



ARBITRATION AWARD

Panellist/s: John Robertson
Case No.: PSHS117-10/11
Date of Award: 30-Jun-2014

In the ARBITRATION between:

Masiza, P.N.
(Union / Applicant)

and

Department of Health - Eastern Cape
(Respondent)

Applicant's Representative: Mr T Vellem Attorney
Applicant's address: Vellem Somhlahlo Attorneys _____
P.O. Box 395 _____
Queenstown _____
5320 _____
Telephone: 084 899 2402 _____
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1st 2nd & 3rd Respondents' Representative: Adv M Booi instructed by the State Attorney _____
Respondent's address: The State Attorney _____
East London _____
Telephone: 082 474 9881 _____
Telefax: 041 582 1126 _____

4th Respondent/Representative: No attendance

DETAILS OF HEARING AND REPRESENTATION

- 1 This matter was heard in Queenstown on 2 and 3 June 2014.
- 2 Mr Vellem an attorney represented Ms PN Masiza (applicant). Adv M Booie instructed by the State Attorney East London represented the 1st 2nd and 3rd respondents namely the Member of the Executive Committee for Health Eastern Cape Provincial Government (MEC), the Head of Department (HOD) for the Department of Health Eastern Cape and the Department of Health (DOH) hereinafter referred to as the respondent. Apart from attending one of the initial hearings Ms MN Sodlula did not attend and neither was she represented. The parties entered into a written statement of agreed facts and submitted argument thereon.

ISSUE TO BE DECIDED

- 3 The issue to be determined is whether:
- the applicant should have been shortlisted for the post of Director Mother Child and Women Health and Integrated Nutrition Programme (MCWH & INP) Ref No. SM/MCWH/BHD/09 a Senior Manager's post (Senior Management Services (SMS)) at level 13
 - the applicant was unfairly denied the opportunity to present her candidature
 - the 3rd respondent committed an unfair labour practice relating to promotion in failing to shortlist and interview the applicant in respect of the post in question.

Dependent on the above, appropriate relief

BACKGROUND

- 4 The facts agreed between the parties sets out the background as follows:
1. *At the time in question (March / August 2009) the applicant was the Deputy Director Planning and Reporting, (post level 11) at Joe Gqabi District Office. During 2012 and 2013 the applicant acted as CEO of Empilisweni District Hospital, Joe Gqabi District, but at the rank of Deputy Director, post level 11. The applicant was promoted to the post of CEO Empilisweni Hospital (post level 12) with effect from 1 February 2014.*
 2. *Prior to her appointment in Planning and Reporting, Joe Gqabi District Office, the applicant was the MCWH Programme Manager for the Maletswai Sub District for 2002 to 2004 and at Senqu Sub District for 2004 until 2007 as Assistant Director level 9. In 2007 the applicant returned to Maletswai as Programme Manager, Assistant Director, level 10 for one year until end March 2008.*

3. *The post of Senior Manager (now referred to as Director) MCWH&INP an amalgamation of the existing MCWH and INP was advertised in the National and Local media during March 2009 (Daily Dispatch of 09 March 2009) with a closing date of 27 March 2009 (A1).*
4. *The applicant together with others (36 in total) applied for the post of Director MCWH&INP (post level 13), their names and details being reflected on the master list (A3-7). The applicant was not shortlisted for the post, received no acknowledgement of her application or that she had not been shortlisted. The advertisement (A1) at the foot thereof states that correspondence will only be entered into with shortlisted candidates.*
5. *The minimum requirements for the post as per the advertisement (A1) were as follows:*
 - *Bachelors Degree in Health related field*
 - *A minimum of 5 years management experience in health services*
 - *A sound understanding of the functioning of the public service health systems is required*
 - *Knowledge of service delivery turn around and change management strategies will be an advantage*
 - *Computer literacy and driver's license*
6. *The applicant qualified in terms of the above criteria in that she:*
 - *Held a Bachelors degree in a health related field namely a BA in Nursing Sciences (A00)*
 - *Held an Honours degree in Nursing Science (A26) (Health Service Management)*
 - *Held an Honours degree in Health Studies (A27) (MCWH and Advanced midwifery)*
 - *Had a minimum of 5 years management experience in health services*
 - *Had knowledge and experience of service delivery, turnaround and change strategy*
 - *Was computer literate and held a temporary driver's licence issued on the expiry of her previous licence, while awaiting her new driver's licence*
7. *36 candidates applied as reflected on the master list (A3-7). Of these 36:*
 - *21 candidates, including the applicant were not considered for short listing, yet they possessed the relevant qualifications (see 1 to 21 in column 5 of the Master list).*
 - *Of the 5 shortlisted candidates only two, Nkohla and Kama had a degree in a health related field*
 - *Of the 5 shortlisted candidates two had written in, in hand, in column 1, the word "No" (Sodlula and Nteyi)*

- *Of the 36 names on the Master list, two candidates in addition to the candidates shortlisted, had the word “Yes” written in hand in column 1 of the Master list, see No. 11 and 27 in the 1st column, (marked A and B in the 5th column) of the Master List.*

8. *5 candidates (Kama MN, Manyakanyaka FT, Nteyi MV, Sodlula NM, Nkohla MV) were shortlisted and interviewed. The interview panel was composed of Dr N Diliza Deputy Director General (DDG) Clinical Services (Chairperson), Dr T Mjekevu CD DHS and Mrs ZZ Macingwane CD DHS. Interviews were held on 2 June 2009, the panel using the same questions and interview assessment forms for all candidates, scored Sodlula, Manyakanyaka and Nteyi the highest namely 238, Nkohla and Kama were placed 2nd and 3rd respectively. The interview panel recommended the 4th respondent (Sodlula) who was subsequently appointed to the post (A178), with effect from 1 August 2009.*

9. *The common cause facts, findings of fact and law made in the award dated 25 February 2013, under case reference PSHS669-09/10 & PSHS736-09/10, which dealt with the same appointment process which forms the substance of this dispute are accepted in so far as they are relevant to this matter.*

10. *Procedural fairness was placed in issue between the parties in so far as the short listing, interviews and recommendation were concerned*

5 It was the applicant’s case that:

- She met all the requirements and possessed the necessary qualifications and experience for the post as advertised.
- In view of the fact that she had an Honours degree in MCWH and Advanced midwifery and 5 years (2002-2008) relevant experience in MCWH, compared to Sodlula, should have been short listed
- In not short listing her for interviews for the post in question the respondent denied her the opportunity of presenting her candidature
- Had she been short-listed she would have been appointed/promoted as she was the most qualified and experienced person for the position.

6 In the event she was to be successful, given the passage of time and the potential disruption to the respondent’s administration, the applicant did not seek an order that the process be redone. In addition, in so far as the applicant was not assessed, she was unable to seek appointment to the post

or promotion within her own post to the same level and accordingly sought relief sounding in compensation

- 7 It was the 3rd respondent's case that the applicant did not qualify to be short-listed. That in any event given the number of applicants and their qualifications the applicant could not prove she would have been shortlisted above the others. The 3rd respondent also argued that, in the event the applicant were successful, which they denied, relief should not be granted as this would open the door to other applicants that had applied and had not been shortlisted. The 3rd respondent sought that the applicant's claim be dismissed and the *status quo ante* remain

SURVEY AND ANALYSIS OF EVIDENCE

- 8 I have considered all the evidence and argument, but because the Labour Relations Act no. 66 of 1995 (LRA) requires brief reasons (Section 138 (7)), I have only referred to the evidence and argument necessary to substantiate my findings and award.
- 9 Paragraph C2.2 of Ch 1 Part VII of the Public Service regulations (PSR) requires that an advertisement for a post shall amongst other things specify the inherent requirements for the post and at paragraph D5 (b) the selection committee can only make a recommendation on the suitability of a candidate after considering amongst other defined criteria, the training, skills, competence and knowledge to meet the inherent requirements of the post
- 10 The advertisement in question, see paragraph [5] above, amongst other things requires that candidates possess a "Bachelor's Degree in [a] health related field" and "[a] minimum of 5 years management experience in health services".
- 11 The Deputy Director General (DDG) Clinical Management Services, who was the chairperson of the selection panel, states that 36 applicants responded to the advertisement of the post and that "*After scrutinizing the applications, the panel short listed five (5) candidates*"¹. No information is given as to the basis on which the short listing was done.
- 12 It appears from the master list (A3-A7) that some candidates who qualified were not shortlisted and some who did not qualify were short-listed. Of the 5 candidates shortlisted 3, (who appear on the master list at No. 22, 3 and 20 respectively (A3-A5)) i.e. Ms Manyakanyaka, Ms Nteyi and Ms Sodlula

¹ See A175-A176

(the 4th respondent), did not possess a Bachelors degree in a health related field. It is to be noted that this does not go to the suitability or not of the candidates in question, but to their qualification to be considered for the post in terms of the advertised minimum criteria. No explanation for short listing these candidates is given and the only inference to be drawn is that the short listing panel / selection panel acted without reason, arbitrarily and irrationally

- 13 The selection of candidates for interviews for a post where they do not meet the requirements of the post, unless such requirement has been relaxed and such relaxation has been published, alternatively the advert makes provision for an equivalent qualification which is met by the candidate in question and properly certified as equivalent by SAQA is not only irregular and amounts to unfair competition but denies those who qualify or (as in this case, although it is not suggested that the short listing of candidates who do not qualify is appropriate), those who possess the same qualifications as those erroneously shortlisted, the opportunity of presenting their candidature. Furthermore it ignores an employee's right to the expectation of fair competition between candidates that at least meet the requirements set out in the advertisement in question.

- 14 To allow candidates who did not qualify in terms of the advertised minimum criteria, in this case Ms Manyakanyaka, Ms Nteyi and Ms Sodlula, to participate in the selection process and be shortlisted, while others including the applicant qualified, is contrary to the expressly worded advertisement, the policy and regulations of the 3rd respondent. This could and should have been identified at screening, preliminary selection and short listing, or prior to the interview panel making its recommendation and appointment, see the Senior Management Services (SMS) Handbook paragraphs 8.3(1), 8.4(2), 8.5(1), 8.7(3) and paragraph D.8 Ch1 Part VII of the PSR). In addition the MEC (i.e. 1st Respondent) is required before making a decision on the filling of a vacant post to satisfy him or herself that the candidate qualifies in all respects for the post and that the candidate's claims in their application have been verified and record this verification in writing (D.8 (a) and (b) Ch 1 Part VII of the PSR). Accordingly this was unlawful, irrational, arbitrary and unfair.

- 15 The failure to conduct proper verification of the candidates for short listing and interviews resulted in three candidates being shortlisted and a person appointed, none of whom met the required criteria, this is unacceptable. Several candidates who applied and met the requirements at least in so far as the degree is concerned were not considered. In the circumstances and in relation to the applicant, who more than qualified in terms of the criteria set out in the advertisement, the participation of Ms

Manyakanyaka, Ms Nteyi and Ms Sodlula in the interview processes was unlawful irregular and unfair².

- 16 I am of the view and find accordingly that the applicant has established that the conduct of the 3rd respondent in the promotion process in question was procedurally irregular and that in short listing 3 persons who did not qualify, (where the applicant more than qualified) interviewing and appointing one of them, acted unfairly in respect of the applicant. This does not mean that all the applicants who qualified and not shortlisted necessarily have a claim. They are entitled to refer disputes concerning unfair labour practices, each matter to be determined on its merits, but then within prescribed time frames. Given the lapse of time, in excess of 5 years, it would appear, *prima facie*, that they have waived their rights, if any, in this regard. The applicant referred her dispute in this matter within the prescribed time period.
- 17 An arbitrator is empowered to determine a dispute by way of an appropriate award on terms the arbitrator deems reasonable (Section 138(1), 138(9) read with 193(4) and 194(4)). It is axiomatic that if a labour practice is found to be unfair, fairness will have to be taken into account in arriving at a reasonable determination of the dispute. This is also in line with an employee's constitutional right to fair labour practices, which is reiterated at section 185(b) of the LRA. In summary an arbitrator may make an appropriate determination for the effective³ resolution of the dispute (in respect of an unfair labour practice referred in terms of the LRA), on terms, which the arbitrator deems reasonable based on fairness, procedurally and substantively⁴. In the event an arbitrator makes a determination contrary to that of the employer, this is not a review of the employer's decision but a determination based on the facts presented by the parties, by virtue of the provisions of the LRA⁵.
- 18 The 3rd respondent's failure to observe the criteria determined by it in the advertisement for the post, the selection of candidates who did not qualify, without reason, and the appointment of a candidate who did not meet the required criteria, when the applicant more than qualified for the post, prejudiced the applicant in so far as she was deprived of a fair opportunity to be shortlisted and dependent

² Khumalo and another v MEC Department of Education KZN [2012] 12 BLLR 1232 (LAC) [36], [39], [41] and [43]

³ See section 1 which reads as follows:

"Purpose of this Act. – The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the work place by fulfilling the primary objects of this Act, which are – ...

(c) to promote...

(iv) the effective resolution of disputes"

⁴ See Minister of Safety and Security v SSSBC and others (LC) JR2952/06 dated 2 December 2009 [15]-[19]

⁵ See Minister of Safety and Security v SSSBC and others (2010) 31 ILJ 2680 (LC) [24] & Minister of Safety and Security v SSSBC and others P186/08 P184/08 (23 March 2010) [15]

thereon to present her candidature. Given the fact that the three candidates in question, did not qualify and that the applicant more than qualified, especially in regard to the candidates in question, had the short listing process been properly conducted the applicant may well have been shortlisted and given the opportunity to present her candidature. In short she was denied the opportunity of fair competition on the basis of the criteria as advertised as against candidates who did not qualify. This is an opportunity lost and for which the applicant seeks compensation as a solatium. Although this is difficult to quantify, given the discussion above, the interests of both parties and the relief sought, I am of the view that compensation in the sum of three month's remuneration is just and equitable in the circumstances. At the time of the incident the applicant's remuneration was R 378 456.00 *per annum* and accordingly she is entitled to compensation in the amount of R94 614.00 (R 378 456.00 ÷ 12 x 3)

Costs

- 19 The applicant sought an order for costs including the wasted costs occasioned by the postponement of the hearing on 28 and 29 May 2014.

- 20 At a prior hearing the parties were not in a position to proceed and by agreement the matter was postponed to 2 & 3 June 2014. The matter was then however scheduled for an earlier date in May. The applicant's attorney, who was unable to attend the hearing on those dates, contacted the PHSDSBC and the matter was rescheduled for 28 & 29 May 2014. Applicant's counsel did not attend on 28 May 2014 and after telephoning him, Mr Vellem reported that he had told him he was unaware that the matter had been set down for 28 & 29 May 2014 and was still under the impression the matter was proceeding on 2 & 3 June 2014. He was unable to attend on the afternoon of 28 May or on 29 May as he was otherwise engaged.

- 21 In the circumstances and on hearing from Mr Vellem I postponed the matter by agreement to 2 & 3 June 2014, the issue of wasted costs occasioned by the postponement to be argued on completion of the case.

- 22 The 3rd respondent's counsel pointed out that at the time in question, he was on record as the respondent's counsel and that both his and the department's representative contact details was on record. Neither he nor the departmental official who accompanied him to the hearings had been notified of the changed dates. Had this been the case, he in the same way as the applicant's attorney would have informed the PHSDSBC that he was unavailable. In the absence of notification from the PHSDSBC or the 3rd respondent he had acted on the agreed dates and attended accordingly.

23 While it is so that the parties agreed on 4 March 2014 that the matter would proceed on 2 & 3 June 2014, it is also so that the PHSDSBC set the matter down for hearing on earlier dates, namely 28 and 29 May 2014. The notification of set down for the hearing on 28 and 29 May, addressed to the applicant, Department of Health Eastern Cape, MEC Department of Health: EC and HOD Department of Health: EC (A6) was faxed to the parties on 4 March 2014 as per the proof of faxing furnished by the PHSDSBC as follows:

Addressee	Fax No	Time	Prints	Result
Ms Masiza	051 633 4331	10:39	6/6	OK

The Department of Health

The MEC Department of Health

The HOD Department of Health

086 545 5091	10:17	6/6	OK
086 595 1694	10:19	6/6	OK
086 545 2051	11:05	6/6	OK
040 635 1128	11.42	0/6	NG ⁶

24 Faxes were transmitted to 3 of the 4-fax numbers of the respondents. The fact that the faxes reached the respondents but were not handed to the official in question or to respondent's counsel does not mean that delivery was not effected. The notification of set down was successfully faxed to the respondent's various fax numbers (see above, apart from one) and should have been duly registered and forwarded to the appropriate directorate / component and official for attention. This was not done resulting in counsel being unaware that the matter was proceeding on 28 and 29 May 2014 and the hearing having to be adjourned. This cannot be held against the applicant or the PHSDSBC. I am satisfied according to the requirements of the law and fairness that the 3rd respondent should bear the wasted costs occasioned by the postponement in question. Apart from the foregoing, I am of the view that a costs order is not appropriate in respect of the other hearings. In some cases there are no explanations for the delay, application for joinder had to be made and in others the matter could not proceed, as the applicant, due to lack of documentation was unable to. In the circumstances I make the following award:

⁶ NG stands for "other error"

AWARD

- 25 The 3rd respondent, in short listing three persons, who did not qualify, for the post of Director Mother Child and Women Health and Integrated Nutrition Programme (MCWH & INP) Ref No. SM/MCWH/BHD/09 a Senior Manager's post (Senior Management Services (SMS)) at level 13 and not short listing the applicant, Ms PN Masiza who did, committed an unfair labour practice (procedural unfairness) relating to promotion, against the applicant.
- 26 The applicant is awarded compensation in the sum of R94 614.00, being the equivalent of three month's remuneration at the time.
- 27 The 3rd respondent is ordered to pay the sum of R94 614.00 to the applicant, Ms PN Masiza PERSAL No. 52395308 within 30 days of the date of this award.
- 28 The 3rd respondent is ordered to pay the wasted costs of the PHSDSBC and the applicant, including the applicant's legal fees and travelling costs, occasioned by the postponement of the hearing on 28 and 29 May 2014.



Panelist: John Cheere Robertson

PHSDSBC