of the parties' **relevant evidence** and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not considered it. My findings are accordingly within the context of all the evidence tendered.

APPLICANT'S EVIDENCE

Siphiwe Marcia Mfusi ("the applicant" or "Ms Mfusi")

- The applicant testified under oath that, after the departure of the former District Director, she and Mr Mjezu acted in the role on a rotational basis until the post was filled. However, the rotations advantaged the second respondent, specifically on one occasion where the acting Head of Department ("HOD") requested her to delay her rotation in the role, thus allowing Mr Mjezu to act during a visit by the President to the District.
- Ms Mfusi met the inherent requirements of the position in terms of her qualifications, seniority and experience. However, she believed that her Postgraduate Diploma in Public Management (at an honours level) was not recognised by the first respondent in the submission to the HOD and MEC¹, and actually surpassed Mr Mjezu's qualifications.
- The panel members' summary of scores, attached to the first respondent's submission in support of the appointment of Mr Mjezu, reflected the following:

| Candidate | Mr Manyane | Ms Kivedo | Mr Monyane | Ms Saul | Ms Mohamed | Total |
|-----------|------------|-----------|------------|---------|------------|-------|
| Mr Mjezu | 21 | 24 | 21 | 16 | 23 | 105 |
| Ms Mfusi | 22 | 22 | 19 | 19 | 21 | 103 |

However, on reviewing the individual score sheets of each panel member, the points awarded by Ms Kivedo to Mr Mjezu amounted to 22, rather than the 24 transferred to the summary, meaning that his overall score was tied with the applicant at 103, and only Mr Monyane and Ms Mohamed's scores reflected that the second respondent performed better than the applicant.

- The submission, ultimately approved by the HOD and MEC on 05 April 2023, noted that *"The selection panel agreed that the recommended candidate/s will be*

¹ Member of the Executive Council

conditionally appointed, pending the verification outcome” despite the requirements of the first respondent’s Recruitment and Selection (“R&S”) Policy at paragraph 9E(c)²:

12. The submission, signed off by the panel members on 31 March 2023, further noted that, in addition to the interview scores, the panel considered the Public Service Regulations of 2016, the employer’s Employment Equity plan and the competency assessments in making their recommendation. The competency assessment results were dated 27 February 2023 and indicated the following developmental areas for each candidate, leading her to conclude that she was the more suitable candidate requiring less intervention on the part of the first respondent than Mr Mjezu:

12.1. Ms Mfusi – Strategic Capability & Leadership, and Financial Management.

12.2. Mr Mjezu – Strategic Capability & Leadership, Programme & Project Management, and Financial Management.

13. Under cross-examination, Ms Mfusi testified that she voiced her dissatisfaction with the employer’s conduct several times before referring a dispute to the Council. The OFA report was presented in Uppington on 08 March 2023, prior to Mr Mjezu’s appointment, and noted, in respect of the period 2023 to 2026, that:

“Representation of women at SMS level is not compliant with the Employment Equity Act, hence at least 3 females should be appointed to ensure compliance at SMS level.”

and

“Males are under-represented in all occupational levels, excluding SMS, and should therefore be targeted for appointment.”

14. She was unaware of the three senior posts in which the first respondent had appointed women to act or its intention to permanently appoint women in those roles in the next cycle.

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- ²(v) The selection committee shall make a recommendation on the suitability of a candidate after considering only-
- (a) Information based on valid methods, criteria, or Instruments for selection that are free from any bias or discrimination;
 - (b) the inherent requirements of the post;
 - (c) the department’s employment equity plan; and
 - (d) ...
- (vi) The evaluation, including the selection of applicants shall be based on the training, skills, competence, knowledge, formal qualifications, recognition of prior learning and relevant experience within a reasonable time to do the job, coupled with the need to redress historical imbalances (pertaining to race, gender and disability). Qualifications should not be defined primarily or solely in terms of educational attainment, but should include skills, relevant experience and other criteria.

15. She argued that the first respondent ought to have considered the results of the assessments, given that competence to perform in a post was a key element in determining the most suitable candidate to be appointed. Further, the employer ought to have considered the impact of the mathematical error in the calculation of the second respondent's score in conjunction with paragraph 9E(c)(v)³ of the R&S Policy, which led to the recommendation of the incorrect candidate.
16. She acknowledged that Mr Mjezu had a Masters degree in Governance and Political Transformation, which, at NQF level 9, was higher than the minimum requirement of an NQF level 7 qualification. However, she believed that her Postgraduate Diploma in Public Management was the equivalent of an Honours degree and was more relevant to the post than Mr Mjezu's Masters degree. She acknowledged that both she and Mr Mjezu met the requirement of at least five years of experience in middle management.

Rinah Leburu ("Ms Leburu")

17. Ms Leburu, as a subpoenaed witness, testified under oath that she was the Deputy Director of Human Resources Administration and acted as the selection panel's scribe. She was present throughout the selection process and drafted the submission signed off by the panel. She confirmed that the advertisement for the position made no mention that the employer's Employment Equity plan would be considered in appointing the District Director. This was because their analysis indicated that both African males and females at the SMS level were underrepresented compared to the provincial EAP⁴, therefore, there was no need to specify a preference. She recognised the OFA report and its findings regarding the need to appoint women at the SMS level. However, she submitted that the department's Employment Equity plan was effective from 01 January 2022, and interviews were conducted in February 2023, both of which predated the OFA report in March 2023.
18. Although she noted the presence of four African females versus eight African males at salary level 13 within the first respondent's Employment Equity profile as of 31 March 2022, she submitted that over or underrepresentation was determined based on workforce percentages (at the specified level) compared to the provincial EAP percentage, noting that the provisions of the Employment Equity Act required an

³ "Points allocated in the interview processes may not be solely used as the determining factor or absolute cut-off points to identify the most suitable candidate, but rather as indicative of a candidate's relative suitability for a post and should be considered with due regard to the employment equity targets of a department."

⁴ Economically Active Population

employer to appoint from the designated groups, which included black people (Africans, Coloureds and Indians).

19. She submitted that the sole criterion for advancing Mr Mjezu over Ms Mfusi was his receiving the highest overall score during the interview process. She was responsible for the computation of the total score based on the individual panel members' score sheets. Referring to each score sheet, she conceded the miscalculation of Mr Mjezu's total score and that he and the applicant had scored 103 points. She noted that, given the same overall result, the Executive Authority was required to make a final decision regarding who the most suitable candidate was.

20. She explained that the final recommendation in the submission was that:

"It is recommended that, the two (2) most suitable candidates to undergo a competence assessment through a service provider appointed by the DPSA⁵; and that the results are communicated to the selection panel to take an informed decision in recommending a suitable candidate.

The selection panel unanimously agrees to recommend Mr. GJ Mjezu as first choice to be conditionally appointed pending the outcome of the compulsory personnel suitability check for appointment at SMS level."

However, based on the DPSA Directive, it was compulsory to send the first and second-ranked candidates for assessment. She confirmed receiving the assessments from the service provider shortly after they were conducted in February 2023.

21. Ms Leburu disagreed that the results indicated that Ms Mfusi was the better candidate, having only two developmental areas compared to Mr Mjezu, who had three, as its purpose was not a determining factor in the decision-making process, and that they were confined to considering the most suitable candidate to be the candidate who scored the highest in the interviews. However, when referred to paragraph 9E(c)(v) of the R&S Policy, she conceded that points allocated in the interview process could not be relied upon as the sole determining factor to identify the most suitable candidate.

22. Ms Leburu confirmed the adverse OFA findings of March 2023 regarding representation at the SMS level. She further confirmed that the first respondent's 2023 Employment Equity plan indicated that, at the Senior Management level, its profile reflected African females at 17.85% (compared to the EAP of 22.0%) and African

⁵ Department of Public Service and Administration

males at 32.14% (compared to the EAP of 28.5%). However, she added that black males accounted for 46.42% (compared to the EAP of 56.1%) versus 39.27% black females (compared to the EAP of 41%).

23. Although she acknowledged that both candidates scored the same, she did not believe that Mr Mjezu's recommendation and subsequent appointment were incorrect.

Phyllis Gosalamang Saul ("Ms Saul")

24. Ms Saul, as a subpoenaed witness, testified under oath that she was the Chief Director: Development and Research and was a panel member who interviewed the applicant and second respondent. She submitted that the panel's recommendation was based on the candidate's performance during their interviews, which culminated in a score of 103 for Ms Mfusi versus 105 for Mr Mjezu. She was unaware of any calculation error at the time of signing the submission and recommendation to appoint the second respondent. She confirmed that she scored Ms Mfusi higher than Mr Mjezu overall, but scores were not the sole factor to be taken into account; rather, the candidate's ability to respond to questions about their core function. Had the panel become aware of the miscalculation of scores, it could have been corrected by relying on other criteria in order to determine the most suitable of the two. However, it could not be reversed at this late stage. She would not be drawn into commenting if an incorrect appointment had been made, despite being advised of the adverse inference that might be drawn.
25. Ms Saul continued that, based on her knowledge, competency assessments were only used to determine the developmental areas of candidates. She acknowledged the content of the submission pertaining to the competency assessments of the applicant and second respondent and that she signed it but reiterated that the assessments were not a determining factor in selecting the most suitable candidate.
26. Asked about the relevance of Employment Equity in the selection process, Ms Saul deferred to the Chief Director: Corporate Services as the official who could best respond. Although aware of the OFA report, she indicated that she would not have remembered all of its findings at the time of recommending Mr Mjezu as the preferred candidate, deferring again to the Chief Director: Corporate Services.
27. Under cross-examination, she confirmed that there was no political mandate leading to the appointment of the second respondent.

Ichabod Manyane (“Mr Manyane”)

28. Mr Manyane, as a subpoenaed witness, testified under oath that he chaired the selection panel that recommended the appointment of Mr Mjezu to the HOD and MEC. He confirmed the principle embodied in the advertisement for the District Director to promote equity through the filling of posts according to the set Employment Equity targets but depended on the advice of HR experts in this regard. Given the date of the OFA report, he submitted that it was not to hand when the recommendation was made and could not recall if the panel was provided with a copy of the Employment Equity plan or if it was attached to the final submission he signed.
29. He testified that they took into account several factors in coming to a recommendation regarding Mr Mjezu, which included the scores awarded, the panel members' observations during the interviews and their deliberations after the interviews. Although unaware of the calculation error at the time of making the recommendation, he did not believe that scores were the sole criterion on which Mr Mjezu had been advanced, especially in light of the R&S Policy provisions. Competency assessments could not be relied upon to determine the most suitable candidate but rather to determine the developmental areas of the top candidates and what the employer would need to focus on in terms of capacity building once a candidate was appointed.
30. Mr Manyane noted that the manner in which candidates responded during the interview process, how they engaged the panel, and their understanding of the work they already performed all contributed to the panel's recommendation, along with the previous opportunities afforded to the candidates to act in the District Director position. He indicated that the panel members' comments on the individual score sheets ought to have also been considered when arriving at a recommendation, as the scores could not be the sole decisive factor.
31. In signing off the submission, the panel members depended on the expertise of the scribe to ensure the accuracy of the calculations and to perform quality control of the document.
32. Under cross-examination, Mr Manyane testified that there was nothing, in his view, that he could recall that might have tainted the credibility of the panel or any political mandate from the HOD or MEC.

Shouneez Wookey (“Ms Wookey”)

33. Ms Wookey, as a subpoenaed witness, testified under affirmation that she was the first respondent's HOD. She confirmed that the candidate's overall score was the first criterion used to determine the most suitable candidate in a selection process. However, in the case of Director-level appointments, the ultimate decision lay with the Executive Authority, who could appoint a lower-scoring official over a higher-scoring one if justified. She confirmed being made aware of Mr Mjezu's inflated score but disagreed that the error resulted in the wrongful appointment of the second respondent, as the panel members briefed her regarding the performance of the two candidates, all recommending Mr Mjezu as the preferred one. She explained that both candidates were very competent managers who had previously acted as ZFM District Director. Noting that Ms Saul had scored Ms Mfusi higher than Mr Mjezu, Ms Wookey explained that the panel members considered how each of the candidates had performed in their areas of responsibility, which contributed to the final decision to appoint Mr Mjezu.
34. She disagreed that the competency assessments were a means to differentiate between the two, insisting that only from 2025 would such assessments be included in the decision-making process, but had only been used in the present selection process to identify developmental areas. Accordingly, Mr Mjezu's recommendation was based solely on his overall score and the panel's recommendation. Although she noted the erroneous submission regarding competency assessments, she signed the submission but neglected to make a comment regarding the error. She disagreed that Mr Mjezu's three developmental areas would require a greater intervention than Ms Mfusi's two, indicating that the qualitative assessment of each candidate needed to be considered and not just the graphical representation.
35. Ms Wookey denied any preferential treatment of Mr Mjezu, particularly regarding the request to Ms Mfusi that she allow him to continue acting during the President's visit, based on the rationale that Mr Mjezu had, just prior to the visit, run the provincial imbizo, and it made sense for him to finish it.
36. The HOD testified that Employment Equity considerations had to be applied in filling posts and had been taken into account when appointing Mr Mjezu. Given that both were African, it was not going to be a factor, as there were several vacancies within the department in which African females could later be appointed to achieve targets, and it made sense to consider skill and competence. However, the overriding factor

was the need for a fit-for-purpose appointment, and she recalled a lengthy discussion regarding Mr Mjezu's outperformance in the interview, which necessitated a deviation from the Employment Equity plan. Whilst the first respondent valued equity, it was irrelevant when appointing the District Director. Although the OFA report indicated a need to appoint women at the SMS level, elements of the report could not just be read in isolation from one another, as its purpose was to act as a tool to improve the standard of service delivery. Additionally, the first respondent needed to appoint people who fit its culture of adaptable and emotionally mature officials to drive impactful service delivery. Based on the panel's recommendation, Mr Mjezu was clearly the most suitable for the position.

37. Under cross-examination, Ms Wookey testified that, while she did not receive any political mandate to appoint Mr Mjezu, her integrity would not allow her to be swayed even if she had. Her recommendation to the MEC was based on the panel's recommendation after she had personally spoken with each of the members.

RESPONDENTS' EVIDENCE

Thabiso Joseph Monyane ("Mr Monyane")

38. Mr Monyane testified under oath that he was the second respondent's recently appointed Chief Financial Officer and had also served on the selection panel that interviewed candidates for the District Director position. There was nothing he could recall that might have tainted or compromised that process, and he was emphatic that he received no mandate from the HOD, MEC or Premier to recommend Mr Mjezu. The sole criteria on which he based his recommendation were the performance and quality of responses of each candidate during the interview process and their ability to demonstrate that they could perform the work required. He acknowledged that the overall score played a role in referring the best candidate for consideration. In the case of Ms Mfusi, he scored her 2/5 for Financial Management, as she could not explain the difference between unauthorised and irregular expenditure, which concerned him as it fell within her current area of responsibility.
39. He noted that no Employment Equity preference was specified in the post advertisement, particularly concerning gender (sex), as it would always have disadvantaged one of the two over the other. Both deserved an equal opportunity to compete for the position.

40. During cross-examination, Mr Monyane testified that ignoring Employment Equity targets, despite the submission indicating that they had been considered, did not present a problem because it was not a determining factor. He reiterated that relying on the sex of the candidates would have favoured one but disadvantaged the other, which would have been unfair and would have potentially discouraged males from applying. While he acknowledged the OFA findings that further redress was required at the SMS level, that could be addressed by filling other senior positions with women. In any event, the R&S Policy simply required candidates to be treated fairly.
41. Referred to the R&S Policy, Mr Monyane noted that the imperative to consider the department's Employment Equity plan (para 9E(v)(c) of the policy) did not imply that the panel was obliged to make its recommendation whilst being bound to the targets. Consideration implied that it could even just be noted as part of the process.
42. Although he scored Ms Mfusi lower in respect of her Financial Management, he noted that none of the other panel members had done so.
43. Mr Monyane had learned of the mathematical error, albeit unofficially. On the face of the score sheets, there had been an error in the scribe's determination of Mr Mjezu's final score, which he agreed was unfair towards the applicant. Although he believed that the final recommendation and decision to appoint was fair, had the panel been made aware of both candidates receiving the same overall score, they would have considered other criteria on which to base their recommendation. However, he disagreed that competency assessments could be used for that purpose despite the contradiction in the submission that it should.
44. He confirmed that the graphical representation of the results of the competency assessments indicated Ms Mfusi's two developmental areas versus the three of Mr Mjezu. However, in affixing his signature to the submission and recommending Mr Mjezu's appointment, he did not rely on the competency assessment results. He attributed his failure to correct the assertion in the submission to possibly being an oversight on his part.

Godfrey Mjezu (“the second respondent” or “Mr Mjezu”)

45. Mr Mjezu declined to lead any evidence in the matter.

ANALYSIS OF EVIDENCE AND ARGUMENT

46. Section 185(b) of the LRA provides that *“every employee has the right not to be subjected to an unfair labour practice”*, while section 186(2)(a) of the LRA defines an unfair labour practice to include *“any unfair act or omission that arises between an employer and an employee involving 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”*.
47. It is trite that, in unfair labour practice disputes, the burden of proof falls squarely on the shoulders of the employee. The Labour Court, in ***Arries v CCMA and others (2006) 27 ILJ 2324 (LC)***, held that there are limited grounds on which a commissioner or a Court should interfere with the discretion exercised by a party competent to exercise that discretion, the reason being that the ambit of the decision-making powers inherent in the exercising of discretion by a party or the 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 where an employee shows that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner. Accordingly, in discharging such an onus, the applicant must demonstrate, on the balance of probability, that the first respondent’s conduct in its decision not to promote her was arbitrary, capricious or based on unacceptable reasons.
48. On the evidence before me, it is apparent that the appointment of either Ms Mfusi or Mr Mjezu to the post of ZFM District Director constituted a promotion, as defined. While Ms Mfusi’s case was based on three pillars⁶ identified by Mr Bindeman in his opening statement, she did suggest in her evidence-in-chief that her qualification was more relevant than Mr Mjezu’s based on its content. I differ with her in this regard, given that the first requirement to be considered for the position was an NQF level 7 degree or equivalent in one or more of the areas of public management, public administration or the social sciences. Both her and Mr Mjezu’s qualifications met this requirement, leading to them being shortlisted for the position. Similarly, her assertions regarding a comparison of their middle management experience hold no water, as both met the minimum requirement of five years stipulated in the advertisement, and there was no requirement for it to be in a specific area.

⁶ The interview scores, the Employment Equity plan and the results of the competency assessments.

49. As a witness, the applicant's evidence was cogent and credible, with the majority of it not being disputed and often being corroborated by both her remaining subpoenaed witnesses and the first respondent's sole witness. What was clearly adduced was that, rather than the 105 versus 103 overall interview scores of Mr Mjezu and Ms Mfusi, respectively, the total score awarded by Ms Kivedo (22/30) was transferred to the summary score sheet and increased to 24/30. As a result, both candidates actually received the same overall score of 103. While the Human Resources Manager was initially insistent that the total score was the determining factor of suitability, it was quickly pointed out to her that paragraph 9E(c)(v) of the R&S Policy did not allow for this.
50. In the third pillar of her dispute, the applicant pointed out that paragraph 11 of the submission recommended that both candidates undergo competency assessments and *"that the results are communicated to the selection panel to take an informed decision"*. However, the recommendation then goes on to state that *"The selection panel unanimously agrees to recommend Mr GJ Mjezu as first choice to be conditionally appointed pending the outcome of the compulsory personnel suitability check for appointment at SMS level."* While Ms Mfusi's evidence was such that she believed that an expectation was created that the competency assessments would be a determining factor regarding who of the two was the most suitable candidate, all of the remaining witnesses consistently testified that competency assessments were utilised solely to determine the developmental areas of the top candidates vying for a position and could not be used to determine the suitability of one candidate over the other. Although the applicant's request for proof to support this notion, apparently based on a DPSA directive, was not forthcoming from the other witnesses, I cannot simply discount their oral evidence. However, what is apparent is that, despite the submission, which was signed off by every panel member and approved by the HOD and MEC, indicating that the competency assessments would be used for that purpose, they clearly were not. Therefore, it is somewhat incomprehensible how every signatory failed to comment or correct this flawed assertion before affixing their signature to the document. Even if the competency assessments were a factor in the determination, I do not agree that the candidate with the smallest number of developmental areas would automatically be the most suitable for the position, without the content of the entire report being taken into consideration, which was notably not presented during the arbitration proceedings.

51. Effectively, one is left with a situation where both candidates scored equally during the interview process, and the first respondent was, therefore, obliged to consider additional criteria to determine the best of the two. It was the applicant's case that, regardless of whether a preference was indicated in the advertisement or not, the employer was compelled to consider its Employment Equity targets based on its stated intention to promote equity in the advert, and the requirement to consider its Employment Equity plan in terms of the R&S Policy and SMS Public Service Handbook.
52. The following facts were never placed in dispute:
 - 52.1. The first respondent's Employment Equity profile as of 31 March 2022, a year before the appointment of Mr Mjezu, reflected four African females and eight African males employed at salary level 13.
 - 52.2. The OFA report, presented on 08 March 2023, concluded that the representation of women at the SMS level was not compliant with the Employment Equity Act and that at least three females should be appointed by the first respondent at that level.
 - 52.3. The OFA report further indicated that males were under-represented in all occupational levels except SMS.
53. What the first respondent did challenge was:
 - 53.1. The status of the OFA report.
 - 53.2. The date of publication of the OFA report compared to that of the recommendation and decision to appoint the second respondent.
 - 53.3. The designated groups were only comprised of Africans, Indians, and Coloureds.
 - 53.4. Both black females and males were under-represented compared to the provincial EAP percentages.
54. In my assessment of the evidence, each of the aforementioned challenges must be rejected for the reasons that follow:
 - 54.1. Regulation 35 of the Public Service Regulations of 2016 requires an Executive Authority to conduct an organisational functionality assessment to assess the

effectiveness of a department's internal systems and processes and to submit the report to the Minister.

- 54.2. Given that the presentation of the OFA report occurred in Upington on 08 March 2023, it predated the recommendation and decision to appoint Mr Mjezu rather than Ms Mfusi, and its findings ought to have been considered and documented in the submission before confirming Mr Mjezu's appointment.
- 54.3. Designated groups in terms of section 1 of the Employment Equity Act 55 of 1998 are defined to include not only black people but also women and people with disabilities.
- 54.4. While Ms Lebhu's assertion that both black females and black males were under-represented in comparison to the provincial EAP is true, the first respondent's Employment Equity profile as of 31 March 2022 revealed that African females were under-represented at 17.85% compared to the EAP of 22.0% and African males were over-represented at 32.14% compared to the EAP of 28.5%.
55. Although all the witnesses recognised the documented obligation in terms of the R&S Policy and the undertaking in the submission to consider the Employment Equity profile and first respondent's targets, each witness presented a different take on how it ought to be and how it was applied. Ms Saul refused to be drawn into its importance or otherwise. Mr Manyane recognised its importance but claimed that the OFA report was not available at the time of the second respondent's appointment. However, he could not recall if the Employment Equity plan formed part of the submission or not. Ms Wookey claimed that, whilst an important factor, it was irrelevant in the present matter because both candidates were African, going on to insist that there were other positions where women could be accommodated at an SMS level. Lastly, Mr Monyane discounted its importance, indicating that the term "consideration" could be interpreted to mean that it was simply noted and that a recommendation preferring Ms Mfusi, as an African woman, over Mr Mjezu, as an African man, would have been patently unfair. Surprisingly, none of the selection panel members or decision makers appeared to be singing from the same hymn sheet regarding the importance of Employment Equity considerations in determining the most suitable candidate, each providing their own understanding or interpretation based on what suited their version. Similarly, while Mr Monyane acknowledged that Mr Mjezu's inflated score prejudiced the applicant, the remaining witnesses disagreed that she suffered any prejudice, with Ms Saul refusing

to answer the question again despite being advised of the adverse inference that might be drawn as a result. In weighing the different versions against one another, I can only conclude that, despite the importance of the first respondent's Employment Equity targets and the identified need to appoint African women at the SMS level, it was not considered in selecting the most suitable candidate in the present matter.

56. In ***Department of Rural Development, the Agrarian Reform v GPSSBC and others (PA3/2018) ZALCPE 2 [2020]***, the Labour Court confirmed the principle that commissioners should be reluctant to interfere with an employer's decision to refuse promotion and that they should only do so when the decision or reasoning is assailable because there is evidence that the employer acted on the basis of some unreasonable, irrelevant or invidious consideration; or the decision was arbitrary, capricious or unfair; or the employer failed to apply its mind to the promotion or acted in bad faith.
57. In ***Pamplin v Western Cape Education Department (C1034/2015) ZALCCT 13 [2018]***, the Labour Court commented that, while the onus in unfair labour disputes lay with the employee to demonstrate that the failure to promote was unfair, the employer was obliged to defend challenges on the substantive and procedural fairness and present evidence that it acted fairly and in good faith if it sought to avoid a negative outcome. Apart from the cross-examination of the applicant, the first respondent's evidence was limited to possibly one or two questions of the applicant's subpoenaed witnesses and a very brief examination in chief of its sole witness, which added little value to my determination. Ms Saul deferred several key questions, and Mr Manyane's evidence was characterised by an exceptionally hostile approach and reluctance to answer questions that he believed would paint him in a bad light.
58. Having regard to the content of the submission, whilst noting the first respondent's concession regarding Mr Mjezu's score, there is nothing before me to indicate that Mr Mjezu was the better of the two candidates. On the contrary, if the employer's Employment Equity considerations are applied, Ms Mfusi was the better of the two. The submission does not differentiate between the two, apart from their scores, as both are painted in an extremely positive light. Unfortunately, Ms Wookey appears to expect me to accept her unsubstantiated submissions that she personally spoke with each panel member regarding their recommendation when this evidence was never tested with any of the panel members who testified by the first respondent's representative. On the other hand, Mr Manyane's logic that the individual comments

made by panel members ought to be read in conjunction with the scores awarded by them makes no sense when the scores awarded are a product of the candidate's responses to the questions put to them. The panel's decision to recommend Mr Mjezu cannot be supported when three of the five panel members scored Ms Mfusi higher than him and ultimately awarded the same overall score to both, with only Mr Monyane ranking Mr Mjezu higher than Ms Mfusi.

59. Other than the applicant herself, the impression created by each of the remaining witnesses during the arbitration proceedings was that they realised that the basis for preferring Mr Mjezu over Ms Mfusi was fatally flawed, and each attempted to furnish their own version of the reasons why Mr Mjezu was the best candidate for the post of ZFM District Director when all relevant factors considered, Ms Mfusi was. Ms Mfusi demonstrated that the first respondent relied on insubstantial reasons to promote Mr Mjezu over her and failed to provide any acceptable reasons for its deviation from its R&S Policy and its obligations regarding redress in respect of the designated groups.
60. The Labour Court in ***Sun International Management (Pty) Ltd v CCMA and others (JR939/14) [2016] ZALCJHB 433*** held that a finding that a failure to promote was unfair must be a rational one supported by facts and can only be made after a holistic assessment of evidence regarding the employee's qualifications and/or suitability against the other candidates. It is also necessary for the employee to demonstrate that the breach unfairly prejudiced her and that she was not only a suitable candidate for consideration but also the best candidate. In the present dispute, the applicant has fully discharged this onus to demonstrate the first respondent's unfair conduct in respect of its decision not to promote her to the post of ZFM District Director.
61. Guided by the ***Department of Rural Development & Agrarian Reform, Eastern Cape v GPSSBC and others (2020) 41 ILJ 1321 (LAC)*** in which the Labour Appeal Court held that Courts and Commissioners should be reluctant to interfere with an employer's decision to refuse promotion, promoting the applicant to the post would cause severe prejudice to the second respondent, who has been in the role for some twenty months already. I further align myself with the judgment of the Labour Court in ***KwaDukuza v SALGBC and others (2009) 30 ILJ 356 (LC)*** that so-called protected promotion is merely a disguised form of compensation, which should not be granted in the absence of proof that the employee has suffered an actual loss and is unlawful if it exceeds the twelve-month limit on compensation prescribed in section 194(4) of the LRA. Accordingly, I am left with only compensation to award in the form of a *solatium*

to redress the *injuria* to the applicant of being treated unfairly by the first respondent. In the present circumstances, six months compensation at the applicant's rate of remuneration would, in my view, be just and equitable, calculated as follows:

R79,808.49 per month x 6 months = R478,850.94

AWARD

62. The first respondent subjected the applicant to an unfair labour practice relating to promotion as contemplated in section 186(2)(a) of the LRA.
63. The first respondent, the Department of Social Development – Northern Cape, is ordered to pay compensation to the applicant, Sphiwe Marcia Mfusi, in the amount of R478,850.94 (Four Hundred and Seventy-Eight Thousand, Eight Hundred and Fifty Rand and Ninety-Four Cents) by no later than 31 December 2024.

Signed and dated at Johannesburg on this 21st day of November 2024.



Allan Kayne