



# ARBITRATION AWARD

Case No: **PSHS1076-18/19**

Commissioner: **Mr. Anand Dorasamy**

Date of award: **29 June 2020**

In the matter between:

**NEHAWU OBO VENJALINE BODASING**

Union/ Applicant

and

**DEPARTMENT OF HEALTH-KWAZULU NATAL**

1<sup>st</sup> Respondent

and

**GLORIA ZANELE DUBE**

2<sup>nd</sup> Respondent

---

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration proceedings commenced at 10H00 on the 24 June 2020 at the Eshowe Hospital Boardroom in Eshowe. The applicant lodged a dispute in terms of section 186(2) (a) of the Labour Relations Act (LRA) challenging her non- promotion.
2. Mr. Thulani Mthembu of NEHAWU represented to applicant, Mr. Sipiwe Cedric Sithole the first respondent and the second respondent represented herself.

### **ISSUE TO BE DECIDED**

3. I am required to determine the true nature of the dispute and whether it relates to whether the first respondent (employer) had perpetrated an act of unfair labour practice against the applicant in respect of her non promotion to the post of Human Resources Manager Eshowe hospital or relates to the transfer of the second respondent and the effect thereof. Should I find in favour of the applicant, I am to determine what relief should be granted to her.

### **BACKGROUND TO THE DISPUTE**

4. The applicant applied for the post but was not promoted.
5. The first respondent submitted that the promotion process was abandoned and the second respondent applied for and was transferred to the post in terms of the respondent's policy for transfers.
6. The first respondent believed that the matter does not relate to promotion but to the transfer of the second respondent.
7. There was a jurisdictional Ruling by Commissioner Mr Khehla Khanyile on the 15 April 2019 where he recorded "The applicant is directed to join the Appointee in the matter."
8. The Appointee was asked to attend the hearing and advised of her rights and she elected to attend the hearing and represent herself.

### **SUMMARY OF EVIDENCE**

#### **APPLICANT'S SUBMISSION**

9. The salient aspects of the applicant's submission are recorded below.
10. The applicant will prove that she was unfairly treated in the promotion in respect of the Human Resources Manager at the hospital. The first respondent contravened the Recruitment and Appointment Policy and Circular NO. 43 of 2011.
11. She prays that the post be re-advertised.
12. The applicant referred a dispute relating to unfair labour practice in respect of promotion. The respondent chose to take the second respondent on transfer.
13. She approached the CCMA for the disclosure of documents and was provided with documents. The candidates were interviewed and the second respondent scored 63% and the applicant 47%. The minutes of the interview process were signed by the panelists and the second respondent was recommended to the post.

14. The second respondent did not receive a letter for the post. It is alleged that she did not have a driver's licence and should not have been short-listed for the post.
15. If the post was aborted then all the candidates should have been informed that it was aborted.

### **FIRST RESPONDENT'S SUBMISSION**

16. The salient aspects of the first respondent's submission are recorded below.
17. The first respondent did not act unfairly towards the applicant in that the second respondent applied for the post with the applicant and they were interviewed but the post was thereafter aborted and there are documents to that effect namely Circular 70 of 2016 which was an instruction that the process was to be stopped.
18. The first respondent's case is that the second respondent was occupying a similar post and she applied for a transfer and was transferred after all due processes were followed.
19. The first respondent prays that this matter is dismissed because the Council does not have jurisdiction in issues of transfers as it forms part of an administration action.

### **SECOND RESPONDENT'S SUBMISSION**

20. She applied for the post and came for the interview but was not informed if she was found suitable or not but a Circular was issued.
21. Then later she applied for transfer and it was approved by Head Office and that is the reason she is at Eshowe hospital.
22. She prays to remain at the hospital because her transfer was approved.
23. At the time of the advertisement for the post she had her driver's licence.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

24. There are two processes that arise from the evidence. The one in respect of the promotion post and the second the issue of transfer.
25. This matter was cited as an unfair labour practice dispute in terms of Section 186 (a) (b) of the LRA. I need to determine from the submissions the true nature of the dispute because the applicant contends that is a promotion dispute whilst the respondents contend that is a matter related to a transfer.
26. The following are recorded for completeness:

27. In *Hotbake Systems (Pty) Ltd t/a The Rich Corporation of SA v CCMA and others* (2019) 40 ILJ 1516 (LAC), the Court noted;

*“[21] The determination of the true nature of the dispute is a factual enquiry which may at times only emerge during the proceedings. In Commercial Workers Union of SA v Tao Ying Metal Industries and others [2009] (2) SA 204 (CC) ;( 2008) 29 ILJ 2461 (CC); 2009 (1) BCLR 1 (CC) the Constitutional Court held that:*

*“A commissioner must, as the LRA requires, ‘deal with the substantial merits of the dispute’. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process, which helps to define the disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms, which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.” (emphasis added).*

28. In *James and another v Eskom Holdings SOC Ltd and others* (CA 8/16) [2017] ZALAC 39; (2017) 38 ILJ 2269 (LAC) (handed down on 13 June 2017), .....

*“Therefore, while a Commissioner is not bound by the description of a dispute in the 7.11 form, he ought to consider the detailed description/ or summary of the dispute contained therein, and in the event that same falls short in revealing the true nature of the dispute, then the Commissioner may assume provisional jurisdiction and consider the evidence in a bid to determine the true nature of the dispute and his/her power to pronounce on same.*

29. In the referral form the Nature of the Dispute is referred as an Unfair Labour Practice dealing with Promotion.

30. Under Summarise the facts of the dispute you are referring the following are recorded:  
*The employer advertised the post of Human Resource Manager at Eshowe hospital. Shortlisting and Interviews were conducted.*

*The post was not filled after the recruitment and selection processes without valid reason/ unknown reason.*

*The applicant was one of the candidates who applied for the post of Eshowe Hospital HRM.*

*The employer fill that post with one of the candidates who applied for the post through transfer.*

*The employer breach the recruitment and selection policy of the Department.*

*The employer also did not follow the proper procedure and the transfer policy of the Department of Health when filling the post of HRM which was advertised when accepting the current HRM and the transfer from Ceza Hospital Ms G Z Dube who was on precautionary suspended at Ceza Hospital because of the allegation of misconduct.*

#### **6. OUTCOME REQUIRED**

*The transfer of Miss G Z Dube must be withdrawn. Eshowe HRM post be advertised and Ceza Hospital post of Human Resources Manager must be not fill put on hold in terms of appointment until the arbitration award for the matter.*

*Arising from the above it is clear that Ms Dube had met the requirements for the post and was the recommended candidate. The process was then aborted and there are Circulars to this effect. Hence as it is the prerogative of the employer to fill or not fill the post, the employer decided despite Ms Dube being the recommended candidate, not to fill the post. No letters of appointment was furnished to any candidate that applied for the post.*

*After the above decision not to fill the post the applicant applied for a transfer to the institution. Her application for transfer was approved and the following are recorded in her letter of transfer:*

**APPROVAL FOR TRANSFER OF MRS G Z DUBE FROM CEZA HOSPITAL TO ESHOWE HOSPITAL**

*Kindly be advised that approval has been granted for the transfer of Mrs Dube from Ceza Hospital to Eshowe Hospital with effect from the date of assumption of duties.*

31. The transfer of Mrs Dube is without change in her rank and salary level.
32. The factual position is that the post of HR Manager at Eshowe Hospital was advertised but the employer decided not to fill the post. Thus, the promotion process ended with the employer taking a decision not to fill the post via the Selection and Recruitment process relating to promotion.

33. Therefore, there is no real or true dispute about promotion as nobody received a letter of appointment authorised by the Head of Department.
34. This dispute then moved to the transfer of Ms Dube from Ceza Hospital to Eshowe Hospital. All the processes in terms of the transfer were followed culminating in the transfer of Mrs Dube.
35. In order to deal with the issue of challenging the transfer one needs to look the Dispute Referral form of the Council and in section 3. NATURE OF THE DISPUTE and under Unfair Labour Practice item 4 Benefits (salary issues/leave pay/ transfer excluded). Therefore, as this dispute in real terms relates to Ms Dube's transfer no determination can be made in this regard.
36. As a consequence of the above I determine that the matter be dismissed and the applicant is not entitled to any relief.
37. In respect of costs I do not believe that any party behaved unreasonable during the proceedings and I elect not to order costs against any party.

#### **AWARD**

38. The first respondent did not perpetrate any act of unfair labour practice against the applicant.
39. The application is dismissed.
40. There is no order as to costs



Anand Dorasamy