



# ARBITRATION AWARD

Panellist/s: Lungile Matshaka  
Case No.: PSHS346-11/12  
Date of Award: 13-Aug-2012

In the ARBITRATION between:

IN THE PUBLIC HEALTH & SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

HELD IN PIETERMARITZBURG

CASE NO: PSHS346-11/12

DATE OF AWARD: 10 August 2012

In the matter between:

NEHAWU obo Msimang M.J.H.

Applicant

And

Department of Health – Gauteng

Respondent

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ARBITRATION AWARD

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The matter was set down for arbitration hearing at the offices of Department located in the Natalia Building, Labour Relations Boardroom, 7<sup>th</sup> Floor, in Pietermaritzburg, on 27 July 2012. It took place under the auspices of the Public Health & Social Development Sectoral Bargaining Council. Mr V Gama, trade union official of NEHAWU, represented the Applicant, while Ms B S Shezi, Assistant Manager – Labour Relations, represented the Respondent.
2. The witnesses gave evidence under oath and the proceedings were mechanically recorded. The parties asked and were granted an opportunity to submit closing arguments in writing by 3 August 2012.

## **ISSUE TO BE DECIDED**

3. I am required to determine whether the termination of the Applicant's employment was substantively and procedurally fair, and if not, to determine an appropriate remedy.

## **BACKGROUND TO THE ISSUE**

4. The Applicant applied for the post of a Lay Counsellor (Ref No. EDH 67/10) as advertised by the Respondent and was appointed on the basis that he had a matric certificate obtained in 2009. After about six months in the service, the Respondent, on the basis of the documentary evidence, came to the conclusion that at the time of the advert and the interviews the Applicant did not have the matric certificate and thus terminated his service with effect from 20 July 2011.
5. On the other hand the Applicant maintains that the Respondent duly appointed him and now the same Respondent has unfairly dismissed him for reason not known. As relief he is seeking to be re-instated.

## SURVEY OF EVIDENCE AND ARGUMENTS

### ***The Respondent's evidence***

6. The Respondent's witness, Mr Derrick Ngcobo testified as follows:
7. He confirmed his position as the Chief HR Officer in charge of HR Practices Section of the Human Resources at Edendale Hospital. The principles governing employment in the Public Service entail advertising the post in the media (intranet) according to the needs of a department and after the closing date a 7 days' grace period is allowed. The next step is to set a date for short-listing according to the advert. All those candidates who meet the requirements of the post will be considered for short-listing. The standard procedure is to short list 9 qualifying candidates for interviews respectively for a single post. In this case there were 366 applicants. 17 candidates were shortlisted for this specific post (Lay Counsellor).
8. The appointment of an interviewing panel would have already been in place to do the short listing and interviews respectively. Mr Ngcobo pointed out that in this instance the panel was not approved by the Head of the institution.
9. He further pointed out that the criteria is to check the duly completed application form i.e. Z83, as well as matric certificate or equivalent e.g. N3 certificate, 10 days HIV & AIDS Certificate, Identity Document and CV. All these certified documents attached to the application form must not be more than 6 (six) months old.
10. He further drew my attention to the declaration reflected on page 2 of the Z83 form that reads thus:  
*"I declare that all the information provided (including any attachments) is complete and correct to the best of my knowledge, I understand that any false information supplied could lead to my application being disqualified or my discharge if I am appointed."*

11. In cross-examination Mr Ngcobo confirmed that N3 is accepted as being equivalent to matric and when there is a doubt about any other certificate, the relevant authorities would be consulted for verification.

### ***The Applicant's evidence***

12. The Applicant in his own testimony testified as follows:

13. At the time of his interview the certificate in his possession was not in existence as it had not been issued. He confirmed that when he applied he did not have a matric. In cross-examination he confirmed that he had attached a subject certificate for the subjects (Computer Practice & Business English) he had passed towards a National N3 Certificate examination. He conceded that in terms of his declaration as per Z83 Application Form he understood that any false information supplied could lead to his application being disqualified or his discharge if he was appointed.

### **ANALYSIS OF THE PARTIES' SUBMISSIONS**

14. As a point of departure according to section 186(1) (a) of the LRA "*Dismissal' means that an employer has terminated a contract of employment with or without notice*".

15. Turning to the present case, briefly the Applicant was one of the 17 candidates who applied and was short-listed for a post of a Lay Counsellor attached to Edendale Hospital. It is common cause that the Applicant reflected in the application form (Z83) that his highest qualification was "matric" and that he obtained it in 2009. However, one of the documents included in the Respondent's bundle, a letter from ***Isibani Fishing School*** reflects the following:

16. "*This letter serves to confirm that the abovementioned student (Msimang M J H (Student No. 2011173) has been accepted by the school to study matric for the academic year 2010/2011. He will be writing his final examination during May/June 2011.*"

17. Further, a declaration that the Applicant signed for in the Application Form (Z83) reflects that he understands that any false information supplied could lead to his application being disqualified or his discharge if appointed. On the basis of incorrect or false information supplied the Respondent has revoked his appointment.
18. On the other hand the Applicant has asserted that he does possess a valid matric certificate. By his own admission the Applicant did not possess the said certificate at the time he applied and was interviewed for the post. Documents included in the Respondent's bundle only reflect subject certificates.
19. I have noted the documents that overwhelmingly demonstrate beyond any doubt that the Applicant did not have a matric certificate at the time he applied for the post in question.
20. In **Wyeth SA (Pty) Ltd v Manqele & others [2003] 7 BLLR 734 (LC)** the court noted that the definition of dismissal in section 186(1) (a) makes no reference to an employee. According to the court, all the statutory definition requires is valid contract of employment and a termination of that contract by an employer.
21. I have to accept that on the basis of the documentary placed before this forum an investigation to determine whether there were grounds for dismissal was done. The Code of Good Practice: Dismissal makes it clear that this does not need to be a formal enquiry. What I have to accept in the present case is that the Applicant was not notified of the allegation regarding the issue of the matric certificate and allowed an opportunity to state his case in response to the allegation. In the above regard I have to agree with the Applicant that his dismissal was procedurally unfair.
22. In terms of the amended section 194 of the LRA the provision dealing with compensation for unfair dismissal reads as follows:
- '(1) the compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for the dismissal was a fair reason*

*related to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just or equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'*

23. In awarding compensation to the Applicant I have had to take the following Labour Appeal Court's pronouncement made in **Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 (LAC)** into account:

*'The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss.'*

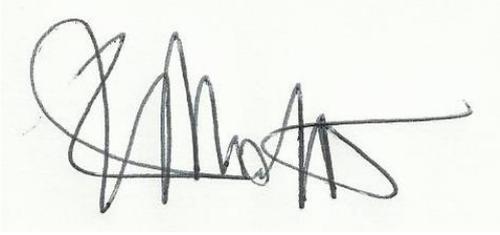
24. In the Applicant's case I have deemed a month's salary to be just and equitable

## **AWARD**

25. The dismissal of the Applicant, Mlungisi James-Howard Msimang, was substantively fair, but procedurally unfair.

26. I award the Applicant, Mlungisi James-Howard Msimang, one (1) month's salary of **R5 174.50** bases on his annual salary of **R62 094.00**.

27. I order the Respondent, Department of Health – Kwazulu Natal, to pay the Applicant, Mlungisi James-Howard Msimang, the said amount of **R5 174.00** within 14 days of the receipt of this award.

A handwritten signature in black ink on a light-colored background. The signature is stylized and appears to read 'Lungile Matshaka'.

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Lungile Matshaka

**PHSDSBC Panellist**