



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: **N.Bantwini**

Case No: **PSHS782-17/18**

Date of award: **23 July 2018**

In the matter between:

PSA obo Siyabulela Jindela

(Union/ Applicant)

and

Department of Health- Eastern Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was part heard on, 05 June 2018 and was finalized on 11 July 2018. It was heard in the offices of the respondent in Bhisho and it came before the PHSDSBC in terms of Section 191 (1) (5) (a) read with section 186 (2) (a) of the Labour Relations Act 66 of 1995 as amended, (the LRA).
2. Parties agreed to submit written closing arguments on 19 July 2018. All arguments have been considered in the preparation of this award.
3. Mr Walter Martin, an official from PSA appeared for the applicant while Mr Sibusiso Nxumalo appeared for the respondent, the Department of Health- Eastern Cape.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the respondent's conduct of failing to appoint the applicant to a position of a Director ICT was fair or not.

BACKGROUND TO THE DISPUTE

5. The applicant referred a dispute to the PHSDSBC through his union, PSA regarding an alleged failure by the respondent to appoint him to the position of Director ICT which was advertised. When the dispute could not be resolved at conciliation level, the applicant filed a request for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

6. According to Mr. Martin's opening statement, the dispute relates to unfair labour practice based on promotion. He strongly believes that the applicant deserves to get the position based on the motivation by the chairperson and the score sheets. When the same position was advertised for the second time, the applicant was not shortlisted. The applicant is challenging the first interview because he was not appointed although he was the suitable candidate.
7. When he requested interview scores from the respondent, a fabricated document with incorrect dates was produced. It is strange that according to the respondent's comments in the document containing scores indicates that the applicant is appointable although he was not employed.
8. The applicant seeks the appointment to the position of Director ICT as a remedy.
9. The applicant, **Mr. Siyabulela Jindela** testified under oath as follows:
10. He applied for the position of a Director: ICT in February 2017. He was invited to an interview and he attended the process. Afterwards he was invited to a competency assessment test around May 2017. When he made a follow up from Ms. Livi, she suggested that he writes a letter to the HOD and he did. He then received some information from a reliable source that he had got the job but when he made a follow

up, he was given a run around and could not get a response that he wanted even when he wrote a letter to the Portfolio Head.

11. When he saw the same position advertised again, he applied but he was not shortlisted until he lodged a grievance which did not yield a positive response. He could not get the documents he requested from the respondent until an incorrect extract from the scores was received from Mr Nxumalo.
12. According to the document on page 21, he is appointable but he does not know why he was not issued with an appointment letter. The document is signed by Mr Nxumalo who did not form part of the interview process. He expected to see a document signed by the Superintendent General who was the chairperson of the interview process. He did not get results from the competency test and his qualifications are legitimate. He was informed by a reliable source that he got the position.
13. The applicant stated further that Mr Madyibi will testify that he (the applicant) was recommended for the position as the candidate who was scored as number 2 as number 1 had a problem with a matric certificate and also having 2 identity documents.
14. Under cross-examination, the applicant testified as follows:
15. He was informed by a reliable source verbally that he was recommended for the position but he cannot give names of the sources. His sources are not decision makers. He is not aware that the information has to be in writing in order for it to be regarded as authentic. He was never informed about the interview results and this means that the respondent did not adhere to the policy.
16. The applicant testified further that even if the respondent decided not to appoint a candidate, he was expecting a letter advising him of the status of his application. The applicant disputed that the document that appears on page 21 is a true reflection of what transpired during the interview process. When it was put to the applicant that a decision to appoint or not to appoint rests with the respondent, in particular, the MEC, the applicant's response was that a candidate can be recommended. He also stated that the respondent should have appointed him automatically when the first candidate was found not to be a suitable candidate.

17. Under re-examination, the applicant stated that human resources deal with appointments and the panel was supposed to have appointed him.
18. The first witness **Mr Ayanda Madyibi** testified as follows:
19. He knows the applicant since 2011 and has been working under his supervision. He was the panelist member during the recruitment process of the position in question and the applicant was interviewed. He was not part of the second interview process.
20. During the first interview, the applicant was the second-best candidate in terms of the scores. With regards to the first candidate, Doctor Mbegashe did quality control and found out that the identity number on the diploma did not correspond with the one in the matric certificate. The panel decided to give the candidate 7 days to clarify that. Mr Jindela was the second-best candidate and although he could not **recall the actual scores**, the numbers that appear on page 21 are incorrect.
21. Under cross-examination, the witness testified as follows:
22. He did sign the oath of secrecy before the interview process was conducted and its purpose is for the panelists not to divulge any information about the interview. He did not speak to the applicant about the interview. The panel regarded him as an appointable candidate and he was rated as number 2 out of the 3 candidates who were interviewed. When it was put to the witness that he was not supposed to disclose any information regarding the interview process, his response was that he only disclosed to his Manager what happened during the interview and that the applicant is challenging his non-appointment to the position of Director ICT. He also did this because of the concerns of service delivery.
23. The witness testified further that the panel recommends the suitable candidate but the power to appoint rests upon the MEC. The candidate who was rated number 1 was Ngxabane and that the applicant was number 2. He could not recall number 3 and there was no tie in scores although he cannot recall them. He is not aware that the respondent did not appoint any candidate and that the position was re-advertised. No report was ever submitted to him regarding the interviews.

24. Under re-examination, the witness stated that he did not discuss the scores with the applicant but he only knew about them when he (the witness) divulged the information to his (the witness) Manager/boss. The 3 candidates were appointable including the applicant who was rated as number 2. He was expecting to see the report of the first process, knowing the professionalism of the Superintendent General.
25. In closing, Mr Martin argued as follows:
26. None of Mr Jindela's rights were considered when a decision was made to retract his appointment by the respondent. He had a legitimate expectation to be appointed in the higher position of a Director: ICT for which he applied for. The decision to retract his appointment was made against the stipulations of the Constitution of SA, as well as the stipulations of PAJA.
27. When the position was re-advertised, the applicant was not shortlisted and this means that the respondent had an agenda. The chairperson's recommendations were never submitted by the respondent despite the fact that the 2 witnesses made reference to them.
28. Mr. Ayanda Madyibi testified under oath that Mr Jindela was found to be the successful candidate for the position after the first candidate was given 7 days to verify the issue of 2 identity document. The scores which were submitted by the respondent were not authentic or were fraudulent as the date reflected on top was incorrect.
29. The respondent's representative's defence to the fact that there was no suitable candidate to be appointed is far-fetched and untrue as suitable candidates were shortlisted for the post and thereafter interviewed. The applicant seeks appointment to the position of Director: ICT as a remedy.

Respondent's case

30. According to Mr Nxumalo's opening statement, the applicant was interviewed on 24 April 2017 for the position of Director Information Communication Technology (ICT). He will call 2 witnesses who will testify that the respondent did not appoint anybody

out of the first interview process as there was no suitable candidate who could be found.

31. **Ms. Kunjulwa Livi**, the first witness for the first respondent testified as follows:
32. She works for the respondent as Manager: Recruitment and Selection since May 2008 and her main responsibility is to manage recruitment processes of the respondent. He knows the applicant as one of the interviewed candidates for the position of the Director: ICT which was advertised in February 2017. She was involved in the process and the 3 candidates were taken through a competency assessment by a private company. At no stage did the panel of the interview made a recommendation for the appointment of any candidate. Appointment of candidates by the respondent is informed by Section 11 of the Public Service Act (PSA) which provides that the MEC or the Delegated Authority has an authority to appoint.
33. The recommendation is only made after all the processes of verification of information and reference checks are done after the interview process. The score sheets are also taken to the external service provider. A decision not to appoint was taken by the respondent and the position was re-advertised.
34. Under cross-examination, the witness testified as follows:
35. She was the secretariat, giving support to the recruitment process of the position in question. The 3 interviewed candidates were all subjected to a competency assessment test and this applies across the public service. She has seen the scores allocated to the candidates and she captured them in the system. The document appearing on page 21 is an extract of the outcome of the interview process and contains all the average scores and comments of the panel in respect of the applicant. It is a true reflection of what transpired during the interview process.
36. The applicant was interviewed on 24 April 2017 not 2018 as reflected in the document, 2018 is a misprint. Mr Madyibi was one of the panelist members. The competency assessment is conducted by an external service provider after the interview has been finalized in terms of the SMS Handbook. Verification of candidates' records is done by the human resources section through SAQA and the security of the department after the interview has been conducted.

37. The 3 candidates out of 4 were appointable according to the panel's comments and were subjected to competency assessment process. After considering all the information, the panel recommended that the position be re-advertised. There was no suitable candidate for the position and the MEC has the authority to appoint the suitable candidate. The witness was also referred to all the scores captured in respect of the candidates and confirmed that they are all accurate including the average score of the applicant (page 15 bundle B). The respondent did not get a report from SAQA
38. Under re-examination, the witness stated that the MEC has an authority to appoint candidates but in this instance, no appointment was made from the first interview. The panel cannot compel the MEC to appoint a candidate.
39. The second witness **Mr Siphumeze Makhitshi** testified as follows:
40. He works for the respondent as the Director: Human Resources Information Systems and has been occupying the position since 01 August 2004. He is responsible for the management of the entire recruitment process of the respondent. Ms. Livi reports to him and he knows the applicant as one of the candidates for the position of Director: ICT.
41. None of the candidates were appointed from the first process. The document appearing on page 21 was written by him and it is an extract from the interview sheet and is a true reflection of what transpired during the interview. The applicant was interviewed on 15 April 2017 not 2018 as reflected in the document, 2018 is a misprint.
42. When it was put to him that Mr Madyibi who was one of the panelist member disputed the scores he allocated to the applicant, the witness's response was that Mr Madyibi must have forgotten about the oath of secrecy and that his memory must have been faded when he testified. The witness made reference of page 15 which reflects scores captured from page 21 reflecting a true reflection of the interview process. Competency assessment test is not the only tool which is used in determining a suitable candidate. The applicant scored 1 out of 5 in all the criteria (page 20 to 25)

in terms of competency evaluation and is not seen as the suitable candidate who could drive the IT department hence he was not appointed.

43. According to the report, none of the candidate passed the competency assessment test hence the process was abandoned and the position was re-advertised. The assessment was conducted by Execu Prime and the applicant was tested on 18 June 2017.
44. Under cross-examination, the witness testified as follows:
45. Mr Nxumalo did request the document contained on page 21 from him and it is the true reflection of what transpired during the interview. He (the witness) got the information from the file. He does not know if the applicant applied when the position was re-advertised for the second time. The first process was abandoned by the MEC as none of the candidates were found to be suitable for the position. It is the MEC's prerogative to appoint a suitable candidate. The DPSA appointed Execu Prime to conduct competency assessment process after the interview was conducted.
46. The witness testified further that Mr Madyibi was not telling the truth if he said the applicant's scores were incorrect. A report form SAQA was never received by the respondent and qualifications were verified through the University. The position was filled after the second process of the recruitment was conducted.
47. In closing, Mr Nxumalo argued as follows:
48. It is worth noting that the applicant is challenging the first phase of the recruitment process wherein the position in question was subsequently not filled. Through its two witnesses, Ms. Livi and Mr. Makhitshi, the respondent has managed to prove on the balance of probabilities that Mr. Jindela was not unfairly treated.
49. Both Mr. Makhitshi and Ms. Livi confirmed the following, which was also not disputed by the applicant:
That:
 - a) The executing authority is the only departmental official who has the right to appoint or not to appoint.

- b) The above is further substantiated by the DPSA circular (on page 16 of Bundle B, paragraph 4)
- c) In an interview process, panel members and or its chairperson only has the right to make recommendations, but not to appoint.
- d) With regards to the dispute in question, the Executive Authority utilized her authority in terms of the Public Service Act read jointly with the SMS handbook when she took a decision not to appoint, hence the position was re-advertised.
- e) The position in question was then filled during the second phase / interview process.
- f) Despite grammatical errors (in terms of the date) a summary of scores produced as documentary evidence, page 21, proved to be in line with the summarized version on page 15 of Bundle B.
- g) Mr. Madyibi broke his oath of secrecy and also lied when he respectively denied his scores and divulged confidential information to the applicant, Mr. Jindela.
- h) Furthermore, the assessment report compiled by Execu Prime (pages 17 - 25 of Bundle B proved beyond reasonable doubt that the applicant Mr. Jindela, had scored below 2 and or 3 which is below the acceptable level.
- i) Mr. Makhitshi managed to demonstrate that the dark shaded line on page 21 of page Bundle B was an indication of the result and or level of scores awarded to the applicant Mr. Jindela in terms of his assessment in question. He scored below the required mark or he did not achieve the required proficiency level.

50. On the other hand, the applicant, Mr. Jindela claimed to have been reliably informed by his sources (which he did not make mention of) that he was recommended and or appointed to the position in question but could not produce any evidence to that effect. The applicant had dismally failed to submit evidence that would have justified his claims.

51. The witnesses of the respondent corroborated each other by confirming that the position was advertised owing to the fact that no suitable candidate was found during the first phase, and this was never disputed. Lastly, since the position was not filled

during the first phase, it is still the contention of the respondent that the Commissioner should dismiss the matter.

ANALYSIS OF EVIDENCE AND ARGUMENTS

52. The issues of common cause that relates to this matter are as follows:
- That the applicant applied for an advertised position of Director: Information Technology Communications (ICT).
 - That the applicant was shortlisted and interviewed during the first interview process.
 - That no candidate was recommended for appointment during the first round of the interview.
 - That the MEC instructed the chairperson to re-advertise the position when none of the candidates were found to be suitable for the position.
 - This means the first process of the interview was abandoned.
 - That the position was filled as a consequence of the second interview process.
 - That the applicant challenged the first process of interview.
53. It is the applicant's case that he heard from a reliable source which he did not disclose that he was recommended for appointment as he won the interview.
54. It must be noted that no evidence to this effect was tabled neither orally or in documentary form was adduced during the arbitration process.
55. The applicant's contention to the fact that the scores which were submitted by the respondent were incorrect and or fraudulent as they were disputed by Mr Madyibi, his witness, is misleading. The reason why I am saying this is based on the fact Mr Madyibi could not even recall what he scored the applicant according to his testimony.

56. Both respondents' witnesses testified that the recruitment process in respect of the position in question was abandoned and the position was re-advertised when no suitable candidate could not be found.
57. It must also be noted that with regards to the competency assessment which was conducted by Execu Prime, the scores obtained by the applicant, are described as "Not achieved and or Poor demonstration of competency", meaning, he scored below the acceptable level (pages 20 to 24 of bundle B).
58. The undisputed evidence of the respondent's witness, Ms. Livi further confirmed that no appointment letter was issued to the applicant as no recommendation to appoint him was made which would have justified and or authenticated his claim for an unfair labour practice.
59. It is therefore my view that the respondent's prerogative to abandon the first process of recruitment and selection for the position of a Director: ICT was exercised in a just, fair, reasonable and capricious manner. This also means that the applicant could not prove the unfair labour practice by the respondent.

AWARD

- 60. I therefore make the following award:

- 61. The respondent, the Department of Health-Eastern Cape cannot be compelled to appoint the applicant, Mr Siyabulela Jindela to the position of Director- Information Communication Technology.

- 62. The applicant failed to prove his claim of unfair labour practice and the application is dismissed.

- 63. There is no order as to costs.



Signature

Ncumisa Bantwini