



# ARBITRATION AWARD

Case Number: GPBC2455/2017  
Commissioner: William Richard Pretorius  
Date of Award: 27 January 2021

## In the ARBITRATION between:

NUPSAW obo R Mofokeng  
(Applicant)

Department of Police, Roads & Transport – Free State  
(1<sup>st</sup> Respondent)

P Lesito  
(2<sup>nd</sup> Respondent)

**Union/Applicant's representative:** Mr Simon Kgosietsile Mojanaga  
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|----------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>2<sup>nd</sup> Respondent's representative:</b> | Mr Nigel Masalla                                                                                                                                                               |
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## ARBITRATION AWARD

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### Details of hearing and representation

1. This award follows the arbitration that was set down in terms of an alleged unfair labour practice as contemplated in section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended (“the LRA”).
2. The arbitration commenced on 19 November 2019 and the Applicant’s final heads of argument was received on 15 January 2021 which is regarded as the last day of the arbitration.
3. The Applicant, Mrs Rebecca Mofokeng, was represented by Mr Mojanaga an official from the National Union of Public Service and Allied Workers (“NUPSAW”). On the other side, the 1<sup>st</sup> Respondent, the Department of Police, Roads and Transport – Free State, was represented by Adv Mopeli, the Director Employee Relations. The 2<sup>nd</sup> Respondent, Ms Palesa Lesito, was represented by Mr Masalla an attorney from Matlho Incorporated.
4. These proceedings were recorded digitally and in writing.

### Preliminary issues decided

5. During the first sitting of the arbitration on 19 November 2019, the Applicant made an application for the citation of the parties to be changed because she was no longer represented by NEHAWU in the arbitration. A ruling was issued dated 19 November 2019 which corrected the citation of the parties to read “NUPSAW obo R Mofokeng and the Department of Police, Roads and Transport (1<sup>st</sup> Respondent) and P Lesito (2<sup>nd</sup> Respondent)”.
6. During the proceedings of 20 October 2020, Mr Mojanaga raised a point *in limine* regarding the appearance of the 2<sup>nd</sup> Respondent’s legal representative, Mr Masalla. Mr Mojanaga argued that Mr Masalla should be granted observer status.
7. The aforesaid point in limine was dismissed on the following grounds: (a) Rule 25(4) of the Rules of the GPSSBC (“the Rules”) allow for legal representation during arbitration proceedings and (b) it is common cause that a joinder ruling was issued dated 19 November 2019 wherein the 2<sup>nd</sup> Respondent was joined in the proceedings.<sup>1</sup>

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<sup>1</sup> See also *Gordon v Department of Health: Kwa-Zulu Natal* (337/07) [2008] ZASCA.

## **Issues to be decided**

8. I am required in terms of the signed pre-arbitration minutes between the parties dated 19 October 2020 to determine whether the 1<sup>st</sup> Respondent committed an unfair labour practice when it promoted the 2<sup>nd</sup> Respondent.
9. In this regard, the parties are in dispute whether (a) the 2<sup>nd</sup> Respondent met the requirements of the post in relation to qualifications and experience; and (b) the certification of the 2<sup>nd</sup> Respondent's documents was done fraudulently.

## **Background to the dispute**

10. It is common cause that:
  - 10.1 The post of Deputy Director: Human Resource Management – Admin Support: Fleet Management was externally advertised with a closing date of 23 December 2016. The requirements for the post were advertised as “an appropriate 3year Diploma/Degree or equivalent qualifications and 1 – 3 years’ experience”.
  - 10.2 Three candidates were shortlisted and interviewed for the aforesaid post, namely, the Applicant, the 2<sup>nd</sup> Respondent and one, Ms Sepuru (“Sepuru”). The interviews were held on 18 May 2017. The interview panel scored the 2<sup>nd</sup> Respondent the highest with 95, followed by Sepuru with 89 and the Applicant with 85. The 2<sup>nd</sup> Respondent accepted the offer of employment with effect from 1 September 2017. She only assumed duties during September 2018 after she attended an induction programme by the 1<sup>st</sup> Respondent.
  - 10.3 The Applicant referred an unfair labour practice dispute related to promotion dated 1 November 2017 to the Council wherein she stated that the 1<sup>st</sup> Respondent appointed the 2<sup>nd</sup> Respondent who did not meet ‘the inherent requirements of the post’. The Applicant sought compensation and protected promotion as relief.
  - 10.4 On 18 December 2017 a certificate of outcome was issued which stated that the dispute remained unresolved. On 27 February 2019 the Council issued a joinder ruling wherein the 2<sup>nd</sup> Respondent was joined to the proceedings.
  - 10.5 The Applicant resigned during January 2018 and subsequently withdrew her resignation during February 2018 and was thereafter reinstated.

## Survey of evidence and argument

11. In addition to their signed pre-arbitration minute dated 19 October 2020, the parties also relied on documentary evidence which was accepted on appearance, except for pages 39 – 41 in relation to the certification of documents which were placed in dispute by the Applicant.
12. The Applicant was the only witness in defence of her case. The 1<sup>st</sup> Respondent called two witnesses. All the witnesses testified under oath. The 2<sup>nd</sup> Respondent did not testify.
13. In his opening statement, Mr Mojanaga stated that the qualifications and experience of 2<sup>nd</sup> Respondent did not meet the requirements as stated in the advert. The certification of the documents of the 2<sup>nd</sup> Respondent was done by an employee of the 1<sup>st</sup> Respondent who is not a commissioner of oath which is a requirement for documents to be certified. The Applicant subsequently resigned and the then Head of Department (“HoD”) of the 1<sup>st</sup> Respondent pleaded with her to withdraw her resignation which she subsequently did based on the promise to appoint the Applicant at a personal salary notch equivalent to the position in dispute.
14. Adv Mopeli in his opening statement submitted that the 2<sup>nd</sup> Respondent met all the requirements of the position. He indicated that there was nothing wrong for an employee in the HR section to certify the documents of the 2<sup>nd</sup> Respondent. He indicated that the 1<sup>st</sup> Respondent was not aware of the “private agreement” between the then HoD and the Applicant. According to him, the Applicant resigned and subsequently withdrew her resignation voluntarily.
15. Mr Masalla, the 2<sup>nd</sup> Respondent’s legal representative, submitted in opening that his client met all the inherent requirements of the post in terms of her qualifications and experience. The 2<sup>nd</sup> Respondent scored the highest of all the other candidates during the interview process. The certification of the 2<sup>nd</sup> Respondent’s documents was done by an employee of the 1<sup>st</sup> Respondent with no evidence that the said official had a vested interest in the appointment of his client.

## Applicant's case

16. **Mrs Rebecca Mofokeng (“the Applicant”)**, testified that she commenced employment in the Public Service during 1993 and joined the 1<sup>st</sup> Respondent in 2010. She worked as an Assistant Director in HR at salary level 7 and supervised five sub-ordinates. Her duties included among others leave management and audit queries.
17. She indicated that during 2015, before the current dispute, the same post was advertised. She was not shortlisted and the 1<sup>st</sup> Respondent appointed one, Mr Dire (“Dire”). After only eight months, Dire was

transferred to another position and the post was re-advertised during 2016 which related to the current dispute. She had to train Dire whereas he was appointed in the higher position.

18. When the same position of Deputy Director Human Resource Management Admin Support Fleet Management was advertised during 2016, she applied and was shortlisted and interviewed. The interviews were conducted on 18 May 2017. She was not appointed; instead the 2<sup>nd</sup> Respondent was appointed. The 2<sup>nd</sup> Respondent accepted the offer of employment on 1 September 2017 but only assumed duties almost a year later. During that period she acted in the position and carried out the duties attached to the post.
19. She resigned out of frustration in January 2018 because she felt that the 1<sup>st</sup> Respondent did not value her experience and contributions. On 21 February 2018, she was called to a meeting with Messrs Tekiso (then acting HoD); Morobe (Chief Director HR) and Sekobile (Director HRM). According to her, Mr Tekiso ("Tekiso") gave an instruction for her resignation to be withdrawn and to reinstate her. She was also promised a personal notch equivalent to the salary level of the post in dispute, i.e. salary level 11. She was subsequently reinstated but the 'promise of personal notch never materialised'.
20. She certified her application documents for the post in dispute at the South African Police Service ("the SAPS"). According to her, the certification of documents cannot be done by HR and must either be done by SAPS or a commissioner of oath.
21. Under cross-examination she agreed that she was not formally appointed to act in the disputed position of Deputy Director. However, she maintained that she executed the duties attached to the position in the absence of the 2<sup>nd</sup> Respondent.
22. She disagreed with the version that Mr Sekobile ("Sekobile") would testify that there was no agreement for her to be placed on a personal notch which was the equivalent of the notch of Deputy Director of the disputed post.
23. She agreed that promotion should be done by following the relevant prescripts of the 1<sup>st</sup> Respondent. She said that the 2<sup>nd</sup> Respondent did not qualify for the position, hence she only assumed duties one year later after been appointed.
24. She indicated that it was not the practice for people applying for promotion positions to certify their documents in the Department. With reference to the stamp on page 39 of the bundle of documents, she confirmed that she had seen the stamp previously on other documents such as pension applications.

25. She was unsure whether Ms Selloane Modibidi (“Modibidi”) who administered the stamp on page 39 was authorised to do so. It was put to her that the 1<sup>st</sup> Respondent would call a witness who would confirm that Modibidi was duly authorised to use the stamp to certify documents. She had no response. She later agreed that the certification of documents by a commissioner of oath is not only done by SAPS.
26. She confirmed her earlier version that the MEC was to approve her reinstatement after she withdrew her resignation. She agreed that the meeting with the then HOD took place after she had referred her dispute to the Council. She confirmed that she did not declare a second dispute pertaining to the issue of the promise to pay her at the salary notch of the disputed post.
27. During cross-examination by Mr Masalla, she confirmed that she was not formally appointed to act in the disputed position, however she was doing the work which the 2<sup>nd</sup> Respondent was supposed to do. She indicated that she has approximately 25 years of experience in HR. She said she was not aware of the scores which emanated from the interview process. She had no comment on the version that the 2<sup>nd</sup> Respondent scored the highest marks and she the lowest during the interview process.
28. She confirmed that she resigned because she felt not being recognised by the 1<sup>st</sup> Respondent given her years of experience and commitment to her work. She reiterated the meeting wherein she was asked why she resigned and the subsequent agreement to place her on a personal notch at the same salary level of the disputed post. She confirmed that Modibidi who administered the stamp on page 39 was employed as a senior HR practitioner.
29. In re-examination she confirmed that the meeting regarding her resignation and subsequent agreement to pay her at the same salary notch of the disputed post was a formal meeting. She confirmed that the reason for her resignation was because the 1<sup>st</sup> Respondent did not recognise her experience and contributions whereas she is one who is training the same persons appointed in the higher positions. She confirmed that she did the work of the 2<sup>nd</sup> Respondent for one year after the latter was appointed as Deputy Director.

### **Respondent's case**

30. **Ms Selloane Modibidi (“Modibidi”)**, testified that at the time of the incident she was appointed as senior HR Practitioner. She explained, with reference to page 39, that the 2<sup>nd</sup> Respondent came to the HR Office and asked for her documents to be certified. She took responsibility and after being satisfied that the original documents accompanied the copies; she certified the documents as reflected on pages 39 to 41.

31. She had no prior relationship with the 2<sup>nd</sup> Respondent and simply certified the documents as she believed that she was duly authorised to do so in terms of paragraph 49 of the Public Service document known as 'Designation of Commissioners of Oath of 1998'. She said that it is practice in the Public Service for HR officials to certify documents.
32. She explained, with reference to pages 94 – 95 of the bundle of documents, that the outcome of the Lexis verification results confirmed the 2<sup>nd</sup> Respondent's matric results and her Advanced Diploma in Human Resource Management as authentic.
33. She confirmed the scoring results as reflected on page 28 which indicated that the 2<sup>nd</sup> Respondent scored the highest (95), followed by one, Sepuru at 89 and the Applicant at 85. She indicated that if the 2<sup>nd</sup> Respondent had declined the offer of employment, the position would have been offered to Sepuru who was the second highest.
34. Under cross-examination she accepted that she did not receive an appointment letter from the Department of Justice confirming her as a commissioner of oath. She maintained that she had the authority to certify the documents at the time of the incident in terms of the designation referred to earlier.
35. She agreed that the certification of the documents of the 2<sup>nd</sup> Respondent and the submission of her application for employment (Z83-form) was done on the same day of 13 December 2016. She said, with reference to page 95, that she and the Director HR, Mr Sekobile, were the only authorised users of the Lexis Reference Check. She was unable to explain why a different user, i.e. Ms Hlapolosa Atlehng used the system as reflected on page 94.
36. She stated that she was not part of an agreement between the Applicant and the HoD regarding the Applicant's reinstatement after the Applicant had resigned.
37. She explained that it is normal procedure for a newly appointed employee to assume duties after an induction period of approximately three months which included training on the post appointed to. She indicated that the 2<sup>nd</sup> Respondent met the requirements of the post and she was the best candidate during the interviews.
38. In re-examination she indicated that she was not aware of the requirement to be appointed in order to certify documents. She explained that the other user, Ms Hlapolosa Atlehng was the Deputy Director HRM and she reported directly to her. She stated that only the Director and Deputy Director HR were authorised users of the Lexis Reference system check. She said that the induction period of three months is at the discretion of management and might be more or less depending on the circumstances of each case.



39. In response to questions by Mr Masalla she indicated that there were other instances where she had certified documents. However, she was not sure whether she also certified the documents of other people who applied for the post in dispute. She reiterated that she had no prior relationship with the 2<sup>nd</sup> Respondent. According to her, the different user with reference to the Lexis Reference Check is not as important other as the outcome of the reference check, which in the case of the 2<sup>nd</sup> Respondent, confirmed her qualifications as authentic.
40. During cross-examination she confirmed that she could not remember whether she had certified the documents of other candidates who applied for the disputed post. It was put to her that she contradicted herself as to who are the authorised users on the Lexis Reference Check system. She responded that at that time only the Director and Deputy Director were the authorised users. She said that the 2<sup>nd</sup> Respondent came to HR Office to request for the certification of her documents. She was not familiar with the protocol of security at the entrance.
41. In re-examination she confirmed the outcome of the Lexis Reference Check, i.e. the qualifications of the 2<sup>nd</sup> Respondent were found to be authentic.
42. **Mr Segoane Sekobile (“Sekobile”)**, testified that he was the Director HR at the time of the advert of the post in dispute. He explained in detail the process followed in recruitment and indicated that the normal process was also followed in the instance of the 2<sup>nd</sup> Respondent. According to him, the 2<sup>nd</sup> Respondent met the requirements of the post as stated in the advertisement.
43. He explained, with reference to the Lexis Reference Check on pages 94 – 95, that he had the authority to allocate login details for users for the system. He indicated that he had delegated the authority to the Deputy Director HR, Ms Hlapolosa Atlehng. He also had the discretion to delegate it to a third person which was the senior HR Practitioner, Modibidi.
44. He explained the outcomes of the Lexis Reference Check as reflected on pages 94 – 95. He confirmed that the 2<sup>nd</sup> Respondent’s qualifications and citizenship were confirmed as authentic.
45. He confirmed that he received the resignation letter from the Applicant and the subsequent instruction from the former HoD to process the withdrawal of the Applicant’s resignation which, according to him, was provided for in terms of the Public Service Regulations. He confirmed that approval was obtained from the Executing Authority for the reinstatement of the Applicant following the withdrawal of her resignation.

46. According to him, there was no meeting with the former HoD other than the instruction he received. He submitted that an instruction to reinstate the Applicant and pay her on the higher notch of the disputed post would have been irregular if such instruction would have been given by the HoD.
47. He said that the enabling legislation for HR to certify documents is done in terms of par. 49 of section 6 of the Designation of Commissioners of Oath. According to him, the Public Service had been designated to perform duties of commissioners of oath provided that such officials were not be lower than level 2. According to him, the documents on pages 39 – 41 were duly certified and signed by the authorised HR official, i.e. Modibidi who was the senior HR Practitioner.
48. Under cross-examination he said he delegated the login details to both the Deputy Director as well as the senior HR Practitioner regarding the Lexis Reference Check. He maintained that only himself and the Deputy Director were authorised to login to system, however, he extended it to also include Modibidi, the senior HR Practitioner due to the functionality of their work.
49. He stated that the 2<sup>nd</sup> Respondent's work experience as HR Administrator according to her CV was relevant which made her suitable for the position as advertised. According to him, experience as Persal controller is obtained through training after appointment.
50. He indicated that the induction period depends on the discretion of management which take into account the position of the post. He said that the 2<sup>nd</sup> Respondent performed the functions for which she was appointed after she completed the induction programme. He agreed that the Applicant had more experience in HR than the 2<sup>nd</sup> Respondent. He pointed out that the 2<sup>nd</sup> Respondent had an Advanced Diploma in HRM.
51. He indicated that certification of documents was done by HR officials for both internal and external clients for services such as recruitment and service terminations. The certification of documents was also done for internal as well as external candidates who applied for vacancies. According to him, par. 49 of section 6 of the Designation of commissioner of oaths, designated responsibility to the Public Service and other entities by virtue of their appointment as HR officials, provided they were not below level 2.
52. He confirmed that he was not part of the interviews. He also confirmed that the interview panel members kept individual scoresheets. According to him, the combined scoresheet was checked against the individual ones to ensure its accuracy. He was part of checking the accuracy of the scoring process.

53. He said that there was nothing wrong with the cross-functional responsibilities of Modibidi of certifying documents and being part of the interview process, because it fell within her scope of work as senior HR practitioner.
54. He submitted that access to the building and/or offices was the responsibility of the security. He indicated that issue of access control and register was only enforced in 2019. He was unable to confirm what happened in 2016 when the 2<sup>nd</sup> Respondent came to the HR Office to certify her documents.
55. He confirmed that he was not part of a meeting between the Applicant and the former HoD. It was put to him that the Applicant resigned and was called back because the Department needed her skills and she was promised a personal notch on the same level as the disputed post. He denied knowledge and according to him, if such promise was made, it would have been highly irregular, because it was not part of HR policy.
56. In response to questions from Mr Masalla, he stated that the placement of the 2<sup>nd</sup> Respondent was determined by the relevant manager especially in light of the fact that it was a managerial position.
57. Under cross-examination he indicated that nobody was performing the duties of the 2<sup>nd</sup> Respondent whilst she attended the induction programme. According to him, it was done at Head Office through delegation of functions.

### Arguments

58. All the parties submitted detailed heads of arguments which I will not repeat here other than referring to relevant sections where necessary in the analysis hereunder. It must be noted that the heads of argument of the legal representative of the 2<sup>nd</sup> Respondent was only received via email on 23 December 2020 which was after the agreed date of submission (11 December 2020) and was accordingly not considered because there was no explanation as to why the submission was late.

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

59. The GPSSBC derives its jurisdiction to arbitrate promotion disputes from section 186(2)(a) of the LRA which defines unfair labour practices with regard to promotion as follows:

**“Unfair labour practice** means an unfair act or omission that arises between an employer and an employee involving – 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 provision of benefits to an employee.”

60. An employee who alleges that she is the victim of an unfair labour practice bears the onus of proving all the elements of her claim on a balance of probabilities.<sup>2</sup> The employee must prove not only the existence of the labour practice, but also that it is unfair.<sup>3</sup> What is fair, depends upon the circumstances of a particular case and essentially involves a value judgment.<sup>4</sup>
61. It is settled law that employees have no general right to promotion. It lies within the discretion of the employer to decide who he wants to promote. What employees do have, is a right to be fairly considered for promotion when a vacancy arises. The arbitration of a promotion dispute does not entail a hearing *de novo*, but a review of the employer's decision. In applying the **Sidumo** test to promotion disputes, it has been held that the arbitrator is not given the power to consider afresh what he would do but to decide whether what the employer did was fair.<sup>5</sup>

Whether the 1<sup>st</sup> Respondent committed an unfair labour practice

62. I am directed by the pre-arbitration minute between the parties to determine whether: (a) the 2<sup>nd</sup> Respondent met the requirements of the post in terms of qualifications and experience; and (b) the certification of the 2<sup>nd</sup> Respondent's documents was done lawfully. In emphasizing the pre-arbitration minute concluded and signed by both parties dated 19 October 2020, the importance thereof was summarized as follows by Professor Butler in his book on arbitration:<sup>6</sup>

"Any party who must defend himself at an arbitration is entitled to know what case it is that he must meet, so that he may prepare himself adequately for the arbitration to deal with it. Surprise as regards issues in dispute should have no part in an arbitration. Equally the applicant should know what parts of his claim the respondent contests and what parts are not in dispute so that he does not waste time and money in proving matters that are not in dispute." [my underlining]

63. The issue of the 2<sup>nd</sup> Respondent's duties as per the Applicant's heads of argument was not raised as an issue in dispute and fits into the above statement that 'surprise as regards issues in dispute should have no part in an arbitration.' I agree and have accordingly decided not to deal it.
64. The Applicant's case in summary, and in line with the pre-arbitration minute, was that the 2<sup>nd</sup> Respondent did not meet the minimum requirements of the post as per the advertisement and the employee who

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<sup>2</sup> *Ndlovu v CCMA* (2000) 21 ILJ 1653 (LC).

<sup>3</sup> Du Toit et al *Labour Relations Law* (5 ed) 488.

<sup>4</sup> *National Education Health & Allied Workers Union v UCT* (2003) 24 ILJ 95 (CC) par 33.

<sup>5</sup> *Minister of Home Affairs v GPSSBC* (JR 1128/07) [2008] ZALC 35 (26/03/2008, Labour Court) par 14.

<sup>6</sup> *Butler & Finsen Arbitration in South Africa (Juta)* at 124.

certified the 2<sup>nd</sup> Respondent's documents did so fraudulently because the employee knew that she was not appointed as a commissioner of oath.

65. I have observed all three witnesses and regard them as reliable and credible witnesses. The Applicant answered questions in a straightforward manner and made concessions where expected. There were no material contradictions in her testimony. I also found Modibidi and Sekobile reliable and credible witnesses who did not waver under cross-examination and provided plausible explanations when cross-examined. Their evidence was also corroborated and substantiated by the documentary evidence presented. The contradiction found in their evidence in relation to the verification process was not material in that it did not change the outcome of the results of the verification process itself.
66. Firstly, I will deal with the issue of **substantive unfairness** in relation to the promotion of the 2<sup>nd</sup> Respondent by deciding on the following key issues:

Compliance with minimum requirements of the advert

67. It is common cause that the advertisement of the post in question required the candidates to have an *appropriate three-year Diploma/Degree or equivalent qualifications and 1-3 years' experience*.
68. The CV of the 2<sup>nd</sup> Respondent stated that she commenced employment in HR during 2013 and that she has matric plus a professional qualification, namely an Advanced Diploma in Human Resource Management.
69. Mr Mojanaga argued that "there is a serious breach of protocol in the recruitment process, because the 2<sup>nd</sup> Respondent's curriculum vitae did not disclose any managerial experience as required by the advertisement". [my underlining] This is a disingenuous statement by Mr Mojanaga, because the advertisement is clear in that it referred to 1-3 years' experience and did not specify the type of experience required.
70. Mr Mojanaga's also argued that if the Advanced Diploma of the 2<sup>nd</sup> Respondent was to be verified through the South African Qualification Authority ("SAQA"), it would have been discovered that it was not a formal qualification. It is *trite* that the onus rests with an applicant in unfair labour practice disputes to prove its case. The Applicant failed to do so. I say this, because the Applicant failed to call witnesses to support its argument regarding the role of SAQA. Moreover, no evidence was led by the Applicant pertaining to the issue of verification of qualifications and the role of SAQA.
71. I am persuaded by the testimony of both Modibidi and Sekobile that the 2<sup>nd</sup> Respondent met the requirements of the advert. I say this, because it is uncontested that the 2<sup>nd</sup> Respondent's CV reflected

that her work experience covered the period 2013 to 2017 which made her eligible in terms of the minimum experience of 1 to 3 years required as per the advertisement.

72. It is undisputed that the 2<sup>nd</sup> Respondent's qualifications had been confirmed by the Lexis Reference Check as authentic. There is no evidence before me that showed that the 2<sup>nd</sup> Respondent's professional qualification, namely an Advanced Diploma in Human Resource Management does not meet the minimum requirement as stated in the advertisement referred to above, i.e. 'an appropriate three year Diploma or equivalent qualification'.
73. Based on the above, I find that the 2<sup>nd</sup> Respondent met the minimum requirements regarding experience and qualifications as stated in the advertisement.

#### Reasonableness of the 1<sup>st</sup> Respondent's decision

74. It is settled law that the emphasis is not on the correctness of the employer's decision but on the reasonableness of the decision to promote an applicant. The question therefore is whether the decision to appoint the 2<sup>nd</sup> Respondent instead of one of the other two candidates was rational?
75. It is common cause that:
- (a) The 2<sup>nd</sup> Respondent received the highest score by the interview panel, followed by Sepuru whilst the Applicant received the lowest score.
  - (b) The Applicant had more experience than the 2<sup>nd</sup> Respondent as well as the third candidate, Sepuru. However, Sepuru was better qualified than both the Applicant and the 2<sup>nd</sup> Respondent. Sepuru also had completed more relevant HR training than the other two candidates.
  - (c) The Applicant and Sepuru worked in the Public Service whilst the 2<sup>nd</sup> Respondent came from the private sector.
  - (d) The Applicant and Sepuru were both appointed as middle managers at the level of Assistant Director.
76. Based on the aforesaid comparison, it does appear that the best suitable candidate for the position on paper (CV) was Sepuru.
77. I am alive to the reference of the 1<sup>st</sup> Respondent in its answering submission to the case of **Benjamin v University of Cape Town (2003) 12 BLLR 1209 (LC)** wherein according to Adv Mopeli the court held that "it does not mean that because someone looks better than another on the paper, does not mean the promotion of the other is unfair". I have read the judgment, but could not find any reference to the said

quotation by the Court. Even if I am mistaken, there was no other assessment tool available to conduct such comparison.

78. I now turn to the question whether the decision of the 1<sup>st</sup> Respondent to promote the 2<sup>nd</sup> Respondent was rational? Based on the undisputed information contained in the CV's of the three candidates, it is my view that the aforesaid decision was not rational. I say this, because the 2<sup>nd</sup> Respondent, on paper, had the least experience and relevant training as compared to the other two candidates and they were also better qualified than the 2<sup>nd</sup> Respondent. This, however, is not the end of the enquiry, because the candidates were subjected to an interview process to further elaborate on their suitability for the position.

#### Casual connection

79. It is *trite* that even if there was unfair conduct by an employer during a promotion process, this does not mean that substantive fairness was proved. Substantive unfairness cannot exist in abstraction. Therefore, in order to prove substantive unfairness that would entitle the employee to substantive relief such as appointment to the position or protected promotion, an applicant also needs to establish such casual connection between the unfairness and the failure to promote.
80. To do that, the applicant needs to show that, but for the unfairness, he or she would have been appointed to the post. This means that the applicant must show that not only was he or she better qualified and suited for the post than the successful candidate but also that he or she was the best of all the candidates who applied for the position.<sup>7</sup>
81. Based on the evidence before me, I find that the Applicant had failed to pass the 'but for' test as explained above. I say so, because nowhere in her evidence or heads of argument did the Applicant establish such casual connection between the unfairness or irregularity and the failure to promote her. Instead, the Applicant relied on her version that the 2<sup>nd</sup> Respondent did not meet the requirements of the advert in relation to experience and qualifications. She had no comments when Mr Masalla put it to her under cross-examination that the 2<sup>nd</sup> Respondent scored the highest and she the lowest whereas this was the opportune moment to state her case as to why she was best of all the candidates.
82. The only plausible inference to be drawn from this is that the Applicant knew or ought to have known that she could not compete against the suitability of Sepuru, hence she deliberately sidestepped any reference to Sepuru.

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<sup>7</sup> *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC).

83. Given the above, I find that the Applicant had failed to discharge the onus to that the 1<sup>st</sup> Respondent committed substantive unfairness in promoting the 2<sup>nd</sup> Respondent.
84. Secondly, I now address the issue of **procedural unfairness** in relation to the promotion of the 2<sup>nd</sup> Respondent.
85. Even in unfair dismissals, the Labour Court has rejected a checklist approach to procedural fairness and has held that substantial compliance with procedural fairness is all that is required, See ***Avril Elizabeth Home for the Mentally Handicapped v CCMA (2006) 27 ILJ 1644 (LC)***.
86. The following procedural issues were relevant for determination:

#### Verification of qualifications

87. I agree with the Applicant that the testimony of Modibidi and Sekobile was contradictory as to whom was authorised to use the Lexis Reference Check. However, the said contradiction did not change the material outcome of the results of the verification reference check which confirmed the 2<sup>nd</sup> Respondent's matric results and Advanced Diploma in Human Resource Management as authentic.

#### Certification of documents

88. It is common cause that Section 6 of the Justices of Peace and Commissioners of Oaths Act no 16 of 1963 ("Designation of commissioners of oath") designates the holders of various offices listed in the Schedule to be commissioners of oaths for the Republic of South Africa. In this regard, paragraph 49 reads as follows:

"Public Service

- (a) Officers in the Administrative, Professional, Clerical, Technical or General A and General B Divisions of the Public Service occupying a post with a salary scale the minimum notch of which is equivalent to or higher than the minimum notch of salary level 2 applicable in the Public Service.
- (b) Employees held against posts in the Administrative, Professional, Clerical, Technical or General A and General B Divisions of the Public Service if the minimum notch of the salary scale applicable to such posts is equivalent to or higher than the minimum notch of salary 2 applicable in the Public Service."
89. It is common cause that the 1<sup>st</sup> Respondent as a government department falls within the definition of Public Service. Secondly, it is common cause that Modibidi was an employee in the 'Administrative' section and occupied a post higher than the minimum notch of salary 2.



90. The Applicant's representative, Mr Mojanaga, argued in both his founding and relying submissions that Modibidi committed fraud by certifying documents while she ought to know that she was not a commissioner of oath, because there was no 'J5 application form' approved by a Magistrate which appointed her as commissioner of oath.
91. Fraud is defined by the Meriam Webster website as the "intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right"; "an act of deceiving or misrepresenting"; "a person who is not what he or she pretends to be".
92. The argument by Mr Mojanaga is defeated by the fact that holders of the offices in the Public Service as referred to above has been duly designated by Section 6 of the Justices of Peace and Commissioners of Oaths Act no 16 of 1963. In agreeing with the version of Sekobile, I cannot see the relevance of an application to the Magistrate in the instance where the legislation is clear on who is designated as a commissioner of oath. In other words, an application to be designated (form J5) is only applicable and relevant in instances where a particular office is not designated as a commissioner of oath which is not the case *in casu*.
93. I have also perused the CV's of the Applicant and Sepuru and found that the documents of the Applicant were certified by SAPS and those of Sepuru by the Department of Cooperative Governance and Traditional Affairs. The latter clearly supports the designation of holders of the offices in the Public Service as commissioners of oath which cloth them with the power to certify documents, otherwise if one follows the Applicant's evidence and argument then Sepuru was also supposed to certify her documents at SAPS.
94. It is uncontested that Modibidi had no prior relationship with the Applicant and/or that she gained financially by assisting the Applicant. Whether the 2<sup>nd</sup> Respondent travelled from Gauteng to submit her application on the closing date of the advert is of no significance for the Applicant's case. I say this, because it is common cause that the submission of application and certification were done on the same day, 13 December 2016. Similarly, the duty rested on the Applicant to subpoena security guards to these proceedings to confirm whether the 2<sup>nd</sup> Respondent accessed the offices on the day of submission of her application. This was not done. It follows that the Applicant has failed to discharge the onus to prove that Modibidi was not allowed to certify documents for reasons referred to above.
95. Given the above, I find that Modibidi was duly designated as a commissioner of oath in terms of paragraph 49 of the Designation of commissioners of oath. It follows that in terms of the designation she was lawfully entitled to certify documents as a commissioner of oath.

### Issue of induction of newly appointed employees

96. It is common cause that all newly appointed employees are inducted when appointed by the 1<sup>st</sup> Respondent. This is also confirmed in the appointment letter which the 2<sup>nd</sup> Respondent accepted on 1 September 2017. The undisputed evidence of Modibidi corroborated by Sebokile confirmed that it was the prerogative of the employer to decide on the form, content and duration of the induction programmes.
97. It is common cause that the 2<sup>nd</sup> Respondent attended a 12-month induction programme before she assumed her duties. In my view, this was a very long period to induct an employee into the operations of the 1<sup>st</sup> Respondent. No reasonable explanation was provided especially from Sekobile as to why it took so long to complete the induction programme.
98. Despite the lack of a reasonable explanation for the long induction period that the 2<sup>nd</sup> Respondent was subjected to, there was no proof that the decision to keep the 2<sup>nd</sup> Respondent on the induction programme for 12 months was arrived at arbitrarily or capriciously or mala fide or in order to further an ulterior or improper purpose.
99. Based on the above, I find that the Applicant had failed to discharge the onus to prove that the 1<sup>st</sup> Respondent committed procedural unfairness in promoting the 2<sup>nd</sup> Respondent.
100. I now turn to the following remaining two matters as referred to in the heads of argument of the Applicant:

### Discovery of documents

101. The Applicant's representative, Mr Mojanaga in his founding submission made reference to a list of documents which were not discovered. However, in terms of the pre-arbitration minutes between the parties, they have agreed that documents were exchanged. Simply put, that there was agreement on discovery of documents.
102. Further, the Applicant had the right in terms of the Rules of Council to subpoena the discovery of such documents. It was not done. Therefore, I am unable to provide the Applicant with a supporting shoulder, because she did not use the remedies available to her.

### Issue of reasonable expectation based on prior promise

103. Much was made about this point by the Applicant in argument to the extent that it turns to be the main issue in contention – far removed from the issues in dispute as per the pre-arbitration minute. Nevertheless, for the sake of completion, I have decided to deal with it.

104. The Applicant's representative, with reference to ***Durusa v University of Durban Westville & other (2001) 7 BALR 753 (CCMA)***<sup>8</sup> and ***SATA obo Van der Mescht v Telkom SA (Pty) Ltd (1998) 6 BALR 732 (CCMA)*** raised in argument on behalf of the Applicant, the issue that the 1<sup>st</sup> Respondent is guilty of unfair conduct in relation to promotion because the alleged promise by the former HoD created a reasonable expectation that the Applicant would be placed on a personal salary notch equivalent to the post in dispute.
105. The referred cases were decided in the CCMA and it is *trite* that arbitrators are not bound by decisions of other arbitrators, except for judgments of our Courts. Nevertheless, it must be noted that in ***Dumisa v University of Durban-Westville*** the employer decided not to promote the employee on the grounds that he failed to meet the criteria laid down by the employer's promotional policy. While the CCMA did not find these criteria unfair, it still decided to order the employer to consider the employee for promotion. This was because the arbitrator found that the employer had promised to consider the employee for promotion, therefore giving rise to a legitimate expectation. The circumstances are clearly different from the matter before me, because the "alleged promise" *in casu* was made *ex post facto* of the referral of the dispute to Council.
106. In ***SATA obo Van der Mescht v Telkom***, the commissioner expressed the view that "level progression is clearly a system of promotion". The said case is clearly not relevant in the current case before me.
107. During cross-examination the Applicant admitted that by the time she referred the current dispute to Council (November 2017), the said meeting where the alleged promise was made by the then HoD had not taken place.
108. It is also common cause that the Applicant did not declare a dispute regarding the 1<sup>st</sup> Respondent's failure to implement the alleged agreement between her and the HoD for her to be placed on a personal notch equal to the salary notch of the disputed post which is the same as 'protected promotion'.
109. Moreover, the Applicant failed to call any witnesses to support her version which means she relied on hearsay evidence. In the absence of a witness or documentary proof of such agreement, the Applicant's case stands to fail. Again, it is not for the 1<sup>st</sup> Respondent to provide proof of the existence of an agreement – it is *trite* that the party who alleges must prove.
110. I agree with the position of the 1<sup>st</sup> Respondent's as stated in its answering submission that the issue of an alleged promise is an after the fact and that Council lacks jurisdiction to deal with it because it relates

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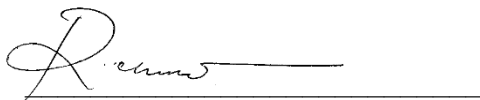
<sup>8</sup> It must be noted that the correct citation is ***Dumisa*** and not ***Durusa*** as quoted by the Applicant's representative.

to an incident which happened after the declaration of the current dispute by the Applicant. It is also not covered by the pre-arbitration minutes between the parties referred to above.

111. It is my view, even if there was such a promise made by former HoD, it would have been relevant to consider only if the Applicant was able to show that she was best of all the candidates for the position. The Applicant has failed to demonstrate that she was best candidate based on the evidence presented before me.
112. I concur with the 1<sup>st</sup> Respondent's argument, even though not so raised by the Applicant, that it is *trite* that acting in a higher post does not create an entitlement for promotion taking into consideration that it is undisputed that the Applicant was not formally appointed to act in the disputed position.
113. The issue of protected promotion with reference to the judgment in ***Ekurhuleni Metropolitan Municipality & Another v SALGBC & Others Case NO: JR369/15 (LC)*** as raised in argument by the Applicant can only be considered, in my view, in instances where the employee has shown that he or she was the best of all the candidates interviewed for the position. The Applicant, for the reasons stated earlier, has failed to demonstrate that she was the best of all the candidates interviewed.
114. Given the above, I am unpersuaded by the argument and evidence presented, because it is based on hearsay, is not relevant and it falls outside the jurisdiction of the current dispute before me.
115. The onus was on the Applicant to provide substantial reasons for the 1<sup>st</sup> Respondent's decision not to appoint her. Unfortunately, the Applicant has failed to do so through oral and documentary evidence as well as in her written heads of arguments. By signing the pre-arbitration minute the Applicant committed herself to issues in dispute which at the end of the day has caught up with herself. Had the Applicant stitched her case together differently, the outcome might have been different.
116. The Applicant was afforded an opportunity to present her case when she was shortlisted and interviewed for the disputed position. However, the Applicant during her own evidence did not once allege that she was the best candidate of all the candidates interviewed for the disputed position and/or has shown proof that she was best candidate for the position. At the end of the day, it was simply not good enough to rely on experience and an alleged promise to justify her case for promotion.
117. Given the incidence of onus, there is no justifiable reason for me to interfere with the exercise of the 1<sup>st</sup> Respondent's discretion in promoting the 2<sup>nd</sup> Respondent, because insufficient evidence was tendered in order to support a version that the actions of the 1<sup>st</sup> Respondent were unfair and grossly unreasonable.
118. I therefore deem it appropriate to make the following award:

## **Award**

119. The Applicant, NUPSAW obo R Mofokeng, has failed to prove that the 1<sup>st</sup> Respondent, the Department of Police, Roads and Transport – Free State, committed an unfair labour practice by promoting the 2<sup>nd</sup> Respondent, P Lesito, as contemplated in section 186(2)(a) of the LRA.
120. The Applicant's case is dismissed.
121. There is no order as to costs.



**William Richard Pretorius**

**(GPSSBC Arbitrator)**