



**PHSDSBC**

Public Health and Social Development  
Sectoral Bargaining Council

# ARITRATION AWARD

Case No: **PSHS761-19/20**

Commissioner: **John Mashika**

Date of award: **19 September 2020**

In the matter between:

**NEHAWU obo NDILEKA PRINCESS GOJO-SILELE**

APPLICANT

and

**DEPARTMENT OF HEALTH – FREE STATE**

1<sup>st</sup> RESPONDENT

and

**SIMON MOKHELE PHUSHULI**

2<sup>nd</sup> RESPONDENT

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## **Details of the parties and representation**

1. The matter was scheduled for an arbitration process on 1 July 2020, 4 August 2020 and 14 September 2020 at the respondent's Psychiatry Hospital in Bloemfontein.
2. It was referred and dealt with in terms of section 191 (5) (a) (iv) of the Labour Relations Act 66 of 1995 (the LRA). It relates to the alleged refusal of the Department of Health-Free State (the 1<sup>st</sup> respondent) to promote the applicant.

3. The applicant, Ndileka Princess Gojo-Silele appeared in person and was represented by Mr. J.M Mabeba, a National Education, Health and Allied Workers' Union (NEHAWU) trade union official.
4. The 1<sup>st</sup> respondent was absent amid being properly notified of these proceedings.
5. The set down notice was mailed to [MakoaMA@fshealth.gov.za](mailto:MakoaMA@fshealth.gov.za), [SenokoanLP@fshealth.gov.za](mailto:SenokoanLP@fshealth.gov.za); [GumedeMJ@fshealth.gov.za](mailto:GumedeMJ@fshealth.gov.za), [PhetlhoTC@fshealth.gov.za](mailto:PhetlhoTC@fshealth.gov.za), [TshabaS@fshealth.gov.za](mailto:TshabaS@fshealth.gov.za).
6. I was satisfied that the 1<sup>st</sup> respondent was properly notified of the process and I duly proceeded to hear this matter unopposed in terms of section 138(5)(b)(i) of the LRA.
7. The proceedings were digitally and manually recorded.
8. A bundle of documents was submitted by the applicant and it was marked and referred to as Bundles A (it consisted of 60 pages).

### **Issues to be decided**

9. I must decide whether the 1<sup>st</sup> respondent committed an unfair labour practice in terms of section 186(2)(b) of the Act in not shortlisting the applicant.
10. In the event I find that the 1<sup>st</sup> respondent's conduct was unfair; I have to determine whether the applicant is entitled to compensation in terms of section 193 (4) of the LRA.

### **Background to the dispute**

11. This dispute was referred to the Council on 17 September 2019 after the grievance that the applicant had lodged with the respondent on 19 February 2019 was not resolved to her satisfaction on 16 August 2019. It was set down for arbitration on 1 July 2020 and could not proceed due to the isolation of the 1<sup>st</sup> respondent's representative, Mr. Paul Ndobo. A ruling was rendered on the day postponing the matter and also joining Mr. Phushuli as the second respondent.

12. Phushuli's joinder was informed by the fact that at that stage of the proceedings the applicant sought to be promoted to the contested position of Admissions Clerk to which Phushuli was promoted to on 1 April 2019. The matter was set down again on 4 August 2020 and it could not proceed due to the isolation of Phushuli.
13. The applicant holds a position of a Queue Marshall which is graded at level 4. She has been on this position since 18 July 2011 when she joined the employ of the respondent. She is currently earning a monthly salary of R13 239.25 (Thirteen Thousand Two Hundred and Thirty-Nine Rand Twenty-Five Cents).

## **Survey of evidence and argument**

### **Applicant's evidence: Ndileka Princess Gojo-Silele**

14. She testified under oath that a position of Admissions Clerk Grade 5 was advertised by the 1<sup>st</sup> respondent through circular 39 of 2018 at the Embekweni Hospital (Zastron) where she is based. She applied for the position and only became aware that she was not shortlisted on 15 February 2019 when interviews were held. She approached her supervisor, Mr. Titoti about this and he confirmed that she was not shortlisted.
15. She lodged a grievance of which its outcome, from the Chief Executive Officer of the hospital, was furnished to her on 16 August 2019. It informed her that she did not meet with the requirements of the advertised position as she did not have the Patients Admissions Data System (PADS). The position stated a Grade 12 (or equivalent) and computer literacy and good typing skills as a requirement. She has a grade 12 certificate (page 29 of the bundle), certificate in typing (page 28 of the bundle) and a certificate in computing (page 30 of the bundle).
16. The advertisement further stated that the applicants should have the ability to work under pressure, have good interpersonal, verbal and written communication skills, self-management and motivation and knowledge of PADS. Since the passing of one Paulos Kronos in 2012, who was the Admissions Clerk she has been doing this job. The only difference between what a Queue Marshall does and an Admissions Clerk does is that the Clerk performs his/her duties in an office. She also has PADS knowledge as can be

seen in pages 32 and 33 of the bundle. Pages 32 and 33 shows that she is one of the users and also that she had logged and worked on the system. The PADS system is just a system where patients' details are captured and loaded.

### **Analysis of evidence and argument**

17. The applicant's evidence was not challenged in these proceedings due to the absence of the 1<sup>st</sup> respondent. It was held in *Abrahams v GPSSBC (JR1790/08)[2011] ZALCJHB 24* (2 February 2011) that a trier of facts need not interfere with the evidence tendered in default hearings. I fully align myself with this view under the circumstances and shall accept the applicants' evidence as correct.
18. The essence of the applicant's case is that she was denied to partake in the interview process for the position of Admissions Clerk due to her not being shortlisted amid the fact that she met with the minimum requirements of the position as advertised. The fact that she met with the minimum requirements of the position cannot be disputed. This is so as the position required a grade 12 certificate, computer and typing skills. Other than her having the necessary required qualifications; she testified that she had worked in the position after the passing away of Kronos since 2012.
19. It therefore stands to reason that the letter from the hospital's Chief Executive Officer containing an outcome of her grievance cannot be correct in as far as it suggests that she did not meet with the minimum requirements. This letter is also not correct in stating that PADS is one of the requirements of the position. PADS; like the ability to work under pressure; good interpersonal, verbal and written communication skills; self-management and motivation is listed in the advertisement as a skill and knowledge that an applicant for the position should have. The implication thereof being that in the normal course of events an applicant for the position may not necessarily have a qualification for these requirements. These are attributes that can be assessed in the interview process; a process she has been denied to partake in.
20. However even if I were to accept that PADS is a minimum requirement an applicant for this position had to have; the applicant testified to the effect that she has worked on the system. She had also produced evidence contained in pages 32 and 33 of her bundle

showing her previous log-in history. She testified that PADS is just but a system used to capture a patient's information in the computer. With her computer qualifications; and having performed the duties of this position since 2012; I certainly do not understand why the 1<sup>st</sup> respondent formed a view that she was not suitably qualified to be shortlisted let alone being promoted to the position.

21. The applicant's evidence suggested that not only did she meet with the minimum requirements of the position; but she was suitably qualified for promotion. Her not being shortlisted implies that she was denied the right to compete for the position. An applicant to a position has a right to be given an opportunity to compete. The denial of such a right constitutes an unfair labour practice. That which the 1<sup>st</sup> respondent did was to deny her this right without any justifiable reason.

22. It is on this basis that I find the conduct of the 1<sup>st</sup> respondent unfair.

### *Relief*

23. The applicant requested that I consider awarding her compensation in the event I find in her favour. This is a fair request under the circumstances and I shall grant in to her.

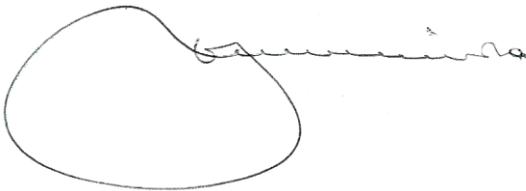
24. I hold a view that compensation equal to six (6) months' salary; that is R79 435.50 (Seventy-Nine Thousand Four Hundred and Thirty-Five Rand Fifty Cents); that is R13 239.25 X 6 months is just and equitable under the circumstances. This is so as the applicant was denied the right to compete in a position I am convinced she may have been promoted into.

## Award

25. I find that the 1<sup>st</sup> respondent, the Department of Health-Free State, committed an unfair labour practice as envisaged in terms of section 186(2)(b) of the LRA against the applicant Ndileka Princess Gojo-Silele.

26. The 1<sup>st</sup> respondent is ordered to compensate the applicant an amount of R79 435.50 (Seventy-Nine Thousand Four Hundred and Thirty-Five Rand Fifty Cents).

27. The above amount must be paid to the applicant on or before 31 October 2020.

A handwritten signature in black ink, consisting of a large, rounded initial 'J' followed by a series of connected loops and a final flourish.

**JOHN MASHIKA**