



ARBITRATION AWARD

Panellist: Prof. Joseph Mandla Maseko

Case No.: PSHS 252-10/11

Date of Ruling: 4 April 2012

In the arbitration between:

PSA obo Mgwenya A. Union/Applicant

and

Department of Social Development - Mpumalanga Respondent

Union/Applicant's representative: Ms. Asnath Sedibane _____

Union/Applicant's address: PSA _____

P.O. Box 6595 _____

1200, Nelspruit _____

Telephone: 013 741 7513 _____

Telefax: 013 741 7505 _____

Respondent's representative: Mr. Elvis Nkosi _____

Respondent's address: Department of Health and Social Development (Mpumalanga)

Private Bag X11247 _____

1200 Nelspruit _____

Telephone: 013 766 3628 _____

Telefax: 013 766 3457 / 086 653 2044 _____

DETAILS OF HEARING AND REPRESENTATION

Both parties attended this arbitration which was set down for the 26th and 27th March 2012. In this arbitration, the Applicant appeared in person and was represented by Ms. Asnath Sedibane of PSA while the Respondent was represented by Mr. Elvis Nkosi.

ISSUE TO BE DECIDED

This matter had been set down for arbitration, as an alleged unfair labour practice ("ULP")

as envisaged in section 186(2) (a) of the Labour Relations Act No. 66 of 1995 (“LRA”). The matter finally concluded when the parties closed their cases and only agreed with this panellist to present their closing arguments in writing.

BACKGROUND TO THE ISSUE

Both parties called witnesses who testified under oath with their versions tested. And in their testimonies, it was **common cause** that:

- (1) The Complainant had been an employee of the Respondent, since 1 June 2006. Having been employed as a generic social worker, the Complainant had since been utilised by her Manager (one **Zodwa Maseko**), as a **Probation Officer**;
- (2) There was no formal letter of appointment appointing the Complainant to the position of Probation Officer;
- (3) While the Complainant had joined the Respondent first as a Social Worker at Level 7, her actual role was altered when her manager **Zodwa Maseko** placed her on the role of a Probation Officer;
- (4) While all Probation Officers to date, were placed at salary Level 8; the Applicant continued at Level 7 which she has been on since her days as a Social Worker;
- (5) After the Complainant had commenced work for the Respondent, there was a national drive to re-grade the positions of certain **Social Workers** to those of **Probation Officers** and remunerated them at Level 8 from Level 7. This was said to have been with a view to address the Occupation Specific Dispensation (**OSD**) to retain **scarce skills** in the public service;
- (6) Employees who were eligible for the once off regarding in this sector, were those social workers who had had experience of not less than two years at the time. And the Applicant did not qualify as she had not attained two years experience as a social worker at the time of this regarding;
- (7) Another employee, however, Mr. Sibusiso Maseko, who had two months less experience on working as a social worker, was translated to the post of Probation Officer with pay increase from Level 7 to Level 8, which the employer could not explain;
- (8) This OSD re-grading drive was a **“once off”** exercise;
- (9) At the time of the re-grading of certain Social Workers to the posts of Probation Officers, the Complainant was still not meeting the minimum requirements to be upgraded, of two (2) years experience;
- (10) In August 2009, the employee noticed that the post she was already holding was being advertised. She did not apply for this post as it was already the one she was holding. She went on to raise a grievance on this matter;
- (11) The person appointed from the advertisement of August 2009 was **Takalani Mathavha**, who was appointed in 2010. But instead of being placed where

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the Complainant is still being used as Probation Officer, Takalani was placed at Kabokweni;

(12) Ms. **Takalani Mathavha** also testified on the side of the Applicant and corroborated the version of the Applicant in so far as it affects her;

(13) Two employees who were appointed to the Level 8 salary scale, namely **Sipho Thwala** and **Sibusiso Maseko**, were employed after the Complainant. But they were placed at Level 8 with her still languishing at Level 7. And it was this realisation that led her to laying her grievance with the Director responsible (Mr. Mkhize); and

(14) After the employee attained the two years experience and had already been utilized by both her manager and her supervisor, as a Probation Officer, she remained at the salary level 7 while all her fellow Probation Officers, including those who had less experience than her, were paid at Level 8. The employer still could not surface a cogent explanation of this differentiation which left the Applicant in a worse position to that of all the other Probation Officers.

The Version of **Sakhile Mathebula**

Ms. **Sakhile Mathebula** testified, inter alia, that:

(1) She supervises Probation Officers. At the time of the arbitration, she had one Probation Officer at Level 9 and five others at Level 8, as well as the Complainant who was the only **Probation Officer** at Level 7.

(2) The Complainant was doing the same work as all the other Probation Officers even using the same job description. There was an argument as regarding the authenticity of the job descriptions because the copies at the arbitration were backdated by the witnesses. But they all testified to their authenticity and the employer, who had the burden to prove that it had acted fairly, did not present different job descriptions to rebut those of the incumbents and their supervisor (Mathebula).

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(3) The salary levels were determined by the job content as all the Probation Officers did the same kind of work that was identical. The differences, in salary levels, as far as she is aware, are based on each person's history.

(4) The Complainant was placed under her (Mathebula) as a Probation Officer by **Ms. Zodwa Maseko**, who was the Manager.

(5) The Complainant does the same work as the others but works in the busiest regional Court compared to the other Probation Officers. As a result, she, Mathebula, does not understand the grading of the Complainant at Level 7 when all her colleagues are at Level 8.

The Version of **Sibusiso Maseko**

In his version, Maseko corroborated all that was said by the employee and the other Probation Officers and their Supervisor who testified in so far as it affects him. He also confirmed that he had lesser experience than the Complainant by two months concerning Probation work. He even testified that he did not meet the minimum requirements when he was first appointed to work as a Probation Officer.

The version of **Takalani Mathavha**

Testifying for the Complainant, Mathavha stated among other things that:

(1) She answered an advertisement for the post of Probation Officer for Mbombela Sub-District, advertised on the **9th August 2009** (Exhibit 5);

(2) She was appointed with effect from 7 May 2010; as Probation Officer, doing the same type of work as that done by the Complainant; and

(3) She (Mathavha) reports to the same supervisor as the Complainant).

The version of Mr. D.E. Mkhize

Mr. Mkhize, testifying for the Respondent, corroborated much of what the Complainant testified as concerns him, as well as stated that:

(1) He is a District Director of the Respondent at its Ehlanzeni Region;

(2) He was aware of the grievance by the Complainant, who had brought it to his attention;

(3) On the 29th September 2009, he (Mkhize) had written a request (Exhibit A) requesting the then Acting Head of Department (Ms. N.L. Mlangeni), to upgrade the Complainant from salary Level 7 to Level 8.

(4) In that request, Mkhize motivated and stated that Applicant had since 2009, acquired the 2 years experience which had earlier disqualified her, and had been trained in Probation Officer work as well as qualified to be upgraded (Para 4 Exhibit A).

(5) The then Acting Head of Department had made a written comment on page two of this motivation, to refer the matter to HR (Human Resources) for advice. And that was the last Mkhize had heard of this matter. (And that was also the last the Complainant had heard of the matter too).

The version of Cecilia Mazibuko

Testifying on the side of the Respondent, Mazibuko testified inter alia that:

(1) She was at the time of the arbitration, a Director of HIV and AIDS for the Respondent and that she had been a Deputy Director at some point. She also indicated that she is a Social Worker by profession;

(2) She was part of the task team that dealt with the upgrading in question and at the time she had represented the side of organised labour, looking out for the interests of the employees who were affected;

(3) While two years experience in social work was needed at the time, to upgrade to Probation Officers at level 8, the labour Component had fought to get even people with 6 months experience to be at least interviewed by the Task Team with a view of upgrading them;

(4) The upgrade of Sibusiso Maseko alluded to above, had occurred outside the Task Team process as far as she (Mazibuko) was concerned. So she would not be in a position to answer questions as to how it took place while the Applicant who had more experience was left behind at Level 7; and

(5) (Under cross examination) If the Respondent were to tell the Complainant that

she was to work as a Probation Officer but at Level 7, this would not be correct or fair, in her view and understanding of the upgrading process.

THE LAW ON THE MATTER

Regarding the issue of jurisdiction over this matter, in *Member of the Executive Council (MEC) for Transport: KwaZulu Natal & Others v Jele [2004] 12 BLLR 1238 (LAC)*, the Labour Appeal Court held that, since the applicant was already employed by the State, the dispute concerned a **refusal to promote** rather than an appointment and was therefore, subject to bargaining council jurisdiction. The Complainant in this case is employed by the state (respondent). This matter is therefore, about refusal to promote as the facts lend themselves to this description in the Jele case (op cit).

The main enquiry in such issues is whether the action or omission complained about is unfair or fair - *Burman Katz Attorneys v Brand NO & Others (2001) 22 ILJ (LC) at 34 AC*.

Section 186(2) of the LRA now prohibits Unfair Labour Practices (ULP). To succeed in a ULP claim, an employee needs to prove that the labour practice in question falls within the statutory definition-s 186(2) of the LRA- *Nawa & Another v DTI (1998) 7 BLLR 701 (LC)*. One may hasten to also add that the **burden to establish** that the conduct complained about exists falls on the shoulders of the Applicant. The applicant in this case has been able to discharge this burden. In this case, the issue is definitely about the refusal to promote – so section 186(2) (a) of the LRA has been established to have application. In the case of *Baxter V National Commissioner Correctional Services & Another [2006] BLLR 844(LC)* the court held that, once the Applicant has discharged its onus as alluded to above, it was incumbent on the respondent to show that they had acted fairly. This award is addressing this latter burden – whether the Respondent acted fairly or unfairly.

In *Mashigoane & Another v University of the North [1998] 1 BLLR 73 (LC)*; the Labour Court held that the word “**promotion**” means being elevated or appointed to a position that carries greater authority and status than the current position an employee is in.

ANALYSIS OF EVIDENCE AND ARGUMENTS

The surfaced issues, to which the law is to apply, include the following:

(1) It has already been established above that this matter is about the refusal by the Respondent to promote the Complainant.

(2) Regarding the fact that there was no formal letter of appointment appointing the Complainant to the position of Probation Officer; Mr. Mkhize, testifying for the Respondent, indicated that this was a loose arrangement between the Complainant and her Supervisor – Ms. Z. Maseko. While this effectively exonerates Mr. Mkhize as the Director responsible, at least in his eyes, this does not help the case of the employer. This point is based on the fact that even the actions of Maseko are actions of the employer in the eyes of the law.

(3) The Supervisor who daily issues work instructions with a job description to back it up, with the title of Probation Officer appended to her, is also the employer in another form. The employer cannot succeed in seeking to escape its responsibility by hiding behind lack of a letter of appointment where the employee is clearly being used as a Probation Officer, qualifies to be appointed as such, but merely being paid less for the job she is doing.

(4) Mr. Mkhize also asserted in evidence that only a formal letter of appointment

appoints a person into a position. While this may be so, this has clearly not

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been the case in this matter. All the witnesses (who were Probation Officers) testified that Complainant was doing the same work they do, the same way, even though she was paid at a level below theirs. This effectively means that the employer is paying the Complainant at level 7 while using her to perform Grade Level 8 work. Besides, the law looks at how parties are conducting the relationship rather than what they term their relationship. This much was held by the Labour Appeal Court in **SABC v McKenzie (1999) 20 ILJ 585 (LAC)**. This (MacKenzie) case is a leading case in endorsing the “**dominant impression**” approach to examining the relationship between an employer and an employee and the nature of their relationship.

(5) More evidence was adduced regarding the mechanism of the re-grading that preceded the translation of the posts of Social Workers with 2 years experience and above. But this additional evidence did not assist in addressing the fairness of the issue. The issue to be decided, as alluded to above, remains whether the practice by the employer is fair or not.

(6) The argument by Respondent that the Complainant did not qualify to be upgraded to Level 8 because she did not meet the 2 years experience required at the time is disingenuous. The reason for this conclusion is that the same respondent continued to employ the Complainant as a Probation Officer doing the same work as all the others. And this practice continued well beyond the employee attaining the requisite 2 years experience. Even her Director, Mr. Mkhize, testified that he had recommended that she be upgraded to Level 8. He could not explain why this never happened, and none of the other witnesses did.

(7) The “**dominant impression**” that this panellist deduces from the way the parties have exercised their relationship, is that:

(a) The applicant has effectively been employed and utilised as a Probation Officer for all intents and purposes;

(b) Even when and after the employee had brought the anomaly to the attention of her Director (Mkhize), the employment as a Probation Officer still continued;

(c) Even after Mkhize, had brought the utilisation of the employee to the attention of his then Acting Head of Department, the employer continued utilising the Applicant as a Probation Officer;

(d) And all this continued without a formal letter stating that the Applicant was now a Probation officer. And in terms of the law (Mackenzie case), op cit, such a letter was not necessary to substantiate what the parties had already agreed by conduct. Contracts can be entered into orally, in writing or by conduct. And in the dominant impression approach, the law has effectively elevated conduct to reign supreme between the other forms of contracting, in the event of a dispute.

(8) As in the case of **Burman Katz Attorneys v Brand NO & Others (2001) 22 ILJ (LC) at 34 AC**; regarding the question of whether the action or omission

complained about is unfair or fair; this panelist is of the view that the act of the Respondent of using the Complainant as a Probation Officer at Level 8, but paying her at Level 7 is **not fair**.

AWARD

In the result, and based on the **reasons** contained in the underlined text above, the Respondent is hereby ordered to:

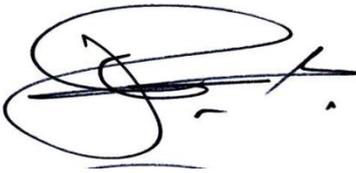
(1) **Adjust** the payment of the Complainant from salary Level 7 to level 8 with effect from **1st June 2009**.

(2) **Back pay** the complainant the difference between the salary at Level 7 and that of Level 8 that would have been paid from the **1st June 2009** to the date of the implementation of this award.

(3) **Implement** the contents of this award on or before the **15th May 2012**.

PHSDSBC Panellist: **Prof. Joseph Mandla Maseko**

Sector: **Public Health & Social Development**



Panellist/s: **Joseph Mandla Maseko**

Sector: **Public Health & Social Development**