



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: **PSHS646-18/19**

Commissioner: **Dumisani Sonamzi**

Date of award: **14 May 2019**

In the matter between:

**Zimisele Arnot Sam & 1 other**

Employee

and

**Department of Social Development- Eastern Cape**

Employer

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## **Details of hearing and representation**

1. This is an arbitration award in the matter between Mr Zimisele Arnot Sam and Mnyamezeli Bomela, hereinafter referred to as “the first and the second employee” respectively and the Department of Social Development-Eastern Cape, hereinafter referred to as “the employer”.
2. The arbitration hearing was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (“PHSDSBC”) in terms of section 186 (2) (b) of Labour Relations Act, 1995 as amended “the LRA” and the award is issued in terms of section 138 of the Labour Relations Act.

3. The arbitration hearing took place on 15 January 2019, 8 February 2019, 27 February 2019 and 11 March 2019 at the offices of Social Development, King Williams Town, Eastern Cape.
4. The first employee was present and was represented by Mr Mama of Java Mama Attorneys. The second employee was also present and was represented by Ms Bridgette Magnus Beetge from Bax Kaplan & Russel Inc.
5. The employer was represented by Adv. Pretorius duly instructed by the office of the State Attorney.
6. The hearing was mechanically recorded.

Issue/s to be decided

7. I am required to determine whether the employer committed an unfair act or omission relating to its failure to promote the employees.
8. In particular, and in regard to the first employee, whether or not the decision/reason not to promote him based on the alleged adverse finding that he had two operational businesses amounted to unfair labour practice. Secondly, whether or not the selection committee that interviewed Ms Williams was properly constituted.
9. In this regard, it was the employee's case that the employer's decision was unfair and irrational because the employee did not hold any directorship on any company or close corporation that conducted business with the employer.
10. The employer's case on the other hand was that the employee failed to disclose his business interests in any entity regardless of whether the entities conducted business with the state.
11. In regard to the second employee, whether or not the employer's decision not to promote him based on the alleged adverse finding of illicit South African Police Service report amounted to unfair labour practice.

12. It was the employer's case that the first employee failed to disclose that he had a previous criminal record.

#### Background to the issue/s

13. The employees responded to an advert for a post of Director: Employee Relations and Health & Wellness Programme.

14. They were short listed and were both recommended to the Member of the Executive Council by the selection panel.

15. Before the interviews, they were required to undergo the process of personnel suitability checks to verify their criminal records, financial records, citizenship, qualifications, reference checks, licenses and directorships.

16. The employer also conducted a verification exercise and the results on their personnel suitability revealed that the first employee had two operational businesses which he did not disclose whilst the second employee had a previous criminal record.

17. None of them was promoted but a head hunting process ensued resulting in the employment of Ms Williams.

18. In or about September 2018 they referred an unfair labour practice: promotion dispute to the council for conciliation.

19. A conciliation process did not yield any settlement and on or about October 2018 they requested that their dispute be arbitrated hence this award.

20. The legal representatives filed written closing arguments.

## Survey of evidence and argument

### First employee's case

**Mr Zimisele Sam testified** under oath as follows:

21. He responded, applied and was short listed for the post of Director: Employee Relations and Health Wellness Programme.
22. He was not promoted and the reason given by the employer was that he had two operational businesses.
23. He emphasized that was the only reason why he was not promoted. He stated that at the time of the interview process until the arbitration hearing, he was not involved in any entity that conducted business with the state.
24. He referred me to the feedback on verification of recommended candidates for employment. That was a communication from Mr L.B. Zenzile: Director-Risk Management and Anti-Corruption addressed to Chief Director: Corporate Services. The letter reads, in part as follows:

“The Unit would like to confirm that the recommended candidate [Mr Zimisele Sam] appears as an active Director for the following:

- Iljelo Labafazi, the company, is compliant and in business as per CIPC. See attached CIPC printout.
- Zigidlo (later corrected to Izidodlo) Khanyisa Agricultural and Multi-Purpose. Primary Co-Operative Limited, the company is compliant and in business as per CIPC. See attached CIPC printout.
- He is an active member of Zanish Trading Enterprise but the company is at final deregistration stage. See attached CIPC printout.”

25. Human Resources Administration must ensure that, officials appointed by the department comply with the new public service regulations, section 13 (C). I must hasten to mention that the employer representative mentioned that, in fact, his instructions were that reference thereto, should have been DPSA instead of section 13.
26. He asserted that he was never a Director of any private or public company nor did he ever involved in any business entity.
27. In regard to Ms Williams, he stated that unlike him, she was given an opportunity to de-register her company.

### Selection Committee

28. He stated that the selection committee for the interview of Ms Williams was not properly constituted. Mr Collins participated in the process in contravention regulations as he did not qualify to be a member of the committee owing to his rank being lower than that of the post under review. Mr Collins was a Deputy Director at the time and the post was for a Director. Mr Collins only resumed duties as the Director only on 2 July 2018.
29. He stated that disclosure did not form part of the recruitment process. There was no question by the committee that was related to disclosure. Under Clause 6 of the Financial Disclosure Form, signed headed "Directorships and Partnerships", the employee stated, under "name of corporate entity or partnership, N/A, Company Registration number, N/A, Type of Business, N/A and Amount of Remuneration, 0.00. On 6 August 2018 he submitted a disclosure form to the employer. This was after he had attended the interviews in question.
30. He stated quite repeatedly in his evidence that Zimish Trading was deregistered on 15 March 2015 although it did not appear on any document as proof that it was indeed deregistered on 15 March 2015. In regard to Ijelo Labafazi, he stated that it was deregistered in 2000. Izigodlo was a co-operative and he did not appear as a Director but merely a member. This company never conducted business with the state.
31. Zimish had done business with the state in or about 2009-2010. He quickly mentioned that at that time he was not employed by the state. He re-iterated that the only reason

he was not promoted was that the employer found that he had two operational businesses. He stated that that was factually untrue.

Under cross examination the first employee stated as follows:

32. He was an MMS member since he was a Deputy Director. He confirmed that that level required of him to be transparent. Transparency also becomes more important if the position is that of Senior Management. He was aware of the employer's directives, the Public Service Act and Regulations as well as the Public Finance Management Act.
33. He was aware of DPSA document albeit after he had received the employer bundle in January 2019. He confirmed that DPSA applied to the position under review. DBSA existed prior to the interviews and was dated 16 March 2017. It was pointed out to him that DPSA required all public servants to make disclosures between 01-30 June each year. He stated that he only disclosed in August 2018. He was referred to an email from Mr Lulamile B. Zenzile which stated that: *"Good Day Colleagues I trust that this email finds you well. This serves as an invitation to come do you disclosure of business interest as mandated by DPSA..."* DPSA issued a Directive that all MMS members must disclose their business interests. An attempt was made to register forms of the MMS members but due to lack of cooperation, the attempt was not successful..."
34. He confirmed that he attended the session on 18 September 2017 with Mr Zenzile. He did not keep the forms as they were kept by the employer. He did not disclose anything because there was no need for him to fill the details in the Financial Disclosure Form. It was pointed out to him that the verification results revealed that Zimish was still registered to which he responded by stating that he relied on the information he received telephonically from CIPC. He confirmed that he did not have anything on paper. It was pointed out to him that Ijelo Labafazi, Zimish Trading and Zigodlo were all active entities even after the interviews. He was referred to regulation 6 (7) (5) in this regard.
35. Under cross examination by the legal representative of the second employee, he confirmed that he did not have a certificate of deregistration from CIPC as conclusive proof of deregistration.
36. On 12 February 2019 the first employee's legal practitioner applied to recall him which application was not opposed and was accordingly granted. He presented and discovered

two documents that he generated from his work computer. He stated that he again telephoned CIPC and was told his companies were deregistered. He explained that the documents he discovered sought to explain that failure to comply with submission of annual returns could lead to deregistration.

37. He stated that the employer's investigation of the registration of the companies could yield different results to that of his because the employer had resources and speciality in that regard. It was put to him that the proof for deregistration was a certificate of deregistration and not what he discovered. He stated that CIPC could not give him a certificate because due to the fact that he never submitted annual returns.

38. He stated that if he failed to disclose as alleged, the employer was obliged to follow a procedure to call upon the employee to show cause why he should not be disciplined. He confirmed that the employer did call upon him to show cause and he responded. The first employee closed his case.

#### Second employee's case

**Mr Mnyamezeli Bomeni** testified under oath as follows:

39. He confirmed that there was only one employer being DPSA. He went through his curriculum vitae and also pointed out that he completed the Z.83 application form. He made reference to regulation 67 (5) and (6) and stated that the employer failed to comply with the requirements thereof.

40. He denied that the MEC for social development issued an authorization for head hunting of Ms Williams as required by the regulations. He stated that there was nothing in the regulations that precluded a candidate from promotion on the basis of a previous criminal record. He was not aware that clearance certificate was necessary. This was also not mentioned in the memorandum. He confirmed that the reason the employer did not promote him was because he had an illicit criminal record which later turned out to be assault with intent to do grievous bodily harm. He confirmed that the checks and verification were done in order to verify the correctness of the information on his application form. He stated that he did not have any issue with the composition of the original interviewing committee.

41. In regard to his previous criminal record he stated that the personnel suitability checks were done after the interviews. He stated that the employer did not furnish him with the reasons for not promoting him up until 24 April 2018. He confirmed that the only reason given by the employer for refusing to promote him was the illicit SAPS report. He became aware of these results in 2019 although he had requested the same.
42. On or about 24 April 2018 he believed that he did not have any criminal record. After reading the results, he recalled that 30 years back him and other young boys were hauled before a court of law. They pleaded guilty to assault GBH and were convicted and sentenced to lashes on their buttocks. He stated that although the verification revealed those negative results, they were not affecting the inherent requirements of the job.

### Head Hunting

43. He stated that there was no need for head hunting because the selection committee had already stated that they were appointable. Head hunting process was never approved by the MEC.

### Constitution of the panel

44. He stated that the constitution of the head hunting committee was flawed in the following respects, firstly the MEC did not approve the head hunting and secondly, the original panel was changed due to the inclusion of Mr Collins who was not at the same grade as the incumbent of the post. He stated that Mr Collins was a deputy director and not a director. Mr Collins had not assumed duties as the director although he was offered and accepted the job. He prayed for the interviewing process to be nullified and re-started.

### Under cross examination

45. It was pointed out by reference to a memo that MEC Dyantyi approved the head hunting. He conceded.

46. In regard to Mr Collins it was suggested to him that Mr Collins had already concluded a contract of employment as Director when he participated in the interviews but had not assumed his duties. He stated that the regulations spoke of assumption of duty.

47. It was pointed out to him that there was no regulation that required that the same original selection committee should be the same that conducts the interviews for the head hunted candidate. Instead, regulation 67 (7) states that:

*“If the selection committee is unable to recommend a suitable person for appointment from those who applied in terms of sub regulation (5), the executive authority may, after the selection process have been completed, approve the head hunting of one or more persons with the requisite competencies and subject such person or persons to the same selection process as those who applied”.*

48. It was further pointed out to him that the selection committee was not aware of the verification results prior to the interviews and before they were sent for competency assessment. He conceded.

49. In regard to Z. 83 he confirmed that the question was “have you ever been convicted of a criminal offence.”

50. He confirmed that he stated “No” which meant that he did not have a criminal record.

#### Cross examination by and employee’s legal practitioner

51. He confirmed that his challenge of unfairness was based on the fact that the employer did not appreciate the fact that the criminal offence was over 30 years old. He further confirmed that all government employees must complete disclosure forms annually. The second employee closed his case.

#### Employer’s case

**Mr Selwyn Collins** testified under oath as follows:

52. He was previously employed as Deputy Director: Legal Services by the Department of Education. He was currently employed as Director: Legal Services, Level 13 Department

of Social Department. He became the Director on 2 July 2018 following an offer and acceptance of employment on 22 May 2018.

53. He assumed his official duties on 2 July 2018. He was not immediately released to assume his duties at the Department of Social Development owing to outstanding matters and back log at the Department of Education. He however rendered services for the Department of Education as well as Department of Social Development before assuming his duties. He carried out work for both departments, attended meetings with HOD for both departments and attended to administrative issues of the Department of Social Department. Both HODs were aware and had agreed to that arrangement.

#### Re: Head-hunting process

54. He was part of a team that conducted headhunting process of the current incumbent, Ms Williams. The interviews took place on 25 and 26 June 2018. As at 25 and 26 June 2018 he had already been offered and accepted employment by the Department of Social Development. He confirmed that he was not involved in the initial recruitment process.

55. There were initially three head hunted candidates although only two were interviewed because the other one recused himself from the process. Ms Williams was recommended and her appointment was subsequently approved by the MEC: Dr Dyantyi. By the time he signed the recommendation, he was the Director: Legal Services at the Department of Social Development.

56. Under cross examination he conceded that he signed the memorandum in August 2018. It was suggested to him that he acted against the regulations because he was not a Director in June 2018. He maintained that in his view during 25 and 26 June 2018 he was entitled to participate in the head hunting process because he had already accepted the offer of employment. He further stated that the circumstances of his employment were unique and therefore should be treated as such. He was invited to produce emails as proof that he rendered services for and on behalf of the Department of Social Development which he did. It was however pointed out to him that those emails did not indicate that he was Director to which he responded to say he merely rendered services on behalf of the Department of Social Development.

**Mr Lulamile Zenzele** testified under oath as follows:

57. He was employed by the Department of Social Development as a Director: Organisational Risk Management. His duties included identification of risk, internal investigation and corruption in procurement processes and ethics management.
58. He was the member of the interviewing panel to assist the employer to appoint a suitable candidate. On 15 May 2018 he received a report from the chairperson of the panel for the head-hunting process. The position applied for by the employees was important because it dealt with employees to ensure that they complied with policies and regulations of the employer. However, both employees were not appointed due to elicited adverse findings against them.
59. The first employee did not disclose that he had business interests whilst the second employee was found to have a criminal record. DPSA required all designated employees to disclose their financial interests. The first employee failed to disclose in 2016-2017 financial year. He also demonstrated how the registration for disclosure of financial interests was done.
60. He conducted personal credential verification process which revealed negative findings against both employees using his access to CPIC. He demonstrated this exercise in the computer. The exercise showed that the first employee never made a disclosure of financial interest prior to the interviews as required by DPSA directive. The first employee was involved in Ijelo LabaFazi, Zimish Trading Enterprise and Zigodlo Co-operative.
61. The second employee stated in the Z.83 form that he had no criminal record. He was a member of the head-hunting process that eventually appointed Ms Williams which head-hunting and subsequent appointment was duly approved by the MEC on 17 August 2018.
62. Under cross examination it was pointed out to him that the disclosure was irrelevant for the purposes of the decision of the MEC not to appoint. He replied by stating that the first employee ought to have disclosed in 2016-2017 financial year. It was further suggested to him that the first employee did not have financial interests in any of the entities. He replied by stating that the verification revealed that he was an active member of these entities.

## Analysis of evidence and argument

### Applicable Legislation

63. Section 186(2) of the LRA states that:

*“Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving-*

- a) unfair conduct by the employer relating to the promotion , demotion, probation(excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provisions of benefits to an employee;*
- b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
- c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and*
- d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”*

64. Section 195 of the Constitution of the Republic of South Africa requires, *inter alia*, a high standard of professional ethics and accountability in public administration.

### Onus in unfair labour practice disputes

65. Although the LRA is silent on the incidence of onus to prove an unfair labour practice, it is generally accepted that he or she who alleges an unfair labour practice (in other words, the employees) must prove the allegation.

## Grounds for Unfair Labour Practice

### Adverse Findings

66. In regard to the first employee, the reason proffered by the employer not to promote him was that he “has two operational businesses. In respect of the second employee he “has an illicit SAPS report”. Other common grounds which will be explored extensively later in this award include Irregularities in the head-hunting process in so far as the constitution of the head-hunting panel was concerned.

### Financial Disclosure Framework

67. Determination on other categories of designated employees to disclose their financial interests and directive on the form, date and financial interests to be disclosed: Issued by the minister for DPSA dated 16 march 2017.

Item No. 6 thereof states that:

*“6.1. The following other categories of employees are designated to disclose financial interest:*

*6.1.1. Employees earning the equivalent of salary level 13 and above through the Occupation Specific Dispensation (OSD),*

*6.1.2. Employees appointed at salary levels 11 and 12 including employees earning the equivalent of salary levels 11 and 12 through the OSD...”*

### Other Categories of Designated Employees

68. Item 7 thereof states that:

*“Period to Disclose Financial Interests by Other Categories of designated Employees and Verification of such disclosure. Period to disclose financial interest is stated as 01-30 June of the year in question. Period to verify the disclosure is by 31 July of the year in question”.*

## Statutory Framework

69. The above named determination and directive was issued in terms of section 41(3) of the Public Service Act read with regulations 16 (c ) and 18 (3) of the Public Service Regulations, 2016.

70. Regulation 16 (c) defines designated employee or category of employees determined by the Minister Regulation 18 (3) provides that any other designated employee not contemplated in sub-regulation (1) (2) shall submit to the relevant head of department, on a date and form directed by the Minister, particulars of all his interests for the period as may be directed by the Minister.

71. Regulation 67 (1) of the Public Service *“an executive authority shall appoint a selection committee to make a recommendation on the appointment to a post”. The selection committee shall consists of at least three members who are employed of a grade equal to or higher than the grade of the post to be filled or suitable persons from outside the public service...”*

72. Regulation 67 (5) *“the selection committee shall make a recommendation on the suitability of a candidate after considering only-*

*a) information based on valid methods,*

*b) criteria or instruments for selection that are free from any bias or discrimination,*

*b) the inherent requirement of the post...”.*

Regulation 67 (7) *“if the selection committee is unable to recommend a suitable person for appointment from those who applied in terms of sub regulation (5), the executive authority may, after the selection process has been completed, approve the head hunting of one or more persons with the requisite competencies and subject such person or persons to the same selection process as those who applied”.*

## Evaluation of the evidence

73. I now turn to apply the applicable legislation to evidence presented at the arbitration. In *Buffalo City Public FET College v Commission for Conciliation, Mediation and Arbitration and Others (P372/12)* [2016] ZALCPE 18 Case Law. Adverse findings in respect of the first employee: Two Operational Business. The gist of the first employee's evidence was that at the time of the recruitment process and at any given time thereafter he was never involved in any entity that conducted business with the state. The employer's case on the other hand was not based on whether or not he was involved with entity or business that conducted business with the state. The employer's case was that the first employee failed to disclose his business interest regardless whether or not the entities conducted business with the state.
74. It was common cause that the first employee fell within "other categories of designated employees" as stated in the determination and directive by the Minister dated 16 March 2017. It was further common cause that the first employee therefore had to disclose his financial interests on 01-30 June of each year. The employee stated in his evidence that during financial year of 2017 to 2018 he completed a Financial Disclosure Form and submitted it on 6 August 2018. The interviews were conducted on 2 March 2018. In my view this form is irrelevant for the purpose of the case under review. I say so because this disclosure form was not the basis upon which the employer refused to promote the employees. In my view, the first employee ought to have indicated whether he held directorships and or partnerships in those entities as the question did not allow for a "not applicable" answer.
75. His CIPC profile arising out of the verification process revealed negative findings. He was an active Director in at least three entities as at 28 November 2018. The employee could not produce any conclusive evidence in the form of a certificate of deregistration, a registered mail or alternative electronic methods of communication. The employee could not even produce a letter written by him to CIPC requesting deregistration. He did not testify to and prove that he prepared and sent the supporting information and documentation like tax clearance, ID and or documentary proof that the entity was not carrying business or was dormant and further that the entity had no assets or had inadequate assets and therefore should be deregistered. To this end, the first employee failed to prove on a balance of probabilities that he was not a member of the entities revealed by the verification process. The employer on the other hand has discharged its evidential burden that the first employee had active directorship status in the entities.

76. The determination and directives state that the objective of the financial disclosure framework was meant to assist executive authorities to identify and manage conflict of interest among employees in senior management positions. It is a tool used to promote just and fair administrative actions by senior officials in government and to promote open and accountable governance as espoused in section 195(1) of the Constitution of the Republic of South Africa.

77. To this end, I can venture to say, employees have a general duty to act loyally, honestly, and in their employer's best interests, and among other things that entails avoiding any possible conflicts of interest. In my view, it is irrelevant whether the first employee did not actually conduct business with the state. In my view, what is relevant is whether his failure to disclose these entities amounted to dishonesty and that requires an answer to the following questions:

1) was there a rule about conflict of interest?

2) if so, did the first employee knowingly breach it?

78. The evidence points to one conclusion, that there is a rule and the first employee was aware of its existence. In my view, the first employee failed to uphold the principles that underpin the disclosure of financial interests which are meant to promote professional ethics in the public service, promote transparency and accountability and effective management of conflict of interest situation.

79. In *Eskom Holdings Ltd v Fipaza & Others* (JA56/10) [2012] ZA LAC 40 Ndlovu JA held the same as Conradie JA in *Absa Bank LTD v Fouche* 2003 (1) SA 176 (SCA):

*“The policy considerations appertaining to the unlawfulness of failure to speak in a contractual context-a non-disclosure-have been synthesized into a general test of liability. The test takes into account of the fact that it is not the norm that one contracting party need to tell the other all he knows about anything that may be material”. Thus, a party is expected to speak when the information he has to impart falls within his exclusive knowledge and the information, moreover, is such that the right to have it communicated to him would be mutually recognized in the circumstances.*

80. In conclusion on this aspect, I find that the employer was within its right to refuse promotion of the first employee on this ground alone. Thus, the reason not to promote the first employee was reasonable, rational and fair owing to the first employee's own failure to disclose the required information annually. To this end, the first employee

failed to discharge his onus to prove, on a balance of probabilities, that the employer committed an act of unfair labour practice.

81. The employer on the other hand managed to discharge its evidential burden that the first employee had adverse finding relating to non-disclosure of mutual. Thus, the first ground of the first employee's challenge must fail.

#### Adverse findings in respect of the second employee: Illicit Criminal SAPS record

82. It was the second employee's case that he was not aware that he had a criminal conviction since the conviction happened more than 30 years ago. He only became aware of the criminal record when he received a bundle of record from the employer indicating that he had an assault GBH criminal record. The fact that he was not aware of the criminal record does not exonerate him for stating that he had no criminal record.

83. In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others* (CA2/2015) [2016] ZALAC55 (25 November 2016), the court made this very clear where the employee who worked for the security company, when he applied for a job in 1996, the employee was asked in a written application –“have you ever been convicted of criminal offence”. He replied “NO” and the company employed him as a security guard. Fourteen years later, he applied for a promotion. The company conducted a criminal record check. It revealed that the employee had two criminal convictions. One was for rape in 1982 for which he got six lashes as a juvenile 17 year old. The other was for assault with intent to do grievous bodily harm in 1991 for which he paid a fine of R 200.00.

84. The employee's defence was that he did not know that he had been convicted of a criminal offence because he had not gone to jail. “I was 17 and did not understand the law. It was not rape. She was my girlfriend”. The company dismissed him for misrepresentation and/or dishonesty. The case finally found its way to the Labour Appeal Court where Judge Savage AJN upheld the employer's appeal and had this to say-at:-

*“[40] The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust which is at the core of the employment relationship, unlikely.”*

*The Labour Appeal Court in this matter upheld the dismissal and held that:*

*“...it is difficult to understand how the arbitrator could reasonably have concluded that Ntloko was unaware of the status of his criminal record and could have denied having any criminal conviction. Consequently, I must agree that the arbitrators’ finding that Ntloko did not knowingly failed [sic] for disclose his criminal conviction when he was employed and when he applied for promotion is one that cannot be reasonable justified on the evidence before him, and must be set aside.” I fully agree with this reasoning as it relates to the second employee.*

The court further held in paragraph 30 that:

*“The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees...”*

The court further stated in paragraph 7 that:

*“An employer is entitled to full disclosure of relevant information when a decision is being made to employ a person and where an express question is asked for a potential employee, an employer is entitled to expect an honest answer in response.”*

The Z83 application form 1 for employment provides that:

*“This form maybe used to identify candidates to be interviewed. Since all applicants cannot be interviewed, you need to fill in this form completely, accurately and legibly. This will help to process your application fairly...”*

85. In *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ at paragraph 7, the court held:

*“It is an implied term of the contract of employment that the employee will act in good faith toward his employer and that he will serve his employer honestly and faithfully...”*

I now turn to deal with the last two common grounds of unfair labour practice relating to both employees.

## Irregularities in Headhunting Process

86. It is common cause that both employees applied in terms of regulation 67(5). All the items for consideration by the selection committee listed under regulation 67 (1) & (7) were not in dispute and were accordingly not challenged. Thus, the selection panel made a recommendation that both employees were employable since they both met the criteria set out therein.
87. I must categorically point out the outset that the employer did not take a decision to promote any of the two employees. In other words the selection process under regulation 67(5) did not culminate in the promotion of any of the two candidates. It is the adverse findings that disqualified the employees from the process under regulation 67(5) as already alluded to in the foregoing paragraphs.
88. Basically the employees challenged the constitution of the panel on the basis that Mr Selwyn Collins was the panelist despite the fact that he was not a Director but a Deputy Director at the time of the head hunting process. The employees relied on regulation 67(1) for this proposition. The justification tendered in evidence by Mr Collins was that he had already accepted an offer of employment on 22 May 2018 as Director: Legal Services Department of Social Development at the time of the head hunting process and interviews. For all intents and purposes he was eligible to participate in that process. This was despite the fact that he officially rendered his services as the Director prior to the assumption of duty date being 2 July 2018. The HODs of both the Department of Education and Department of Social Development authorized that arrangement that he should continue with his responsibilities as Deputy Director: Education as well Director: Legal Services Department of Social Development.
89. The question that I have to answer is whether Mr Collins was employed as a Director: Legal Services, Department of Social Development. If not, whether his participation in the head hunting process constituted unfairness. Agreement occurs when an offer is accepted and this acceptance has been communicated to the offeror. Once an offer has been accepted it becomes legally binding. In employment law, acceptance would occur when the prospective employee accepts the verbal or written offer and this is communicated to the employer. The circumstances of the participation of Mr Collins, the offer and acceptance of the contract of employment, the agreement reached by the HODs of the respective departments and various other reasons he testified on, are in

my view, sufficient for me to make a finding that the head-hunting committee was properly constituted.

90. To answer the second question, it was held in *Nooman v Safety and Security Sectorial Bargaining Council and Others* [2012] 33 ILJ (LAC), (the first employee also referred to this case in his closing arguments) that there is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post. Any conduct that denies an employee an opportunity to compete for a post constitutes an unfair labour practice.
91. If the employee is not denied the opportunity of competing for a post then the only justification for scrutinizing selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason. As long as the decision can be rationally justified mistakes in the process of evaluation do not constitute unfairness justifying an inter deference with the decision to appoint.
92. To this end, I find that the employees failed to discharge their onus to prove, on a balance of probabilities that the participation of Mr Collins in the head hunting process amounted to unfair labour practice. I therefore accept the explanation given by Mr Collins and the circumstances under which he took part in the head hunting process. The employees' second challenge must also fail. In any event, I hold a view that the employees' case of unfair labour practice relating to promotion fell squarely on the outcomes of the verification process and the refusal of the employer to promote them based on the adverse findings of the verification process. Anything beyond that could not have taken their case any further because, as they alleged the reason/decision for their non-promotion had already occurred. If they wanted to challenge the head hunting process and the subsequent appointment of Ms Williams, in my view, they should have approached the court for an appropriate relief or an interdict that being said the reasons for my award is not based on this view but based on their failure to discharge the onus.
93. For the reasons set out above and having considered all relevant facts and legislation pertinent to the dispute under review as well as written closing arguments by the respective legal representatives, I find that the employees failed to make out a case of unfair labour practice on the part of the employer.
94. I therefore make the following award:

Award:

95. The employees failed to prove on a balance of probabilities that the employer committed an act of unfair labour practice.
96. The employer did not commit unfair labour practice for not promoting either of the employee and consequently the employees are not entitled to any relief.



Signature: \_\_\_\_\_

Commissioner: Dumisani Sonamzi