



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: C.OAKES

Case No.: PSHS1309-16/17

Date of Award: 24 July 2017

In the matter between:

**S.E.W. Gumbi**

(Applicant)

and

**Department of Health- Kwazulu Natal**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. The hearing took place at the Madadeni Hospital, on the 26 June 2017.
2. The Applicant was represented by Mr Musa Sithebe, an attorney. The Respondent was represented by Mrs N.A. Gumede, an Employee Relations Officer for the Department of Health.
3. The parties submitted closing arguments in the present matter. The submission of the award was extended to the 24 July 2017.

## **ISSUES TO BE DECIDED**

4. I must decide whether the Applicant was dismissed by the Respondent.

## **BACKGROUND TO THE DISPUTE**

5. The Respondent is the national department of health having under its control hospitals and clinics. The Applicant was appointed and worked as a Data Capturer until her appointment was withdrawn.

## **SURVEY OF EVIDENCE**

6. The first witness to testify was Sithembiso Emaculate Winnielove Gumbi who testified under oath as follows:
7. In June 2016, in response to an advertisement she applied for the position of a Data Capturer, was interviewed and appointed.
8. The minimum requirement for the post when advertised was grade 12. She had at the time a level 4 qualification which is the equivalent of grade 12. Other qualifications, she possesses is an N4, N5, N6 in management assistance, a certificate of competence in Community Outreach Programmes and Small Business Management (page 111 and 112 of bundle 'B' of the Applicant's bundle).
9. She studied towards the qualifications at Majuba College and the requirement for entry for study is grade 12.
10. She was offered a contract of employment for the position of Data Capturer and commenced employment on the day that she signed the contract of employment, that is, the 08 November 2016. She worked for the month of November 2016 and was not paid a salary. She was contacted in this regard and told that she was not paid as her level 4 qualification had not been verified. She was contacted in this regard by Sifiso Makhubo in the first week of December 2016.

11. He informed her that in order for her level 4 qualification to be verified she must obtain a certificate and not just a subject statement.
12. This was even though she was a current in-service trainee who when employed on the 25 May 2014. She was employed based on her management assistant qualification for which the entry requirement for study was grade 12 at Majuba College.
13. When told that her qualification was not verified and a certificate was required he (Sifiso) gave her time to obtain her certificate.
14. She contacted the department who communicated with her indicating that they were having problems printing certificates. She provided Sifiso with the letter obtained from the department of education in this regard. The letter on page 22, bundle 'A' is the letter received from the department of education in this regard and states at paragraph 3 : "The candidate qualified for an NC (V) L4:office administration at Majuba TVET college in November 2013, a verification letter has been attached."
15. The letter was issued on the 31 August 2017 by the department of education.
16. There was another letter from the department of education written by M.C. Moshokoa from the department of education which is on page 24, bundle 'A', which confirms her level 4 qualification. The letter is dated the 31 August 2017. This letter certifies her level 4 qualification.
17. She provided Sifiso Makhubo the departments contact details and provided the department of education, Mr Makhubo's details.
18. She is aware that the department of education communicated with the Respondent through Mr Makhubo regarding the availability of her certificate. She had shown Mr Makhubo the emails she had got from the department of education regarding the availability of her certificate and Mr Makhubo said that he has the communication. The emails on page 7 and 8 of bundle 'A' was received from the department of education.
19. The email on page 9, bundle 'A' was from Stanford from department of education sent to Mr Makhubo regarding the availability of the certificate. It shows that Mr Makhubo was communicating with the department of education.
20. Mr Makhubo was aware that the department was unable to communicate timeously.

21. She is not aware of any communication from the department of education disputing her level 4 qualification. As far as she is concerned her qualification was verified as Mr Makhubo received communication from the department of education in this regard as early as August 2016.
22. She was told by Human Resources that they wanted a level 4 certificate for verification.
23. The policy on page 1 to 4 of bundle 'B' confirms that level 4 is equivalent to a matric certificate.
24. On the 03 March 2017, she was issued with a certificate which she took to Mr Makhubo. This is when Mr Makhubo told her that her appointment was withdrawn and that he cannot accept her certificate. He handed her a letter of withdrawal of her appointment on page 19, bundle 'A', dated the 07 February 2017. He told her that he had forgotten to call her to fetch the letter.
25. The letter written by the department of education on page 22, bundle 'A' indicated that the certificate would be available on the 28 February 2017.
26. She testified that the withdrawal letter refers to a matric certificate which was not provided.
27. Under cross-examination she testified as follows:
28. The education requirement for the advertised position was grade 12. When she applied she attached her subjects which she completed for her level four qualification.
29. She assumed duties on the 08 November 2016 and worked until the second week of December 2016, when she was contacted by Sifiso and told to stop working and get her certificate as the Respondent wanted to verify it. She then left work and followed up with her college who in turn contacted the department of education in Pretoria. This went on until March 2017, when she received her certificate.
30. She was informed that her appointment was withdrawn when she took her certificate to the district office in March 2017. She is aware that her certificate was cancelled and she needed to obtain her certificate.
31. She was made aware of this by Sifiso and she informed him that she would keep calling the department of education for the certificate.

32. When she stated that the employed was aware that she is awaiting her certificate, she was referring to the fact that when she applied for in service training in 2014, the Respondent used her level four subjects to employ her and were aware that she had not been issued with a certificate.
33. On the 31 August 2016, the department of higher education issued them with letters stating that they were unable to issue certificates.
34. It is possible that Sifiso only received the letter in December 2016 as the department of higher education indicated that they did not change the original date on the letters when issuing them and only changed the Identity number of the student and their names on the letter.
35. She agrees that there is a clause on her subject statement which states that it is not a national certificate.
36. She agrees that she did not have a senior certificate when she applied for the position and the requirement for the position advertised was a senior certificate.
37. She completed her level 4 qualification in 2009 and had been applying for a certificate every semester.
38. On the 03 March 2016, she took her certificate to the district office where she met with Sifiso outside the office and handed him her certificate. Sifiso handed her the letter indicating that her appointment was withdrawn and that she must take her certificate on Monday to Human Resources. She went on the Monday and handed her certificate to Phindile Zwane who works in Human Resources. Phindile asked if she was not aware that her appointment had been withdrawn. She told Phindile that Sifiso told her that whenever she received her certificate she must take it to Human Resources.
39. It is correct that Sifiso contacted her in February 2017, and told her that he has a letter for her, but does not recall him reading out the letter.
40. She agrees that her letter of appointment was subject to verification. She also agrees that there was a challenge in verifying her qualification.
41. Under re-examination she testified as follows:

42. When she applied the requirement was that the successful candidate have a senior certificate. She met this requirement in 2009. The only difference was that she was unable to provide a certificate in printed form. The subject statement on page 105 confirmed that she met the requirements of a senior certificate.
43. She was given until January 2017 by the Respondent to obtain the certificate. She did not meet the time frame and communicated this to Sifiso. When she told him, he said she should keep putting pressure on the department of education.
44. The Respondent was aware of the letter on page 22, bundle 'A' from the department of education and that it would be printed on the 28 February 2017. She believes in light of this that the cutoff date of January 2017 was unfair.
45. The department of education communicated directly with the Respondent.
46. The next witness to testify was Enock Sifiso Makhubu who testified under oath as follows:
47. He is currently employed as a Human Resources Officer at Edendale Hospital. Prior to this he worked at Amajuba health district. His duties related to all instructions given to him by his employer, process allowances and serve in the recruitment process.
48. He knows the Applicant as she worked doing in service training at the Respondent. He was the recruitment officer in the appointment of data capturers.
49. The data capturers were appointed subject to verification. They appointed them and thereafter verified their qualifications. The verification results returned and the Applicant was requested to obtain a certificate as she had submitted a statement of results.
50. The Applicant said she would communicate with the department of education. As a result of her communication with the department of education they (department of education) then communicated with them (Respondent).
51. The Applicant informed him that she would provide a certificate. He compiled a report in this regard for management. Time passed and management wanted to fill the post and decided to withdraw the Applicant's appointment.
52. Page 8 is a report from their source, the South African Qualification Authority (SAQA) who verifies qualifications which indicates that the Applicant's certificate had been cancelled.

53. The Applicant commenced employment on the 08 November 2016 and after they received the report from SAQA, they decided to relieve the Applicant of her duties until she provided the Respondent with a replacement certificate. He then informed the Applicant of the report cancelling her certificate. He then waited and on the 14 January 2016, the Applicant had still not provided a replacement certificate. Management informed him they would have a meeting in this regard. Time passed and they informed him to write a letter to the Applicant withdrawing her appointment.
54. After management had signed the letter of withdrawal, he telephoned the Applicant and informed her about the letter. She asked him to read out the contents of the letter which he did.
55. In mid-February, she came to fetch her letter. This is when she asked him how she should deal with the issue, because she had requested the certificate from the department of education but was still waiting.
56. On the 03 March 2017, the Applicant brought a certificate to him which he refused to take. He referred her to his immediate supervisor who took her to the manager. He does not know if management accepted the certificate.
57. After he had read out the contents of the letter the Applicant said she would go personally to fetch the certificate.
58. She telephoned him thereafter and told him that she was in Pretoria trying to sort out the problem.
59. He wrote the letter to the Applicant which is on page 19, bundle 'A' where he informed her that she is required to bring her certificate by the 09 February 2017, failing which her appointment will be withdrawn.
60. He gave her the letter around February 2017.
61. He recalls that he was contacted by Mr Phahlele, Director General at the department of education who said they were having a challenge in issuing the certificate. Phahlele informed him that the Applicant was worried that she was losing her job. He stated that he is confirming that she had a certificate.
62. The letters in this regard from the department of education on page 22 and 24 are dated the 31 August 2016. He thinks he received the letter on page 24 in December 2016. Mr

Phahlele explained that he was not going to change the dates on the letters as the Applicant had requested the letters earlier.

63. He cannot comment on that the Applicant was dismissed. He told her after receiving the report from SAQA that she must go and get her certificate and provide it by the 31 January 2017. She was still an employee on the 03 March 2017.

64. What he submitted to SAQA was the statement of results on page 105, bundle 'A' and a copy of her identity document.

65. He was told to write to the Applicant withdrawing the appointment. He was told by management that the post needed to be filled as the post was on a conditional grant.

66. All that was outstanding in the Applicant's appointment was her senior certificate.

67. Under cross-examination he testified as follows:

68. He did not look at the certificate when submitted by the Applicant on the 03 March 2017. He took her to his supervisor. He thinks they went to the manager's office as he had seen them leave the supervisors office. However, he did not see them go into the supervisor's office.

69. He became aware of the certificate when Phahlele contacted him by email in March 2017 and informed him the Applicant had a certificate. Phahlele sent him an email with the same subjects appearing in the Applicant's statement of results.

70. They had overlooked the certificate during the interview because they had over 200 applicants. They left that for the verification of the certificates.

71. He agrees that the Applicant did not misrepresent her qualification and that the challenge was with the department of education.

72. After the withdrawal of the post the post was re-advertised.

73. When re-examined he testified that SAQA verifies qualifications.

## ANALYSIS OF EVIDENCE

74. The issue for consideration is whether the Applicant was dismissed on the 03 March 2017 as alleged by the Applicant in her referral to the Public Health and Social Development Sectoral Bargaining Council.
75. It is common cause that the Applicant was handed a letter officially on the 03 March 2017, withdrawing her appointment. The Respondent's witness testified that the Applicant was informed in February 2017 to fetch a letter, at which time she requested that he read out the letter to her, which he did.
76. Fundamentally and imperative in the present matter is that the services of the Applicant were withdrawn by the Respondent.
77. The question then is: Does the withdrawal of her appointment amount to a dismissal? It can be viewed on the one hand as a repudiation of her appointment because of a breach on her part given the clause making her appointment conditional on the Respondent being able to verify her qualifications.
78. Equally so it can be viewed as a dismissal as she had been appointed and was an employee, despite the existence of the condition. For this reason, the employer was enjoined to have had regard to the requirements for dismissing an employee, that is, to dismiss for a fair reason and follow a fair procedure.
79. In the present matter, the services of the Applicant were terminated as a result of her not being able to provide a certificate for verification. It is this dismissal which requires interrogation.
80. Firstly, it is common cause that the Applicant did not fail to provide a certificate but rather the department of education. The Respondent was aware of this as the department of education communicated this to the Respondent through letters and emails. It is not necessary to repeat these communications as they were not disputed and in fact, the Respondent's main witness confirmed this.
81. It seems to me in the face of clear communication from the certificate granting body, that is, the department of education, that the respondent was being unnecessarily petty, especially in the face of a clear indication by the department of education that she met the requirements in respect of a senior certificate and more importantly there was clear communication from the department as to why they were unable to print the certificate.

This was communicated to the Respondent in an email and a letter written to the Respondent.

82. It seems to me to be wholly unreasonable given the circumstances that the Respondent take a hard line to the requirements of verification. Here I am referring to the Respondent's requirements in respect of verification. Common sense and logic dictates, in the face of all the communication and proof of existence of the certificate, that the Applicant's case was peculiar and required a circumspect approach to ascertaining the veracity of her qualification.
83. The printing or provision of the certificate was out of her hands and was unfair to hold her accountable for the failure of the department of education to grant the certificate. They are after all the only body that can grant the certificate.
84. To place emphasis on technical shortcoming in providing the certificate is unfair, when the true situation is clear and that is that her qualification was confirmed and the reason why the certificate was not submitted was because the delay was with the department of education.
85. Fairness would have dictated that the Respondent should have in the face of this evidence extended the period to provide the certificate.
86. I must pause to state the Respondent was aware that the department of education had given them an undertaking that the certificate would be printed on the 28 February 2017, however they chose to provide the Applicant a cutoff date of January 2017.
87. They appear to have been acting in bad faith in this regard. This much can be inferred from the manner in which they conducted themselves in this regard. It was not necessary to set a deadline of January when the department had indicated that the certificate would be available on the 28 February 2017.
88. In short, I am satisfied that the applicant was dismissed and that the dismissal was unfair. The Applicant has requested retrospective reinstatement.
89. I see no reason why she should not be reinstated. She at the time of appointment was employed as a Data Capturer. Her salary in terms of her appointment was R119 154 per annum. Although the Applicant was dismissed on the 03 March 2017 she has not been paid salary for seven months. The back pay and outstanding salary due to the

Applicant must be calculated as follows: R119 154-00 divided by 12 months =R9 929-50  
X 7 =R69 506-50.

## **AWARD**

90. The Respondent, The Department of Health- KwaZulu Natal is ordered to reinstate the employee, Sithembiso Emaculate Winnielove Gumbi in its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to her dismissal.

91. The re-instatement in paragraph (90) is to operate with retrospective effect from 03 March 2017.

92. As at the date of the award the remuneration due to Sithembiso Emaculate Winnielove Gumbi as a result of the retrospective operation of the re-instatement, amounted to R69 506-00 minus such deductions as the respondent is in terms of the law entitled or obliged to make.

93. The amount referred to in paragraph (92) is to be paid to Sithembiso Emaculate Winnielove Gumbi on or before 15 August 2017.

94. Sithembiso Emaculate Winnielove Gumbi is to tender her services to the employer on 1 August 2017.

*C. Oakes*

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**C.OAKES**  
**COMMISSIONER**