

# ARBITRATION AWARD

Case Number: PSHS97-14/15

Panelist: Khaya Mqugo

Date of Award: 8 September 2014

In the matter between:

**SASAWU obo Rasmeni NE**

Applicant

and

**Department of Health – Eastern Cape**

Respondent

---

Union / Applicant's Representative

: Mr Bata

Union / Applicant's Address

: 1<sup>st</sup> Floor B 15 Chungwa House  
Pick n' Pay Building, Bhishe

Telephone No

: 040 635 1305

Telefax

: 040 635 1651

Respondent's Representative

: Mr Lose

Respondent's Address

: Lilitha College of Nursing in Association  
Private Bag x 0028, Bhishe.

Telephone No

: 040 608 9685

Fax Number

: 040 608 9689

---

### **Details of the hearing and representation:**

1. An Arbitration hearing took place under the auspices of the Public Health and Social Development Sectoral Bargaining Council at the Lilitha College of Nursing, Global Life Building in Bhisho.
2. The Applicant, Nomawonga Rasmeni was present and was represented by Mr Mlamli Bata, SASAWU Official.
3. The Respondent, Department of Health- Eastern Cape, was represented by Mr Bongani Lose, the Deputy Director Employee Relations, Department of Health, Bhisho.
4. The proceedings were conducted in English and therefore the services of an interpreter were not utilized. The parties requested to file written closing arguments due to the complication of the matter and documents dealt with during arbitration. Both parties filed their closing arguments on the 2 September 2014.
5. Handwritten notes were kept and the proceedings were electronically recorded.

### **Issue to be decided**

6. I am required to determine whether the Respondent's failure to promote the Applicant was an unfair labour practice in terms of Section 186(2) (a) of the Labour Relations Act 66 of 1995 (LRA).

### **The background**

7. At the commencement of the Arbitration proceedings the parties submitted the following documentation:
  - Bundle A: Exhibit A:
  - Applicant's Referral for the Conciliation of the Dispute.
  - Applicant's Correspondence Enquiring about Outcome of the Interviews.
  - Copy of Applicant's Grievance.
  - College Principal Acknowledgement of Receipt.
  - Post Advertisement.
  - Interviewing Panel's Recommendations.

- Request of Activation of Level 8 Post.
- Approval of Activation of Level 8 Post.
- Internal Transfer – Ms Y. Malgas.
- Request for A Transfer on Health Reasons: Y Malgas.
- Request for straight Transfer.
- Memorandum Requesting the DDG: HR and CS to approve internal transfer of Ms Malgas.
- Organogram.
- Enquiry about Level 8 Post:
- Referral for Arbitration:
- Certificate of Outcome of Conciliation Proceedings.

8. Bundle B: Exhibit B:

- Recruitment Policy of the Eastern Cape Province.

9. Bundle C: Exhibit C:

- Letter requesting Nullification of Interviews.

10. The Applicant commenced employment with the Respondent on the 8 January 2007. She has been working as a Principal Personnel Officer.

### **Survey of evidence and arguments**

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

11. I have considered all the evidence and arguments, but because section 138 (7) of the LRA requires brief reasons, I have only referred the evidence and arguments that I regard as necessary to substantiate my findings and the determination of the dispute.

12. Mrs Nomawonga Rasmeni, the Applicant, testified that she commenced employment with the Respondent on 8 January 2014. She is currently working as a Principal Personnel Officer.

13. She was working under supervision of Mr Qamarhwana, who was the Chief Personnel Officer and the Assistant Director was Ms Vanda.
14. Mr Qamarhwana left the Chief Personnel officer (Level 8) Post in 2009 and the Applicant performed the duties of Mr Qamarhwana.
15. Towards the end of 2009 the level 8 post was advertised. Copy of the advertisement appears on Page 11 of Bundle A.
16. The Applicant applied. She was shortlisted and interviewed after the interviews she was informed by Mrs Thiso, Assistant Manager: HR – Central Office who was chairing the Panel during the interviews that she performed very well in the interviews.
17. The Applicant was the second top candidate as per the Panelist's scores. She obtained 84% and the top candidate got 92.3%.
18. The five (5) Panelists recommended the Applicant to be appointed in the Post and qualified that by saying the Applicant was already performing the duties of a Chief Personnel Officer and was doing exceptional job.
19. In 2009 and 2010 financial year there was a moratorium on posts but in 2010 and 2011 financial year the moratorium was uplifted.
20. There was a similar level 8 post in Mthatha which was occupied by a certain Ms Malgas.
21. Towards the end of 2012 the Applicant heard that Ms Malgas wanted to join Lilitha College at Bhisho and around March 2013 Mrs Malgas arrived at Bhisho.
22. There were new appointments and Ms Malgas was one of them. Mrs Links, the College Principal addressed the College Staff in the Boardroom and the new appointments were also introduced.
23. Another official enquired from Mrs Links about the status of Mrs Malgas. Mrs Links said that Mrs Malgas was not transferred but she only came to assist.

24. In May 2013, Mr Mafongosi had already been transferred from Alfred Nzo to Mthatha to occupy Mrs Malgas's Post.
25. The Applicant read a letter from the system stating that Ms Malgas was removed from Mthatha establishment and placed to eMadwaleni establishment. She submitted Page 33 of the Bundle A as proof.
26. She queried the process followed by the Respondent of transferring Mrs Malgas to the Level 8 Post in Bhisho and also transferring Mr Mafongosi to Mrs Malgas's post in Mthatha. She stated that a post must exist before effecting a transfer unless the person is seconded.
27. In a followup staff meeting they were informed that Mrs Malgas requested transfer from Mthatha to Bhisho.
28. The Applicant was only informed in February 2014 that the Level 8 post was approved for Mrs Malgas and that she was going to report to her.
29. She told the Managers that she had a problem with that and she wrote a letter to the College Head requesting clarification regarding the filling of the post whereas she was told the post had been freezed.
30. The College Head, Mrs Links responded by saying they will forward a response as soon as the relevant information has been gathered.
31. She stated that it was not fair for the Respondent to abolish the post and transfer a person to that abolished post and then approve it.
32. She was not happy that the Respondent was able to motivate the post to be unfreezed for the transfer of Mrs Malgas but they failed to do that for her.
33. She testified that the Respondent sometimes do have the authority to do things on their own way. In 2010 / 2011 an employee who was the second best candidate was never appointed even though the top candidate declined.

34. She became demoralised, frustrated when she discovered that the post had been approved for somebody else.
35. She requested that she be appointed to the post of Chief Financial Officer. She stated that all the duties she had been doing have been taken and given to Mrs Malgas and the Applicant is currently doing nothing.
36. Under cross examination he referred to page 13 which showed that she got 84% and the top candidate got 92,3%.
37. She conceded that the Panel only recommended her to be appointed, however, her appointment had not yet been approved. She further conceded that the recommendation is either approved or disapproved.
38. She conceded that at some stage there was a moratorium freezing the post, however, it was later uplifted.
39. She stated that she does not have a problem with a straight transfer, the problem she had was for the Respondent to advertise the post and nullify it after she had been recommended for it and later unfreeze for the purposes of transfer.
40. Under reexamination she stated that the Human Resources Department was represented during the interviews.
41. She testified that when the moratorium was uplifted it was time to open the door for the interviewing panel to finalise its process. The fair procedure would be to consider the recommended candidate.
42. She stated that the Respondent's failure to promote her in the post after the moratorium was uplifted was tantamount to an unfair labour practice.
43. The Applicant closed his case.

**The Respondent's evidence:**

44. Mr Vuyisile George Qele testified that he is an Admin Registrar and has occupied that post for the past nine years.
45. He testified that there was a lady who worked as Level 8 Human Resources Officer at Mthatha Campus, who applied, on medical grounds to be transferred to Bhisho.
46. The Management felt that services of level 8 employee were needed.
47. On the day interviews were taking place he got a phone call informing him about the interviews. When he was informed about who the Panelists were, he felt that the process was not transparent and was not properly constituted.
48. He wrote a letter to the Chief Operating Officer requesting him to nullify the process on the ground that it was not transparent.
49. He realized that the Panel was not adequately represented as there was Mrs Thiso and Mrs Dlabantu, the Campus Head who knew nothing about HR issues.
50. Thereafter a moratorium freezing the post was approved and the post was never readvertised, it was filled only when there was this transfer from Mthatha.
51. He stated that the transfer came as a result of Mrs Malgas's application for a lateral transfer from Mthatha Campus to Bhisho Campus.
52. The reason for Mrs Malgas's application for transfer was ill health. She also wanted to be nearer to her Daughter who was staying in East London.
53. He stated that the respondent was always in need of the Level 8 position, hence they agreed on the transfer.

54. At the time of transfer this Level 8 post was still frozen. However, even if the post was frozen, it was the prerogative of the Management to unfreeze the post and employ a suitable candidate.
55. He referred to pages 26, 27 and 28 of Bundle A which is a Memorandum requesting regularization of internal transfer of Mrs Malgas.
56. Mrs Malgas was already working in the Bhisho Campus when this Memorandum was written.
57. The Respondent committed an administrative error by approving Mrs Malgas' application for transfer irregularly. Therefore the Memorandum to the top management was trying to regularize the Mrs Malgas' transfer retrospectively.
58. Under cross examination he conceded that he received a grievance from the Applicant regarding this same dispute.
59. On receiving the grievance from the Applicant he wrote a letter to the principal of the College, Mrs Links informing her about it.
60. Before filing a grievance the Applicant wrote a letter to the College Head on the 12 February 2014. The second paragraph of that letter stated that "This letter serves to request your good office to furnish me with information regarding the filling of the said post as I never got a written response on the result of the interviews as to what happened to that post as a moratorium is being lifted."
61. Mrs Links responded to the Applicants' letter on the 18 February 2014 as follows:"The office of the Principal will forward the response as soon as the relevant information has been gathered."
62. He conceded that the reason to appoint the chairperson of an interview panel is to lead the process and act in the best interest of the employer.
63. The interviewing Panel recommended the Applicant for the Level 8 post as Follows:"It is recommended that Mrs Rasmeni be appointed even though Ms Qubeka had a higher total score than her. Mrs Rasmeni is currently fulfilling the role as a Chief Personnel Officer and is doing an exceptional job.

She has stepped into this role since the departure of Mr Qamarwana and has shown an excellent work ethic. Should Mrs Rasmeni decline the offer for any reason, the panel feels that Ms P. Qubeka is a capable replacement.”

64. He did not see any link between Mrs Malgas’ transfer and the recommendations by the Panel because that process was nullified.

65. He made the request of nullification of the process even before the Panel made its recommendations. He could not be able to answer why recommendations had to be made if the process had been nullified earlier.

66. When asked why he did not communicate with the chairperson of the Panel, Mrs Thiso about this nullification, he stated that he had no obligation to do that.

67. Paragraph 2 of the letter written by Mr Qele to the Chief Operating Officer reads as follows:”I called the AD: HR and she informed me that the Panelists were herself, a Ms Tozana from the complex and Mrs Dlabantu from the East London Campus. I expressed my disquiet about the composition of the Panel as I felt that the Central Office was not adequately represented, but I did not stop the process as she said that the Acting Principal had asked Ms Dlabantu to represent her in the Panel. The Head of Auxiliary Services was also not part of the Panel for the Registry Clerk, as a post that falls directly under him.”

68. Paragraph 5 of Mr Qele’s letter reads as follows:”In the circumstances I would recommend that the interview process for the Registry Clerk and Senior Personnel Officer be nullified and a more inclusive approach be adopted. This does not in any way reflect on the integrity of the parties that were involved in the said interviews.”

69. He never made the chairperson of the Panel aware of the letter requesting nullification of the post.

70. He conceded that the Chairperson’s reasons for recommending the Applicant to the Level 8 post were unfair and clear.

71. He stated that the Panel would have appointed by the delegated authority and he is not the delegated authority.
72. He was not able to furnish any written approval by the COE of his recommendation on nullification of the interviewing process. He was only told verbally that he did the right thing.
73. On the 22 July 2013 Ms Nonkelele, the Deputy Campus Head wrote a memorandum to Mrs Links, the College Principal requesting approval of Mrs Malgas' transfer from Mthatha to Bhisho.
74. He stated that this memorandum was not enough to effect straight transfer of Mrs Malgas he needed the transfer to be approved by a Senior Manager.
75. In November 2013 he wrote a memorandum to the Deputy Director General HR and CS requesting regulation of the internal transfer of Mrs Malgas, retrospectively.
76. Bullet point 3 of the memo reads as follows:"Mrs Malgas will be currently held against the unfunded post which was vacated by Me Qamarwana during 2009 / 2010."
77. Mr Qele also wrote a memo dated February 2014 which reads as follows:"This is to confirm that the College is likely to underspent on its COE budget for the 2013 / 2014 financial year and the transfer of Mrs Malgas from Mthatha Campus to the Central Office will not put the College in any budgetary pressure."
78. He described an unfunded post as a post which is vacated for a certain financial year as there will not be money budgeted for it in that financial year.
79. At the time of transfer this Level 8 post was still frozen. However, even if the post was frozen, it was the prerogative of the Management to unfreeze the post and employ a suitable candidate.
80. He referred to pages 26, 27 and 28 of Bundle A which is a memorandum requesting regularization of internal transfer of Mrs Malgas.
81. Mrs Malgas was already working in the Bhisho Campus when this Memorandum was written.

**Analysis of evidence and argument:**

81. It is common cause that the Applicant had started working for the Respondent as a Principal Personnel Officer in 2007.
82. She was working under the supervision of Mr Qamarwana, the Chief Personnel Officer, Level 8, who resigned towards the end of 2009.
83. The Applicant acted in this post and when it was advertised she applied, shortlisted and interviewed.
84. The interviewing panel chaired by Mrs Thiso, Respondent's Assistant Manager Human Resources recommended the Applicant for appointment to the post.
85. The Panel's recommendation dated 22 January 2010 which appears on page 13 of Bundle A reads as follows:"It is recommended that Mrs Rasmeni be appointed even though Ms Qubeka had a higher total score than her. Mrs Rasmeni is currently fulfilling the role as a chief Personnel Officer and is doing an exceptional job. She has stepped into his role since the departure of Mr Qamarwana and has shown an excellent work ethic. Should Mrs Rasmeni decline the offer for any reason, the Panel feels that Mrs P. Qubeka is a capable replacement."
86. This recommendation was signed by Mrs Thiso and was not signed by the College Registrar, College Principal and other Senior Managers.
87. On the 15 December 2009 Mr Qele, the Respondent's Registrar wrote a Memo requesting that the interview process be nullified arguing that it was inadequately represented.
88. Paragraph two of this Memo reads as follows:"but I did not stop the process as she said that the Acting Principal had asked Mrs Dlabantu to represent her in the panel."
89. Mr Qele also stated that he never communicated the contents of this memo to the interviewing panel.

90. He also could not dispute that the entire Panel was not aware of a pending nullification of the interviewing process.

91. This is also justified by the recommendation of the Panel dated 22 January 2010, a month after Mr Qele wrote a memo requesting nullification of the interview process.

92. The Chairperson, Mrs Thiso communicated the outcome of the interviews to the Applicant and this raised hopes to the Applicant to be officially appointed to the Post she had acted in it.

93. The Applicant was never appointed to the Post instead a moratorium was put on the filling of all vacant posts particularly within the Health Department.

94. The Applicants' argument is based on the fact that a certain Mrs Malgas who was Level 8 in Mthatha was replaced by Mr Mafongosi from Alfred Nzo.

95. Mrs Malgas was placed on Level 4 post at Emadwaleni whilst she was waiting for the Level 8 post in Bhisho.

96. The Applicant testified that it was unfair to abolish a post when she had been recommended for the post and later transfer another employee to that same abolished post.

97. She stated that the Respondent could not motivate the unfreezing of the post for her but was able to do that on behalf of Mrs Malgas.

98. Stage 3, of the Recruitment Policy provides that appointment involves 3 stages, namely issuing appointment letter, placement and probation.

99. The Policy requires the incumbent to sign the appointment letter.

100. It is common cause that the Applicant was never issued an appointment letter and therefore she was never appointed to the Level 8 post.

101. Clause 7.10.1. of the Recruitment and Selection Policy provides that “No communication as to the filling of a post, which may be directed to candidate is valid prior to a decision by the Manager to whom the power to appoint a person has been delegated, or the MEC in the n case of SMS members.”

102. The communication between the Applicant and Mrs Thiso is nullified by this provision and her recommendation was also nullified by the moratorium.

103. The question of unfairness revolves around replacing Ms Malgas with Mr Mafongosi with the intention of sending Mrs Malgas to the Level 8 post which was frozen just after the Applicant was recommended.

104. A request to activate the Level 8 post dated 28 April 2014 has this provision: “Kindly reactivate this post as soon as possible. The post was abolished on the system we therefore request the above in order to relocate Mrs Malgas.”

105. At the time of making this request Mrs Malgas had already been working at the Respondent’s Bhishe College.

106. The Applicant testified that a post must exist before effecting a transfer.

107. After the interview process was nullified the Level 8 post was never readvertised to allow the Applicant to contest with Mrs Malgas and also for the Respondent to task a properly constituted panel.

108. In terms of V11 C.25 of the Public Service Regulations, 1999 an Executive Authority may fill a vacant post without complying with Regulations V11 C 2.3 and C.24 if:

- a) The Department can fill a post from the ranks of supernumerary staff of equal grading.
- b) The Department plans to fill the post and part of a programme of laterally rotating or transferring employees to enhance organizational effectiveness and skills.

109. In *De Nysscen v General Public Services Sectoral Bargaining Council and Others* (2007) 28 ICJ 375 (LC) the Court found that the failure to appoint the Applicant was unfair and ordered that the Applicant be appointed and remunerated as if she was successful in her application. The relief sought by Mrs Rasmeni is not directed at setting aside of the appointment of Mrs Malgas and the reversal of her appointment.

110. Therefore it was not necessary to cite Mrs Malgas as a party having a direct and substantial interest in the dispute.

111. One of the remedies the Applicant is seeking is Protective Promotion to Level 8 Post.

112. The Applicant requests that the promotion post be paid retrospectively with effect from the 22 January 2010, the date on which the Applicant would have been appointed to the post.

113. Paragraph 9 (1) ©, Part B. V1/111 of the Public Service Commission Staff Code provides that, "Protective Promotions are affected on the recommendation of a Commission to protect the position of officers and employees who are found to have been prejudiced in the filling of a promotion post after such a post had been filled. This in essence amounts to providing all the benefits of the promotion post to one employee without actually appointing him thereto with the consequence that the appointment of another employee to that post remains intact,"

On his own admission, Mr Qele, the Respondents Registrar conceded that, the Respondent committed an administrative error and irregularity by approving Mrs Malgas' application. He had to write a memo requesting the top management to regularize Mrs Malgas retrospective transfer.

114. Failure to appoint the Applicant after she was recommended by the interview panel was unfair and constituted an unfair labour practice.

115. Failure to readvertise the post when the Respondent felt there was a need for the Level 8 to be filled was unfair and prejudicial to the Applicant and constituted an Unfair Labour Practice.

116. Section 23 (1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that everyone has a right to Fair Labour Practices.

117. In *De Nysschen v GPSSBC and Others* (supra) the Court held that if the employer exercises its discretion in contrast with Section 23 (1) of the Constitution, its discretion cannot be unassailable.

118. Based on the evidence led I find that the Respondent's actions regarding the Appointment of the Level 8 post amounted to unfair labour practice.

119. The Applicant wants Protective Promotion retrospectively with the effect from 22 January 2010.

120. It is common cause that after the Applicant was recommended the Level 8 post was frozen.

121. It is reasonable for the Applicant not to expect retrospective claim to include this period.

122. The Level 8 post was approved on the 11 December 2013 by Mrs K. Campbell, DDG: HR and CS and therefore the retrospective payment will be effective from the 11 December 2013.

123. I therefore make the following award.

**Award:**

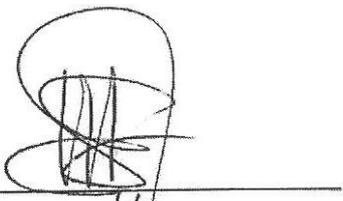
124. The Respondent's failure to appoint the Applicant and the appointment of Mrs Malgas without following proper procedures constituted unfair labour practice.

125. The Respondent is ordered to provide the Applicant with all the benefits of the Promotion post (Level 8) with effect from 11 December 2013.

126. The Respondent is ordered to pay all the benefits of the promotion post from 11 December 2013 to 30 September 2014 on or before 15 October 2014.

127. The Respondent is further ordered to pay the promotion benefits on a monthly basis with effect from 30 October 2014.

128. There is no order as to costs.

Signature   
Panelist: 