



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: Gail McEwan

Case No: **PSHS1015 -16/17**

Date of Award: 19 June 2017

In the matter between:

NEHAWU obo KAMONA MUBITA

(Employee)

and

DEPARTMENT OF HEALTH – WESTERN CAPE & GHALIEP ADAMS

(Employer & interested party)

DETAILS OF HEARING AND REPRESENTATION

(1) Arbitration was held on 15 June 2017 at the Western Cape College of Nursing in Athlone. Present was Kamona Mubita (employee) who was represented by Anwar Maniers (NEHAWU). The Department of Health (DOH) (employer) was represented by Mvuzo Ngqame (labour relations officer). The certificate of outcome declaring the matter unresolved at conciliation is on file and is dated 2 February 2017. These proceedings were digitally recorded and the employer handed in a bundle of documents. Ghaliep Adams (currently chief artisan grade A at Alexander Psychiatric hospital) was joined as an interested party to this dispute.

BACKGROUND TO THE ISSUE

(2) Mubita started working for the employer on 30 September 2008; works as an artisan foreman (Stikland

Psychiatric Hospital); earns R23 600.00 per month and believes the employer committed an unfair labour practice when he was not interviewed for the post of chief artisan – Grade A at Alexander Hospital.

THE ISSUE TO BE DECIDED

- (3) I am required to determine whether or not Mubita was subjected to unfair labour practice by the employer relating to promotion as contemplated by section 186(2) (a) of the Labour Relations Act (the Act). In the event of the foregoing question being decided in the Affirmative, I am required to make an appropriate award in terms of section 193(4) of the Act. The issues in dispute were narrowed in that Mubita was eliminated as a job applicant at the initial screening stage of the recruitment process as it was found that he did not have an appropriate trade certificate nor the requisite ten years' experience as an artisan when he applied for the job as Artisan foreman grade A at Alexandra Psychiatric hospital. Mubita is seeking to be elevated to this position and grade but at Stikland hospital.
- (4) I have considered all the evidence and argument, but because the Labour Relations Act, 66 of 1995, as amended (LRA), requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

SUMMARY OF EVIDENCE

The employee's version and testimony was as follows:

- (5) Kamona Mubita testified that his current function is to manage the maintenance work as an artisan foreman at Stikland psychiatric hospital. Mubita supervises others in the workshop when servicing/maintaining the machinery at the hospital. The engines in the boilers get serviced as this is a mechanical function. Mubita applied for the position of a chief artisan grade A at Alexandra psychiatric hospital. Mubita was of the view that both being psychiatric hospitals similar machinery would be used and the advertisement for the post was open to all. On ER bundle page 1 is the advert which has as a minimal educational qualification an appropriate trade test certificate. Mubita pointed out that no speciality trade is mentioned. The experience required for this position is ten years post qualification experience as an artisan/artisan foreman. Mubita qualified as an artisan in 2002 and therefore has thirteen years' experience. Mubita started on the engineering side in March 2006 and therefore has ten years' experience. The advertisement was posted on 20 July 2016; he applied in the same month but his application was not successful. Referring to bundle

EE2 page 9 Bianca Beukes (senior personnel practitioner) advised Mubita in an email dated 4 October 2016 that the panel scrutinised his curriculum vitae and found that he did not have an appropriate trade test certificate and hence was not shortlisted for the position. On bundle EE2 pages 10 & 11 is a letter dated 14 October 2016 to Mubita from Jenny Engelbrecht (deputy director PM and facility management) where Mubita was again informed that he did not have an appropriate trade test certificate. Mubita then went to the Chief Director: People management with a grievance and was also in contact by email and telephone. Bundle EE2 page 13 confirms that at 19 December 2016 his grievance was unresolved and he was told that he lacked the ten years of appropriate experience as was required for the post for which he had applied. After which Mubita referred a dispute to the Council.

- (6) Mubita feels he is qualified for the job advertised for Alexandra Hospital as at Stikland he has acted as the chief artisan (only when his supervisor was on leave); has ten years' experience and a trade test certificate. Both hospitals are psychiatric institutions and would be the same in terms of the machinery utilised. Ghaliep Adams (the successful candidate) comes from the Bellville mobile workshop so his job is very different from that done in the hospitals. Mubita draws up specifications and at the mobile unit no management skills are required and they do not work on projects. However the jobs for the chief artisan at Alexandra and Stikland hospitals are the same. Referring to bundle EE2 page 27 Mubita confirmed he has passed grade 1 in the part-time management development programme at the University of the Western Cape. On Bundle EE2 page 29 is an attendance certificate confirming that Mubita successfully completed the training intervention in Project Management at the Western Cape Provincial Training Institute. Mubita also successfully completed the course for module 1 – requesting and procuring of goods and services (bundle EE2 page 30). Mubita also successfully completed Word 2007 grade 1 (Bundle EE2 page 28). Mubita has a trade certificate in motor mechanics (bundle EE2 page 25). This trade certificate is dated 11 December 2002 and Mubita believed that motor mechanics is a sub-category of engineering. The advertisement for the artisan foreman grade A never specified a trade and the certificate obtained by Mubita was from the MERSETA. Mubita seeks to be moved to the post of chief artisan grade A at Stikland hospital alternatively to be given a salary adjustment to bring him line with the grade A position. Mubita held that had he been interviewed he would have been appointed to the position.
- (7) Under cross-examination it was put to Mubita that the word appropriate trade test certificate would relate to trades such as carpentry, electrician or plumbing and that motor mechanics was not an appropriate trade certificate for the job. Further that motor mechanics had nothing to do with machinery such as generators. Referring to bundle EE2 page 24 Mubita did not agree that carpentry never fell under one of the headings of: petrol tune up; braking system; gearbox or steering box. It was put to Mubita that there is no wood in a

car chassis yet Mubita insisted that there are wood components in motor vehicles. It was explained that carpentry included the building of cupboards and Mubita countered this by stating that there is wood in caravans and ambulances and he was able to build a cupboard. It was put to Mubita that carpentry is not a part of his qualification as shown on bundle EE page 24. Mubita insisted that the examiner had a discretion which could include wood. Referring to bundle EE2 page 24 it was put to Mubita that his qualifications do not contain fitting and turning or any electrical work. Further that if Mubita had no qualifications in these trades it would be impossible for him to supervise others carrying out these functions. Mubita has no plumbing or electrical qualifications. Mubita agreed that his qualifications were all motor vehicle related. Mubita has been in the public service since 2008 in a hospital environment. Therefore Mubita only had eight years relevant experience at the time he applied for the position of chief artisan grade A. Mubita pointed out that the advertisement does not stipulate hospital experience. Mubita insisted he had ten years post qualification experience as the environment was not specified in the advertisement. It was put to Mubita that the vacancy was only open to those who had an appropriate trade certificate which would, as an example, exclude piolets. A motor trade certificate was not an appropriate trade certificate for this position. Mubita is aware that the panel looked at all applications and listed appropriate trade certificates as being in the fields of electrical, plumbing, carpentry or fitting and turning (ER bundle page 3). No motor mechanic trade certificate is listed as an appropriate trade certificate. It was not disputed that Adams has an electrical trade certificate.

The employer's version and testimony was as follows:

- (8) Jenny Engelbrecht (deputy director people management and facility management) testified that the advertisement for the position of chief artisan grade A is on bundle EE2 page 8. Mubita was not shortlisted as he did not have an appropriate trade certificate. Prior to the shortlisting of candidates the panel look at the job description and the scope of the work. An appropriate trade test certificate would be in the disciplines of electrical, plumbing, carpentry and fitting or turning. The trade certificate in respect of Mubita was not accepted as it is for motor mechanics and maintenance of vehicles is not done on site. The job required a trade certificate in either electrical or carpentry. The qualifications of Mubita are all specific to the motor trade which is not suitable for heavy cabling and such like. A total of eight candidates were not shortlisted.
- (9) Under cross-examination Engelbrecht confirmed that the advertisement is dated 20 July 2016. The advert does not specify what trades would be regarded as being appropriate. Engelbrecht is aware that Mubita qualified in 2002 as a motor mechanic. A standard advertisement was used and the panel decides what the appropriate trade certificates would be. Engelbrecht conceded that in her response to Mubita (EE

bundle page 11) she had not mentioned what trade certificate would be appropriate. In terms of experience Engelbrecht explained that Mubita qualified in 2002 yet according to his curriculum vitae only started working as an artisan in 2008 and therefore only has eight years post qualification experience. Mubita did other work but not as a foreman or an artisan until 2008. The trade certificate of Adams is dated 2006 which meant that by 2016 he had ten years' experience in the trade.

ANALYSIS OF EVIDENCE AND ARGUMENT

- (10) In our law the right to challenge promotion to a position or post is limited. The position is usually expressed so as to state that a candidate has no right to promotion but only to be fairly considered for promotion. Promotion is an area where managerial prerogative should be respected unless bad faith or improper motive has tainted the appointment or promotion. The party aggrieved by non-promotion bears the onus of proving on a balance of probabilities that the employer exercised its discretion improperly and that his non promotion is linked to the employer's unfair conduct. As stated in *Goliath v Medscheme (Pty) Ltd (1996) 17 ILJ 760 (IC)*, the applicant must show that the employer's conduct was mala fide. In that case the court stated amongst other things that "*in the absence of gross unreasonableness which leads the court to draw an inference of mala fides, this court should be hesitant to interfere with the exercise of management's discretion.*" From the evidence before me there was no gross unreasonableness or mala fide on the part of the employer in not appointing Mubita to the position of chief artisan grade A. Mubita did not have an appropriate trade certificate as he qualified as a motor mechanic and this job requires carpentry, electrical or fitting and turning. Furthermore Mubita has only eight years' post qualification experience as an artisan or artisan foreman. Mubita has failed to prove on a preponderance of probability that the employer committed an unfair labour practice when it eliminated him at the shortlisting process as Mubita did not meet the minimum requirements in terms of an appropriate trade certificate and post qualification experience of ten years.
- (11) A commissioner's function is not to ensure that employers chose the best or most worthy candidates for promotion, but to ensure that when selecting employees for promotion, employers act fairly towards candidates. On the available evidence the employer acted rationally in making the appointment of Adams.

AWARD

- (12) I find on a balance of probabilities that Mubita was not subjected to an unfair labour practice in his non-appointment to the position as chief artisan grade A. Subsequently this case is dismissed.

G. McEwan

PANELLIST: Gail McEwan