



ARBITRATION AWARD

Commissioner: **Janine Carelse**

Case No: **PSHS1103-19/20**

Date of award: **28 January 2021**

In the matter between:

PAMELA PRUDENCE MANGOLOTI

APPLICANT

and

DEPARTMENT OF HEALTH- NATIONAL

FIRST RESPONDENT

PHUMLANI NTLANGANISO

SECOND RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was initially set down for hearing on 20 October 2020 and a joinder ruling was issued for the successful candidate to be joined as the second respondent. The matter was adjourned to 16 November 2020 and on that day the applicant's representative requested a postponement, as the respondent submitted their bundle late and contrary to the agreement between the parties. The postponement was granted to 13 and 14 January 2021. The matter proceeded on these dates and was finalised. The proceedings were digitally and manually recorded, and the matter proceeded in English.

2. The applicant was present and represented by Mr. I Amod, an attorney at Parker Attorneys. The first respondent was represented by Mr. Mabula, a labour relations official employed in the respondent's labour relations unit. The second respondent was present and represented by Mr Wildschut, a NEHAWU official. The applicant referred an alleged unfair labour practise dispute relating to promotion.
3. Both parties handed in bundles of documents on which they relied in support of their cases. The applicant's bundle was marked bundle "A" and the first respondent's bundle was marked bundle "B".
4. Mr. Mani, the interpreter, was present to interpret from Xhosa to English and vice versa, when required.

ISSUE TO BE DECIDED

5. The issue to be decided is whether the first respondent committed an unfair labour practice against the applicant when it failed to promote her to the position of chief forensic analyst.

BACKGROUND TO THE MATTER

6. The applicant is employed by the first respondent as a forensic analyst in the blood alcohol section. The applicant applied for the promotion post of chief forensic analyst. She was subsequently shortlisted and interviewed, however, the second respondent was successful and appointed into the post. The applicant challenges the appointment, alleging that she was the best candidate and that she should have been appointed into the post. She challenges both the substantive and procedural fairness of the promotion appointment. The applicant seeks to be promoted to the position of chief forensic analyst.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence

Applicant's Evidence

7. The applicant gave evidence under oath and stated she has a BTech in Chemistry and that she worked in the pharmaceutical and petroleum industry. She commenced her employment with the first respondent on 5 March 2012 in the blood alcohol unit as a forensic analyst. She was assessed by the South African National Accreditation System (SANAS) and became qualified as a technical signatory. It is essentially a competency assessment. She was further trained by the section head of the unit. The Cape Town blood alcohol lab is a SANAS accredited lab, whereas the other blood alcohol labs in the country are not SANAS accredited (Page 18 of bundle A). She applied for the chief forensic analyst position on 18 April 2018. She stated that her work as a forensic analyst is to prepare samples to be analysed and she interprets the results. She goes to court if she needs to give testimony on it.

8. She averred that the labs are divided into three sections – food, blood alcohol and toxicology. The food and toxicology sections are not SANAS accredited. In the blood alcohol section, you must be trained to perform the lab activities and you must know the standard operating procedures. At one point, she was appointed as a deputy where she had to assist the section head with his duties. She was required to check the spreadsheets and whether everything was done according to the procedure. This happened between February 2018 and June 2018. During this period, she was also required to train the analysts and to authorise them. The reason why she was chosen to act as a deputy is because she is also a technical signatory. She contended that in terms of paragraph 3,7 of the internal policy on the organisational structure, resources required and personnel, it states that the lab must use competent personnel who have current training and who are authorised to perform the accredited activities of the lab (Page 16 of bundle A). The training involves how to use the instruments and samples. Paragraph 3,9 of the policy states that section heads must be technical signatories.

9. She further referred to paragraph 4.8.2 of the policy which provides that chief forensic analysts are also responsible for the rudimentary general management, in a specific section, to act as mentors and to assist the section head with the training, supervision and assessment of personnel; the checking of results, statistical evaluation and interpretation of statistical data; the prevention maintenance of equipment; method developing, validation and verification and the compiling and reviewing of section documents and QMS (Page 17 of bundle A). She referred to a list containing the names of several people who have been accredited by SANAS and it is clear that her name is on the list and not the second respondent which means that he is not SANAS accredited (Page 19 of bundle A).
10. The interview for the chief forensic analyst post was held on 6 June 2019 and on 9 June 2019 she received a phone call from Nancy Mafikeng (Mafikeng) that they needed to verify her matric certificate. She went to the Department of Education and applied for her certificate and informed Mafikeng that she will receive it in four to six weeks. When she received it she sent it to Mafikeng. On 12 September 2019 she heard through the grapevine that the second respondent was appointed. On 19 September 2019 she sent an email to Mafikeng and she asked where she needed to improve and where she went wrong and on 26 September 2019 Mafikeng said that the process is not yet completed because another post needs to be filled and if she is not successful with the other post then she must enquire. She wrote an appeal letter on 30 September 2019 to Mafikeng's boss because she wanted the original score of the panel. At the time Mafikeng said that she was not aware that the position was filled, whereas the second respondent said that he was called by Mafikeng. On 1 October 2019 Mafikeng said that now she is aware that post has been filled and they will respond with the appeal letter.
11. She contended that ultimately, she does not believe that the second respondent should have been appointed because he does not have a training record to work in the blood alcohol lab and the internal policy of the respondent is clear that the person must be competent to work in the lab. She referred to the interview minutes and stated that for question 2, three of the panellists rated the second respondent a 2, whilst two of them rated him a 5, albeit that his answer was a no, meaning that he did not have any experience in that particular area of work. She was rated differently by two different

panellists. She was shocked when she got a 1 and another one gave her 4 because the 1 rating indicates that she has no knowledge of equipment.

12. Under cross-examination she stated that the respondent did not act fairly when it promoted the second respondent. She conceded that the respondent did not miss a step in the recruitment process. She stated, however, that the respondent did not follow its own internal policy. The second respondent did not have the training records and was not cleared by SANAS and the chief forensic must be able to assist the section head when he is not there. She averred that the second respondent was not trained in blood alcohol. She contended that SANAS has a specific standard and only an accredited person can perform the accredited functions.

13. She conceded that the respondent did not do anything wrong shortlisting her and the second respondent because they had all matched the requirements of the post. She stated that SANAS comes in with quality management. She conceded that SANAS is not mentioned as a requirement for the post. She stated that the first respondent did not follow the quality management standards and the internal blood alcohol policy. She stated that with an accredited lab you must have a training record and the second respondent does not have training in blood alcohol. She acted for six months assisting the section head. She conceded that when you act, it does not mean that you will get the post. The feedback was that she was performing well. She averred that she had a problem with hearing from other people that the second respondent was appointed, and they were supposed to inform her directly that she does not qualify for the post. She stated further that the first respondent did not follow a fair recruitment process, they used pencils and not pens, and different people scored differently, and she has a problem with that. Furthermore, they did not follow the internal blood alcohol policy.

14. Ms. Neliswa Mdunana (Mdunana) testified under oath on behalf of the applicant and stated that she has a degree in chemistry, and she has been employed by the respondent for 10 years and she works in the same department as the applicant as a forensic analyst in the Cape Town lab. She is also a technical signatory. To become a technical signatory, you must be assessed by SANAS, whereafter you are deemed competent and you become a technical signatory. The lab must prepare using the standards and requirements of SANAS under the ISO 1725. She stated that according to the lab you

must be a technical signatory and if you are a chief forensic analyst you must be a technical signatory. There are many forensic analysts who are not technical signatories. The second respondent did not do training. The applicant on the other hand worked in the section for many years, she is a technical signatory and she was acting chief forensic analyst for some time. She believes that the applicant has the best subject knowledge.

15. Under cross-examination she stated that she has been working with the applicant for nine years. The applicant has more knowledge of the blood alcohol section than the second respondent. She stated further that the first respondent did not follow the internal lab policy because the first respondent did not appoint a competent person. She averred that when a policy is drafted it is drafted to be followed and it was not followed in this case. The Cape Town lab operates under the requirements of SANAS. She conceded that the post does not state that SANAS accreditation is required. She conceded that the lab is a sub-component of the National Department of Health. The second respondent must have a training record and he must be able to assess the work of the analyst because he gives permission to print the reports. He is the supervisor of the analysts.
16. Under re-examination she averred that a person cannot train other analysts if the person himself is not trained. She stated that analysts who are not accredited by SANAS do sign off their own reports, even if they are not technical signatories, however, a technical signatory's report weighs more.

First Respondent's evidence

17. Ms. Alida Grove (Grove) testified for the respondent under oath and stated that she drafted the advert of the chief forensic analyst post. She is familiar with the duties of the post. The chief forensic analyst position is there to assist the assistant director, who is the section head, administratively. The intention is to rotate the chief amongst the three sections and therefore they must have knowledge of all three sections. She averred that ISO17025 is an international guideline for how to perform admin work and keep records. It is a broad guideline that is applied, and all four labs work according to this standard, even if they are not accredited. The requirements are the same for all of the labs. She

averred that she was the chairperson of the interviewing panel. She stated that all of the candidates were interviewed and all of them were asked the same questions and the panellists scored each of the candidates according to how they responded to the questions and a candidate was recommended to the executive authority. The questions covered all three of the sections and they wanted to cover the knowledge of all three of the sections.

18. The second respondent was appointed as the successful candidate. She did not receive any complaint or concern about processes that were undertaken before and after the interview. The labs are not required to be accredited by SANAS, but they decided to have the lab in Cape Town accredited. If they have the SANAS logo on their reports then it is more of a status thing. It is not a requirement. They perform the same work and issue the same reports, but they do not attach the same SANAS logo to the reports. Their clients are the SAPS and forensic pathology services mortuaries and there are no complaints or questions that the other labs are not accredited.

19. The labs work according to ISO 17025 even if not accredited. The only difference is in an accredited facility the analyst would attach a SANAS logo on the report and if not, a technical signatory they don't attach the SANAS logo. There is no difference. The report is signed by the analyst who tested the sample. A technical signatory was not a requirement for the post. During the interview process the second respondent was not the most suitable candidate and they appointed the most suitable candidate. During the interview process all of the panel members scored individually. All the scores were tallied and the person who came out with highest score was recommended. The experience is used to short list the candidates and in the interview, they are scored only by the way they respond to the questions. She is convinced that they did appoint the most suitable candidate.

20. Under cross examination she stated that she has been working in forensic chemistry since 1991 in the National Department of Health. She started as an assistant forensic analyst and in 2011 she was appointed as the Director. She specialises in forensic toxicology and blood alcohol. She worked for the SAPS and she came to Pretoria as head of the lab. There will be slight difference here and there in the way the labs function. Their overall aim is to standardize everything. The performance of the labs varies, and it

is not a competition because not all labs have the same number of analysts and the same amount of equipment. They all adhere to the guidelines of ISO 17025. She contended that it was an internal decision to have the Cape Town lab accredited. Accreditation is a very costly exercise and to be licensed and be certified by SANAS is not free. The law does not require them to be accredited. She contended that there is no pressure from the Cape Town side to be accredited. She does not have SANAS accreditation.

21. She averred that all the analysts are trained in the same way, but you have to prepare for an assessment of how the procedure is done and what it entails. There is no difference between a person who is accredited and somebody who is not accredited. When people are appointed, they are trained on how to do the analysis. They must explain to courts the techniques being used and they do the same work. They go through the same training. She contended that in all of the interviews she scores low. She has high standards. She averred that Schillick is the head of the lab and Jacobs also has many years of experience. In an interview you are tested and how you respond there is how you score. She averred that they could use anything to use to fill out the forms, pencil or pen.

22. She stated further that LIMS is laboratory information management system. If somebody answers no, then the lowest they would score is 3 and if yes it would be a 5. $13 \div 3 = 4,6$. When they decide on who is the most suitable candidate, they look at all the scores. The score sheets of all the panellists are looked at and not only one panellist. The panellists score on how they perceive. She conceded that the second respondent's score was scored inaccurately by an additional 0.2 points. ISO 17025 is not a requirement for shortlisting. All labs follow ISO 17025. A requirement of shortlisting was knowledge of ISO 17025. It was tested in the interviews through the questions that were asked.

23. She contended that the internal policy document that was referred to by the applicant and her witness did not form part of the recruitment. Accreditation was not a requirement. It was stated specifically in the advert. Technical signatory is not a requirement of the job. The candidate has a chance in the interview process to show what they are worth.

The way the candidates responded is how they were scored. There was no disadvantage or unfairness. The machines do the same work and the techniques are taught at tertiary level and are universal. She stated that in Durban the second respondent performed 1000's of blood alcohol tests. He has been in court numerous times and he has testified successfully. He has been doing the work for many years. She signs the travelling claims and that is how she knows. She has never received evidence that was rejected in court that was testified to by the second respondent. She stated further that the second respondent's training record is not relevant to his appointment.

24. Ms. Nancy Mafikeng (Mafikeng) testified for the respondent under oath and stated that she is the assistant director HR planning and policy at the National Department of Health. She recalls the applicant's interview and she played a role as a HR practitioner. She has been in HR for more than 10 years. She averred that in this case, the executive authority has the authority to promote an employee. She had to ensure that there is fairness in the recruitment process and that all candidates are treated fairly and are asked the same questions. She played the role of an HR practitioner. She averred that her job starts at the advert stage and the shortlisting stage. She stated that the HR unit will receive a request from the line manager to say they have a vacant post to advertise. They would advertise the positions and receive applications. They screen the applications and request the executive authority to approve the panel who will come up with criteria for shortlisting in terms of job description and advert. They shortlist and invite the shortlisted candidates for interview. The panel will sit and draft the questions and they would recommend, and they are expected to score the candidates. The candidate with highest score is recommended to the executive authority.

25. She stated further that they have an HR questionnaire and she is required to ask the candidates if they are comfortable with the process and whether they think that it is fair. According to the forms the applicant was happy with the interview and did not raise any questions. The internal policy of the lab is not part of the requirements that have been captured on the advert. They cannot add anything that is not on the advert. The second respondent was recommended for the post and she did not receive any complaint about him being appointed. The other applicants did not raise any concern. The scores were compiled and consolidated by her. The scores will be consolidated and translated to a

person being the highest score. The outcome is purely based on the interview and how they articulate themselves at the interview.

26. Under cross examination she stated that she cannot remember the dates that applicant requested the feedback. She attended the interview on 6 June 2019 and the results of the interview was made public, but she cannot recall the date that the announcement happened. When the applicant called her, she told her that they cannot give feedback now because they can only give all the information once another post was finalised which was not part of the advertisement. This post eventually did not transpire. She did not tell the applicant that she was considered. It would have been the same post with the same requirements and at the same level. She averred that it is not strange for them to contact somebody six months after an interview.

27. She stated further that they were hoping that the respondent would meet the employment equity target that disabled people would apply. In this instance she had the file and she gave the applicant the feedback. She further informed the second respondent. There is no way that she could have told the applicant that she was not aware that the post was filled. She contacted the second respondent to tell him that he was successful. It is understandable that people can have issues after having filled out the form regarding the manner in which the interview was conducted. She was referred to an email that she sent the applicant wherein she indicated that she was aware that the post was filled. She cannot recall when she informed the applicant when the second respondent was promoted. There is nothing suspicious about her informing the applicant about the second respondent. She can only inform the person once the successful candidate is advised and accepts the offer of employment.

ANALYSIS OF EVIDENCE AND ARGUMENT

28. It is trite law that an employee who alleges that the employer perpetrated an unfair labour practice relating to promotion bears the onus of proving the claim on a balance of probabilities. It is a well-established principle that employees do not have a right to be promoted in the ordinary course and that they only have a right to be given an opportunity to compete for a position. In *Noonan v Safety and Security Sectoral Bargaining Council*

and Others [2012] 33 ILJ 2597 (LAC), the Court confirmed that an employee must be given a fair opportunity to apply for a post and to be considered and unless the selection process is rigged or arbitrary, an arbitrator ought not to intervene. A process will be rigged if it is motivated by improper consideration such as discrimination, victimization or corruption. The Court went on to hold that it will be arbitrary if the decision has little or no rational basis. (See also *City of Cape Town v SAMWU obo Sylvester & others* (2013) 34 ILJ 1156 (LC).

29. The applicant's case is essentially that the first respondent acted unfairly and arbitrary when it promoted the second respondent to the position of chief forensic analyst. She claims to have been the best candidate for the position, given her experience in the blood alcohol section, the fact that she is a technical signatory and accredited by SANAS and because she had acted in the position of chief forensic analyst in the Cape Town blood alcohol section for a period of six months. The applicant averred that the first respondent failed to comply with its internal laboratory policy by appointing a person who is not competent in the blood alcohol section. It is further her case that the second respondent does not have a training record in the blood alcohol section and will not be able to supervise and mentor his subordinates.
30. The first respondent's key witness, Grove, who is the director and oversees the laboratories in the country, testified that she drafted the advert for the position and that it was not a requirement of the post that the candidate be SANAS accredited. She stated that all of the labs are guided by and use ISO 17025, which is an international standard. She averred that this applies whether or not the lab is SANAS accredited. There are analysts who are SANAS accredited and there are analysts who are not SANAS accredited, however, everybody does the same work. The only difference is that a technical signatory will be able to complete and sign a report with a SANAS logo on it. She indicated that it is a mere "status thing". She contended that she is not a technical signatory and SANAS accredited. She stated that the second respondent met the requirements for the post and the applicant conceded that the second respondent had met the requirements for the post, as stated in the advertisement of the post.

31. Grove further stated that the second respondent was the best candidate at the interview and was recommended by the panel to be appointed as the chief forensic analyst at the Cape Town lab. She averred that she is personally aware that the second respondent worked in the blood alcohol section before and that he had conducted 1000's of blood alcohol tests and testified in court on several occasions and testified successfully. She bears personal knowledge of this because she signed off his travel claims. She stated that the second respondent fared the best at the interview because he was able to articulate what he knows, and this is what matters; how the candidates answer the questions at the interview. Grove came across as a very strong and credible witness.
32. It should be noted that the internal laboratory policy on which the applicant relies, does not state that the chief forensic analyst must be a technical signatory. It does however categorically state that the section head must be a technical signatory.
33. Grove, who testified on behalf of the first respondent, further clarified that the panel members of the interview were allowed to use either pen or pencil to complete the score sheets and that there were no requirement for them to complete it in pen. She further clarified the issue relating to the marking by the panelists and stated that when a candidate indicates that he/she did not do the work and know the answer, the score will be a 3. She explained that this was done according to the laboratory information management system. She further conceded that the second respondent was incorrectly afforded an additional 0.2 points by the panel. In this regard, I noted that the second respondent still scored the highest and remained the best candidate, despite the additional 0.2 points. Once again, Grove came across as a reliable and credible witness and I did not identify anything suspicious or peculiar about the way the panel had scored the second respondent.
34. The applicant contended that she was the acting chief forensic analyst in the blood alcohol section for the period of six months and whilst she was acting, her work performance was exemplary. I agree with Grove when she testified that the applicant is not entitled to be promoted on the basis that she has previously acted in the position. The applicant is obliged to go through the same process as the other candidates. This is what is fair and as Grove rightly stated that it depends on how the candidates answer

the questions and whether they can properly articulate what they know that matters. The scoring is wholly dependent on this, which ultimately determines who the best candidate will be.

35. The applicant's contention that she has an issue with the fact that different people score differently defeats common sense. Grove rightly testified that that is the main reason why they have several panelists, as people cannot be expected to score the same and people score according to what they perceive to be correct.

36. With reference to procedural fairness, the applicant further contended that the respondent failed to follow a fair recruitment process but by the same token conceded that the respondent did not miss any steps in the recruitment process. Mafikeng testified about the steps that the respondent followed in the recruitment process and I am satisfied that it was done fairly.

37. The *Labour Court in Minister of Police v Safety and Security Sectoral Bargaining Council and Others* (JR2339/15) [2018] ZALCJHB 136 (29 March 2018) had this to say :

"....It is not the duty of an arbitrator to assess an employee for promotion. The duty of an arbitrator is to assess the fairness or unfairness of the failure to promote and not to assess promotability....."

38. In the result, I find that the respondent did not act arbitrary and/or unfairly when it failed to promote the applicant to the position of chief forensic analyst at the blood alcohol laboratory in Cape Town.

AWARD

39. The applicant was not subjected to an unfair labour practice relating to promotion in terms of section 186 (2) (a) of the LRA.

40. The applicant’s claim is dismissed and she is not entitled to any relief.



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Janine Carelse