



# ARBITRATION AWARD

COMMISSIONER: C L DICKENS  
CASE NO. : PSHS 415-11/12  
DATE OF AWARD: 15 APRIL 2012

In the Arbitration between:

NEHAWU obo BAFANA JOSEPH MASHININI

APPLICANT

and

DEPARTMENT OF SOCIAL DEVELOPMENT: FREE STATE

1<sup>st</sup> RESPONDENT

THABO ISAAC MAHLABA

2<sup>nd</sup> RESPONDENT

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DEFAULT ARBITRATION AWARD

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## 1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1 An Arbitration hearing was scheduled for the 16<sup>th</sup> of January 2012 at the Liberty Life Building, St. Andrew Street, Bloemfontein. An issue regarding jurisdiction arose, and it was found that the Bargaining Council does indeed have jurisdiction to entertain this matter. *See Jurisdictional Ruling dated the 18<sup>th</sup> of January 2012.* The Arbitration was re-scheduled for the 3<sup>rd</sup> of April 2012.
- 1.2 The Applicant, Bafana Joseph Mashinini, was represented by Mr. Mofokeng of Nehawu. The Respondents, Department of Social Development: Free State and Thabo Isaac Mahlaba, failed to attend the proceedings. Notice was sent to them by fax on the 17<sup>th</sup> of February 2012 to fax number 086 626 2874. The Bargaining Council confirmed that this was Mr. Mahlaba's personal fax to e-mail number.

- 1.3 I am satisfied that the Respondents received sufficient notice, and we proceeded in default of them.
- 1.4 The Arbitration proceedings were digitally recorded.

## **2. ISSUE TO BE DECIDED:**

- 2.1 The Applicant has referred an unfair labour practice dispute to the Bargaining Council. The Commissioner is required to determine whether the Employer acted unfairly when they failed to shortlist and promote the Applicant to the position of Manager: Labour Relations, with effect from the 1<sup>st</sup> of May 2011.

## **3. BACKGROUND TO THE ISSUE:**

- 3.1 The Applicant stated that he is employed as the Registrar: Supreme Court of Appeal, and that his primary Employer is the Department of Justice and Constitutional Development.
- 3.2 The Applicant confirmed that he applied for the position of Manager: Labour Relations and that he was not shortlisted.

## **4. SURVEY OF EVIDENCE AND ARGUMENT:**

### **4.1 SUBMISSIONS BY THE APPLICANT:**

#### **4.1.1 The following witnesses were called to testify on behalf of the Applicant:**

- Bafana Joseph Mashinini, being the Applicant himself.
- Mojalefa Elias Mantso
- Richard Tyebela

- 4.1.2.1 *The Applicant* testified that he is currently employed as the Registrar of the Supreme Court of Appeal and that he is currently acting as the Court Manager for the Supreme Court of Appeal.

- 4.1.2.2 He testified that his tasks include managing the whole office. He oversees all the supervisory tasks in the office. He held that he facilitates the communication between the judiciary and attorneys. He supervises the judges' secretaries, law researchers, librarians and general administrative staff. He too is in charge of the Human Resources and Labour Relations in the office. He also presides over disciplinary hearings in the Department of Justice at large.
- 4.1.2.3 The Applicant testified that he complies with the advertisement for the post in that he does have advisory skills. He held that he has been fulfilling advisory functions since 2004 up till now.
- 4.1.2.4 The Applicant held that he has an LLB degree which he obtained in 2004 and he also has a certificate in Labour Relations which he obtained in 2006 from Damelin.
- 4.1.2.5 The Applicant testified that he is suitable for the post as he possesses the necessary qualifications and the required experience. The Applicant held that if he had been shortlisted and interviewed for the position, he could have succeeded in being appointed to the position.
- 4.1.2.6 The Applicant held that the present incumbent, Mr. Mahlaba, should not have been the successful candidate as he did not meet the requirements for the position. He held that Mr. Mahlaba does not have an LLB degree. He held that he should have been shortlisted as he had the necessary qualifications as required by the advertisement. He stated that Mr. Mahlaba only has a B-Tech in Human Resources.
- 4.1.2.7 The Applicant held that the manner in which Mr. Mahlaba was appointed is questionable. He was appointed from another Department to act as a Manager: Labour Relations. For the acting position he was interviewed by the same panel as the panel who took the decision to appoint him permanently in the post. He held that there was no way that the panel could have been fair to the other candidates.

- 4.1.2.8 The Applicant held that he is asking, if it is practical, that the advertising process be restarted. He held that on the other hand he is seeking protected promotion for compensation for the sake of practicality.
- 4.1.3.1 **Mr. Mantso** testified that he is employed at the Free State High Court as a Law Researcher. He held that the Applicant is known to him as he was his Supervisor when the Applicant worked at the High Court. He stated that the Applicant worked with the personnel issues and he was the Registrar of the High Court. He stated that when the Court Manager was not there, the Applicant was dealing with the Court matters. He was dealing with the Labour Relations issues and conducted hearings. He also dealt with issues regarding labour and personnel.
- 4.1.4.1 **Mr. Tyebela** testified that he is currently employed at the Department of Justice and Constitutional Development as a Labour Relations Officer. He held that he has known the Applicant for a long time as the Applicant often helps their Department as Presiding Officer and Investigator in Labour related matters.
- 4.1.4.2 He held that the Applicant has a vast experience in Labour Relations and that he would be capable of heading a Labour Relations Unit.

#### 4.2 SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

- 4.2.1 None submitted.

### 5. ANALYSIS OF EVIDENCE AND ARGUMENT:

- 5.1 The dispute which the Applicant has referred to the Bargaining Council is an Unfair Labour Practice Dispute relating to Promotion. I am required to determine whether the 1<sup>st</sup> Respondent's conduct was unfair when they failed to shortlist and appoint the Applicant to the position of Manager: Labour Relations in the Department of Social Development.
- 5.2 Both the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents failed to attend the proceedings, therefore I have only the Applicant's version before me.

- 5.3 On the Applicant's version, he met the requirements of the advertisement in that he had an LLB Degree and he also had extensive experience in Labour Relations Leadership and supervisory skills.
- 5.4 The Applicant testified that the successful candidate, the 2<sup>nd</sup> Respondent, does not have an appropriate B degree or equivalent qualification in law.
- 5.5 On the Applicant's version, it is clear that he did meet the requirements for the position and that there was no reason why he should not have been shortlisted. I must therefore find that the 1<sup>st</sup> Respondent acted procedurally unfairly in that they failed to shortlist the Applicant for the post of Manager: Labour Relations. See: *Goliath v Medscheme (Pty) Ltd. (1996) 17 ILJ 760 (IC)*.
- 5.6 I must further find that the 1<sup>st</sup> Respondent acted substantively unfairly in that they appointed the 2<sup>nd</sup> Respondent in the position of Manager: Labour Relations, whereas he failed to meet the basic requirements for the position. See: *Coetzee v South African Police Services [2004] 2 BALR 139 (SSSBC) as well as NUTESA v Techikon Northern Transvaal [1997] 4 BLLR 468 (CCMA)*.
- 5.7 In terms of compensation for the procedural unfairness, I am of the opinion that the 1<sup>st</sup> Respondent should pay the Applicant 2 (TWO) months' salary at his present salary scale. The amount is R 36 888-16 (THIRTY SIX THOUSAND EIGHT HUNDRED AND EIGHTY EIGHT RAND AND SIXTEEN CENTS) (R 221 329-00 per annum / 12 months = R 18 444-08 x 2 months)

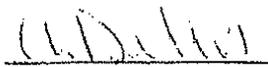
**6. AWARD:**

- 6.1 The 1<sup>st</sup> Respondent, Department of Social Development: Free State, acted procedurally unfairly in that they failed to shortlist the Applicant, Bafana Joseph Mashinini, for the position of Manager: Labour Relations. The 1<sup>st</sup> Respondent acted substantively unfairly in that they appointed the 2<sup>nd</sup> Respondent, Thabo Isaac Mahlaba, in the position of Manager: Labour Relations, whereas he did not meet the requirements for the position.

6.2 The 1<sup>st</sup> Respondent is ordered to compensate the Applicant with 2 (TWO) months' salary at the in the amount of R 36 888-16 (THIRTY SIX THOUSAND EIGHT HUNDRED AND EIGHTY EIGHT RAND AND SIXTEEN CENTS) which amount must be paid to the Applicant before or on the 15<sup>th</sup> of May 2012.

6.3 No order as to costs is made.

**SIGNED AT BLOEMFONTEIN ON THIS 15<sup>th</sup> DAY OF APRIL 2012**



**SENIOR COMMISSIONER**

**C L DICKENS**

**PHSDSBC**