



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: PSHS46-18/19

Commissioner: QUEENDY GUNGUBELE

Date of award: 09 JULY 2018

In the matter between:

***PSA OBO NGOAKO LENNOX RASHOPOLA***

(Applicant)

and

***DEPARTMENT OF HEALTH-GAUTENG***

(Respondent)

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## **BACKGROUND TO THE DISPUTE**

1. This matter was heard on 21 June 2018 and it was concluded on 07 June 2018 at S G Lourens Nursing College in Pretoria.
2. The applicant appeared on his own whilst the respondent was represented by Mr Sphiwe Mazibuko, the Labour Relations Officer.

## **DETAILS OF HEARING AND PRESENTATION**

3. The applicant is employed by the respondent as an Assistant Director, Finance at Kalafong Hospital. He is remunerated at R477 000.00 per annum. He referred his alleged Unfair Labour Practice-promotion, dispute to the Bargaining Council under section 198(2)(a), of the Labour Relations Act, 66 of 1995, "the LRA".

## ISSUE TO BE DECIDED

4. Whether the respondent's conduct amounted to Unfair Labour Practice- promotion as contemplated by section 186(2)(a) of the LRA, and make an appropriate determination.

## APPLICANT'S CASE

5. The applicant testified that he was alerted by someone that the interviews on the position of Director, Finance had been conducted without him being shortlisted. He said that he could not understand why his application was overlooked, as he had all the attributes for the position. He submitted that the respondent breached the provisions of Resolution 3 of 2009, which provided that the employees could only gain promotion by applying to vacant positions. If one was denied the opportunity to compete with other candidates, there would be no prospects of being appointed to a higher position.
6. The applicant said that he requested for information from the respondent but he only received the minutes of the shortlisting process, which did not indicate the criteria over which he was disqualified as one of the candidates. He also referred to page 8 of bundle X, whereby his colleague, called Nengwanani was joined as the second applicant on the basis that he was appointed to the position of Director, Finance, which he was contesting in his matter.
7. The applicant argued, further, that he was the best qualifying candidate for the position, as the CEO motivated for him to act in the same position of Deputy Director-Finance, during 2010 when the incumbent was on a prolonged sick leave. He said that he acted in that position until the incumbent resigned in 2013. He found that the respondent's conduct of not shortlisting him when that same position got advertised, on the allegations that he lacked the supply chain experience, was unfair. He stated that he let the issue rest in order to avoid confrontation and the Deputy Director Finance resigned in 2017 and he acted in that position until he was told that Mr Nengwanani was appointed. He referred to his credentials on pages 14 to 18 of bundle X, which also contained his CV, Job Description and his Certificate.

8. He decried the fact that the respondent benefitted from his experience when they were in need of assistance during hard times but when the post became available, they declared him to be the unsuitable candidate.
9. The applicant said that the advertised position was graded level 11, which did not require the department to save money because the difference between his current salary level and the advertised one was R1 700.00. he opined that the respondent's conduct was calculated at undermining his capabilities.
10. The applicant prayed that he be paid the difference of the amount he would have earned at the last notch of salary level 11, R774.57 000.00 per annum in line with the advert. He confirmed that the post was already occupied by the new incumbent, Mr Nengwanani
11. The applicant submitted, further, that the CEO also acted irregularly by being on the interviewing panel and also becoming the Appointing Officer instead of making recommendations to the HOD. The applicant stated that the CEO, Dr Letebele-Hartel, overstepped her power by being both the referee and player and thus, the appointment of Mt Nengwanani to the position of Deputy Director- Finance was irregular and should be set aside.
12. Under cross-examination, the applicant denied that he failed to meet the requirements of the advert by failing to attach a detailed CV on the Z83 Form. He averred that he handed over his CV to the respondent, who could have withheld it in order to disqualify him. He added that such a motive was confirmed by the fact that the respondent also omitted his CV from its bundle of documents marked Y.
13. He conceded that the advert required that the Z83 application form be accompanied by the CV, the certified ID document, the Drivers' License, which he confirmed that they were not in the bundle. However, he argued that although the respondent was not compelled to appoint him if he did not submit all the relevant documents, Resolution of 2009 provided that he be given an opportunity to compete. He also argued that he had complied with the advert requirements by submitting the documents with his original application.

14. The applicant also conceded that he was aware of a letter on page 3 of bundle Y but said that he was not aware as to whom it was addressed. He added that the said letter was supposed to be addressed to the DG before he lodged his grievance about the unfair appointment of Mr Nengwanani.
15. The applicant said that the CEO normally shared with him what she would discuss with the HOD and when she showed him the said letter, he disagreed with the contents thereof and said that he would lodge a grievance. He said that the CEO never responded to his inquiry until when he went to make a follow up. However, he conceded that he had a meeting with the CEO on 26 January 2018 after he wrote a letter of complaint in January 2018. He said he expected to have the CEO's response in black and white, unlike what the CEO said on 09 April 2018 in response to his query.
16. The applicant submitted that Ms Mdluli of HR alleged that he submitted his documents late, Ms Bambalala said that the issue was his lack of NQF qualification, whilst the CEO said that he did not submit the CV. He added that the letter on page 3 of bundle Y only mentioned the lack of CV.

## **RESPONDENT'S CASE**

17. Dr Keneilwe Letebele-Hartell, the Senior Medical Manager testified that she was the Acting CEO of Kalafong Hospital. She said that she was familiar with the letter from the applicant dated 24 January 2018 on page 4 of bundle Y. She denied that she did not respond to the said letter and averred that she called the applicant to her office in order to address the issues he had raised. She said that she explained why he was not shortlisted and that he did not submit the relevant documents as per the advert, viz: the certified ID Copy, Driver's License and Proof of qualifications. She said that when she pointed out the shortcomings in his application, he replied that he would lodge a grievance and argued that he submitted the required documents. She added that while the applicant did not submit the documents, the panel member also pointed out the fact that he did not submit his CV as well. See page 7 of bundle Y wherein a panel member wrote during the shortlisting process: "*no CV, Unable to determine work experience*". She submitted that the applicant's failure to submit such documents caused him not to be considered for the shortlisting, as he failed to meet the requirements of the advert.

18. She said that she shared the letter on page 3 of bundle Y with the applicant in response documenting their meeting held on 24 January 2018. She said that after the applicant said he would lodge a grievance, she asked HR whether she would have to adjudicate over it, as she was worried that the applicant reported directly to her and that the grievance was against her alleged unfair conduct.
19. The CEO submitted that the second respondent, Mr Nengwanani, met all the requirements in so far as the panel had determined. She averred that Mr Nengwanani's promotion to the current position had nothing to do with the applicant's non-compliance with the requirements of the advert.
20. Under cross-examination, the CEO conceded that she was acting in her position where there was no induction and she was not *au fait* with the HR processes. She normally presided over grievances against Supervisors so in the applicant's case, she had to seek advice from the Labour Relations department as to whether she should preside over her reporter's grievance. She shared the letter to the HR Manager with the applicant. She said that she was not completely familiar with her delegated powers, as she was learning her role on the job.
21. She said that she chaired the interviews whilst HR advised her on the correct processes to follow. She submitted that she was not aware of the Ruling on page 8 of bundle X and argued that she only knew about the applicant's grievance regarding the shortlisting. She added that when the applicant approached her about his exclusion, she explained that it was due to the lack of documents and they agreed. However, the applicant asked her to advertise again and she refused because she knew there was nothing wrong with the short listing. She denied that she made an irregular appointment.
22. She said that the applicant and HR had more expertise on the processes. She added that she had nothing personal against the applicant. As a panel member, she had also satisfied herself together with other members who recommended that she goes ahead to appoint the suitable candidate. HR prepared the submission on the panel decision to appoint Mr Nengwanani, which she signed off.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

23. It is the duty of the applicant to prove, on the balance of probabilities, that the respondent's conduct amounted to an Unfair Labour Practice, as contemplated by section 186 (2) (a) of the LRA.
24. The applicant's submission that he submitted all the relevant documents was circumspect, as he did not refute the CEO's version to the effect that he asked her as to why did she not call him to submit the outstanding documents. Furthermore, he did not refute the CEO's version that he asked her to re-advertise. It was also incumbent upon the applicant to come with the person to who he had given his complete application so that his argument could be corroborated with certainty. His reluctance to prove his case rendered his evidence to be treated with the necessary caution.
25. The respondent followed the necessary procedures in the appointment of Mr Nengwanani and the applicant failed to submit reliable authority to prove that the CEO was not supposed to chair the process and be mandated by the panel to sign off the appointment as per the panel's recommendation. The CEO, only executed the panel recommendation of a suitable candidate, unless if there were evidence to the contrary.
26. The fact that the applicant was willing to assist in his acting capacity was laudable but that did not in any way exempt him from being treated in the same manner as the rest of the candidates. There was no evidence of malice or bad blood against the applicant and the suggestion that someone concealed his relevant documents to his application was not substantiated by any evidence, save for his opinion. It is also highly unlikely that the panel could sabotage the applicant's endeavours by concealing his documents.
27. I am not satisfied that the respondent had committed an irregularity in the appointment of the second respondent, Mr Nengwanani.

## **AWARD**

28. The applicant, Mr Ngwako Rashopola failed to prove that the respondent, Department of Health-Gauteng committed an Unfair Labour Practice as contemplated by section 186(2)(a) of the LRA, 1995.

29. This matter is dismissed.

30. No order as to costs.

A handwritten signature in black ink, appearing to read 'Queendy Gungubele', written in a cursive style.

**QUEENDY GUNGUBELE**