



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: R de Wet
Case No.: GPBC2062/2015
Date of Award: 19 February 2021

In the ARBITRATION between:

PSA obo SEFUBA, TM

(Union / Applicant)

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT (DOJ&CD)
(First Respondent)

OFFICE OF THE CHIEF JUSTICE (OCJ)
(Second Respondent)

SEJOSENGWE, M
(Third Respondent)

Union/Applicant's representative:
Union/Applicant's address:

Mr. Hall

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Respondent's representative: Adv. Ngwenya

Respondent's address:

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- [1]. The dispute was referred to the General Public Service Sectorial Bargaining Council (*hereinafter referred to as the "GPSSBC" or the "Council"*) in terms of section 186(2) of the *Labour Relations Act, 66 of 1995 (hereinafter referred to as the "LRA")*. The matter was scheduled for arbitration via virtual hearing on 3 February 2021.
- [2]. At the conclusion of the proceedings, indulgence was granted to both parties to submit written heads of argument on or before 12 February 2021. Both parties complied with the time period provided and the submissions were duly considered.
- [3]. The Applicant, Mr. Sefuba was present and was represented by Mr. Hall, Trade Union Official, whilst Adv. Ngwenya represented both the first and second Respondents. The third Respondent, Ms. Sejosengwe did not attend the proceedings. Upon enquiry it was established that she was aware of the process, but for reasons unknown to these proceedings, did not attend. The matter accordingly proceeded in her absence.
- [4]. The bundles of documents admitted at the commencement of the proceedings, were marked Bundle "A" (Applicant's bundle), and Bundle "R" and "B" (Respondent's bundles) respectively.

ISSUE TO BE DECIDED

- [5]. To determine whether or not the actions or omissions of the Respondent towards the Applicant,

constituted an unfair labour practice. The dispute whether or not the Respondent perpetrated an unfair labour practice is three-fold and encompass the following:

- failure to assess and promote the Applicant;
- failure to shortlist, and invite the Applicant to an interview for the Secretary General of the Office of the Chief Justice position; and
- failure to pay the Applicant the cellular phone benefit.

[6]. At the commencement of the proceedings on 3 February 2021, it was placed on record that the dispute insofar the alleged unilateral changes to condition of employment, was withdrawn.

[7]. In the event of a finding in the affirmative, to determine the appropriate remedy.

FACTUAL BACKGROUND TO THE MATTER

[8]. It was commonly accepted by both parties that the background as summarised by the Labour Court¹ was an accurate reflection of the sequence of events as the dispute unfolded. The background was summarised as follows:

[9]. Up until 2010, the Office of the Chief Justice (*hereinafter referred to as the "OCJ"*) formed part of the Department of Justice and Constitutional Development (*hereinafter referred to as the DOJ&CD*). Mr. Sefuba was the General Executive Manager in the OCJ appointed by the DOJ&CD and was the head of office since 2008. He reported to Chief Justice Pius Langa until he retired in 2009. He met the new incoming Chief Justice Ngcobo in August 2009 whereafter he was told he would be deployed.

[10]. Effective 1 September 2010, the OCJ was established as a National Department. During 2011, the OCJ advertised the post of Secretary General. Mr. Sefuba responded to the advert by applying for the position but was not shortlisted nor interviewed.

[11]. Pursuant thereto, Mr. Sefuba lodged an internal grievance relating to the failure of the OCJ to shortlist and invite him for an interview. Integrated in the complaint was the discontentment of Mr. Sefuba with

¹ *Department of Justice and Constitutional Development and Others v General Public Service Sectoral Bargaining Council and Others* (JR486/16) [2018] ZALCJHB 280; (2018) 39 ILJ 2001 (LC)

the fact that he was not assessed nor promoted since 2008/2009. In the absence of a satisfactory resolution to the grievance he referred a dispute to the Bargaining Council with the assistance of the Union, on 19 December 2012. The Council allocated case number GPBC 6/2013 to the referral.

[12]. The matter was scheduled for conciliation on 16 May 2013 and proceeded to be heard in arbitration on 15 October 2015 when the dispute could not be amicably resolved amongst the parties. Pursuant to the successful review the matter was remitted back to the Council.

[13]. Mr. Sefuba petitioned me, in the event of a finding in his favour, to grant the following award:

- i). to be assessed from 2008 onwards;
- ii). to be compensated for the failure to be shortlisted and interviewed for the post of Secretary General; and
- iii). to be paid all outstanding telephone bills as per the cellphone policy.

INTERLOCUTORY POINT

[14]. The issue of condonation was raised *mero moto* and the parties were requested to address the issue along with the written heads of argument. A brief background to the dispute is necessary to set out the need, or otherwise for condonation.

[15]. Mr. Sefuba referred an alleged unfair labour practice dispute to the Council involving the alleged unilateral change to conditions of employment, failure to be provided with a performance contract, failure to be assessed and promoted since 2009 and failure to be shortlisted and invited to the interviews for the position of Secretary-General. In the wake of the arbitration proceedings, the Labour Court set aside the award and remitted the matter back to the Council to be heard by a different and commissioner. As already alluded to earlier in this award, the challenge relating to the alleged unilateral changes to condition of employment, was withdrawn at the commencement of the proceedings on 3 February 2021.

[16]. Pursuant to the first referral, a second dispute was referred to the Council under case number GPBC 2062/15 whereas it was claimed that Mr. Sefuba was, at all times, during the course of his employment, entitled to a cellphone allowance. Subsequent, the parties agreed to combine the two disputes under case number GPBC 2062/2015.

- [17]. In responding to the question whether there is a need for an application for condonation, Mr. Sefuba explained that Mr. Hall, the current Union Representative, took over the matter from the erstwhile representative at around the time when it was remitted back to the Council by the Labour Court. Prior to that, he only assisted in preparing the matter for arbitration. During Mr. Hall's involvement in the matter there was never any issue or dispute about condonation. Mr. Sefuba has a vague recollection of an issue relating to condonation but does not recall exactly when and where, or about which issue in dispute such condonation would have been.
- [18]. In light thereof, it was the Applicant's submission that the matter was condoned in the previous arbitration proceedings, otherwise the matter would not have proceeded to arbitration nor to the Labour Court for adjudication. Alternatively, the delay in referring the matter should be condoned for the reasons stated above, namely: that though, the dispute might have arisen in 2009, it was an ongoing dispute because Mr. Sefuba was raising the matter with the various acting Secretaries Generals, who themselves were not sure as to who the employer was.
- [19]. It was not apparent from the case file and the facts before me, whether or not condonation was granted and as a result, jurisdiction must be determined before a determination on the merits can be made. It was contended by the Applicant that the matter would not have been capable of proceeding up to the level of the Labour Court, if condonation was not granted, however this contention is not sound in law. Jurisdiction is a fact it either exists or it does not. The mere fact that the matter was arbitrated, reviewed, and remitted back to the Council does not in, and of itself, establish jurisdiction. Equally important, from the judgment of the Labour Court, it is apparent that the issue of condonation was not before the Court and therefore it cannot be said that such delay was condoned.
- [20]. Turning to the argument that the matter is ongoing or repetitive, the Labour Appeal Court in **Mngadi v Jenkin NO and others** (DA 7/2019) [2020] ZALAC 42 had regard to the judgment in **SABC Ltd v CCMA & others**² whereas it was held that a promotion resulting in ongoing discrimination and where these Applicants were continually being paid at a lower rate, constitutes a "*continuing or repetitive*" act that recurred on each pay date. Applying that reasoning to the present case, it was held that Mr Mngadi's referral of his dispute in relation to the alleged ongoing and repetitive discrimination was not out of time, at least in relation to the payment of his salaries (discrete repetitive acts) in the six months prior to his referral. Condonation was not required to conciliate the alleged dispute with regard to those *last payments and intended future payments*. Where the Applicant is seeking a remedy exceeding the period provided for in the Act such as for example six months prior

² (JA 36/07) [2009] ZALAC 13; (2010) 31 ILJ 592 (LAC); [2010] 3 BLLR 25 (LAC)

to the date of referral in the EEA, then condonation must be sought and granted before the Commissioner will be able to entertain that period falling outside the statutory period. Although the facts in both **Mngadi** and **SABC** can be differentiated from the matter currently before me on the basis of *inter alia* the issues in dispute, I am not persuaded that there is any reason for the principle mentioned in both **Mngadi** and **SABC** not to be capable of being applied to the facts currently before me, with the necessary changes to the context. In other words, if the principle is applied to the matter currently before me, then the Applicant must apply for condonation for any period where relief is sought exceeding the 90 days stipulated in the LRA. In the event that I am wrong on the applicability of the principle to the facts of this matter, then the Applicant must in any event apply for condonation before such period can be considered.

[21]. I am persuaded that both the promotion and performance assessment disputes constitute ongoing and repetitive disputes as the Applicant would continually being paid at a lower rate. Applying this principle, the need to apply for condonation for a dispute referred within 90 days from the date of the referral is extinguished, but any period longer than 90 days the need would persist. Apart from mentioning that the Applicant followed a grievance and received no satisfactory response, nothing was presented to account for the full period of delay. A period of delay of this nature is excessive and requires an explanation that is full and satisfactory. To merely state that the grievance process was followed, does not account for every period of this lengthy delay. Condonation is accordingly not granted for any period exceeding 90 days prior to the referral.

SURVEY OF EVIDENCE AND ARGUMENT:

For purposes of this award, it is not my intention to record verbatim the submissions made by any of the parties. Only the salient points that have a bearing on the issue in dispute to be decided, are recorded hereunder.

Evidence AND Argument

Applicant's version:

[22]. The Applicant was the only witness to testify in support of his own case.

[23]. Mr. Sefuba testified that he worked under the late Chief Justice Langa until he retired in July 2009 and was replaced by Chief Justice Ngcobo. At this time things turned for the worst for him, as he was informed during a meeting, he had with Chief Justice Ngcobo, that he would be deployed elsewhere.

- [24]. He nonetheless continued with some menial tasks until Adv. Jiyana was appointed at the beginning of 2010. Chief Justice Ngcobo then instructed him to vacate the office he held at the Constitutional Court, and to move into new offices in a different building. Henceforth little to no tasks or duties were given to him to do, albeit that he was available and willing to work.
- [25]. Throughout this time, he made continuous attempts to establish the status of his position and work to be done but received no clear instructions or guidance. Consequently, he was told that positions would be made available and that he should apply. The positions were however on the same level that he was employed at, to wit. Chief Director, and he accordingly decided against applying for such. He was left in abeyance and was sent from pillar to post, not even knowing who he was working for.
- [26]. Following thereto Chief Justice Mogoeng was appointed at the beginning of 2012. In turn he appointed Dr. de Wee as the acting Secretary General. Dr. de Wee confirmed Mr. Sefuba's status as employee of the OCJ and not the DOJ&CD and undertook to instruct Mr. Dreyer to resolve the issues he faced.
- [27]. Pending resolution of the challenges that he experienced, he noticed the position of Secretary-General was advertised. Having 12 years' experience as the Head of Office, and meeting the minimum requirements in terms of qualifications, he formed the opinion that he would be the best fit for the position and he accordingly responded to the advert by applying for the post. Subsequently it came to his knowledge that interviews were to be held but that he was not invited. After escalating the matter to the Human Resources (HR) department, he was informed that no further information was available as to the failure to invite him for an interview. Whether or not the successful candidate met all the requirements could never be established.
- [28]. With the assistance of his union, he lodged a grievance and whilst the grievance was underway attempts were made to deploy him to the South African Judicial Educational Institute (SAJEI).
- [29]. Likewise, all telephone bills that he submitted for payment was ignored. All Chief Directors receive a telephone allowance of R1 500.00. He also received such allowance until it was stopped by Ms. Sejosengwe despite using his own cellular phone for work purposes. He was not remunerated for the out-of-pocket expenses incurred, although the specific amount owing to him could not be quantified.

Respondent's version:

- [30]. The Respondent relied on the testimony of two witnesses, namely Dr. de Wee and Mr. Holby.

- [31]. Dr. de Wee testified that the COJ was considered as a separate business unit under the auspices of the DOJ&CD until such time that it was promulgated as a National Department.
- [32]. The position of Secretary-General is on the same level as a Director-General, whilst the position that Mr. Sefuba occupied is the equivalent of a Chief-Director position. The position of Chief-Director is two (2) levels lower than a Director General.
- [33]. Ms. Sejosengwe who was appointed to the position of Secretary-General, is highly experienced with years of service in Court systems. Mr. Sefuba on the other hand, does not have the necessary experience required specifically in relation to, *inter alia* budgets.
- [34]. Mr. Holby testified that he is currently the Director: Human Resources. Although he was not employed at all times during the initial stages of this dispute, he had to familiarise himself with the merits of the matter by virtue of his position. From the evidence to his disposal, it is evident that Mr. Sefuba is employed by the COJ reporting to Ms. Sejosengwe.
- [35]. Of particular concern though, is that Mr. Sefuba is hardly ever seen at work. Despite opportunity given to him to take up alternative employment, Mr. Sefuba has declined any and all opportunities given to him. Since April 2013, at the very least, the Applicant has not carried out any duties, but nevertheless receives his salary. Had Mr. Sefuba undertaken his duties, he would have been assessed by his supervisor.
- [36]. In relation to the cellphone policy, no agreement could be secured with the unions and as a result the cellphone policy of the DOJ&CD is used³ by the COJ. The policy provides for two options, either to be supplied with a cellular phone or to receive an allowance. Be that as it may, it is a working tool to ensure employees are placed in a position to perform their duties satisfactorily. Mr. Sefuba did not qualify for the benefit as he did not perform any official duties.

ANALYSIS OF EVIDENCE AND ARGUMENT:

Legal considerations: -

³ Bundle R page 76

- [37]. Section 186(2) of the LRA, defines an unfair labour practice to mean “*any unfair act or omission that arises between an employer and employee involving (a) unfair conduct by the employer relating to 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.*”
- [38]. In unfair labour practice disputes, such as those relating to promotions, the *onus* is on the employee to prove that he/she is a suitable and the better candidate for the position in question. The onus to establish that conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA, therefore rests on the Applicant. Hence the Applicant is burdened to establish a *prima facie* case before the evidentiary burden will shift to the Respondent to defend the challenges against the fairness of their actions or omissions⁴. It follows that for the onus to be discharged, the Applicant must prove that the Respondents have: (i) committed an unfair labour practice as defined in section 186(2); and (ii) that the Respondent's conduct was unfair⁵.
- [39]. Section 138(1) of the LRA accords a discretion, and in the same regard places a duty on commissioners, to deal with the substantive merits of each and every matter before him/her, with the minimum of legal formalities and to adopt a process that allows both parties a full opportunity to ventilate the issues in dispute in a fair manner⁶.
- [40]. The Respondent argued that notwithstanding the Applicant having filed a bundle of documents, no reference to any of the documents in the bundle was made during the evidence-in-chief of the Applicant. It was contended that it was not open to a party, particularly one that bears the onus such as the Applicant, to merely deliver a bundle of documents and not make specific reference to the documents he seeks to rely upon. In the absence of the documents having been mentioned and referred to in evidence and the relevance explained in evidence, it was argued that the documents are not properly before these proceedings.
- [41]. The Labour Court clarified that the mere inclusion of documents in a discovered bundle, handed in as evidence at an arbitration, does not make it evidence properly before the Commissioner. As such, it cannot be taken into account by the Commissioner at all. Generally, documentary evidence must be authenticated by calling a witness to testify that the document is what it purports to be. If the author of the document is not called, the documentary evidence would also be hearsay evidence, which cannot be admitted “*willy nilly*” but only in terms of section 3 of the LEAA, on application. The Court went on to

⁴ *Pamplin v Western Cape Education Department* (C 1034/2015) [2018] ZALCCT

⁵ *Buffalo City Public FET College v CCMA and others* (P 372/12) [2016] ZALCPE 18

⁶ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* [2014] 1 BLLR 20 (LAC)

state that the mere fact that there might have been relevant information in the bundle of documents does not mean that the information is evidenced properly before the Commissioner. The Commissioner is not at liberty to traverse through documents the parties handed in at arbitration to consider evidence the parties might have dealt with but chose not to⁷.

The factual dispute:

[42]. The dispute is three-fold and was divided into three elements, being: -

- i). the failure to assess and promote Mr Sefuba since about 2009, with the related complaint of the failure to enter into a performance contract with him;
- ii). the failure to shortlist and invite Mr Sefuba to an interview for the Secretary General of the Office of the Chief Justice position; and
- iii). the failure to pay Mr Sefuba the cellular phone benefit.

[43]. Each of the different elements will be considered and discussed separately.

Failure to assess and promote Mr. Sefuba since 2009:

[44]. It is the contention of the Applicant that he has not been assessed by the Respondents and as a result of a failure thereof, he has not been promoted. Mr. Sefuba testified that his performance was previously assessed by the late Chief Justice Langa in 2008/2009 and that he was found to be promotable and entitled to a salary progression, which was nonetheless not implemented. Further to that, his complaint is that since then, he had not been promoted nor assessed and remained on notch 3 of level 14, after all the years that he has been a Chief-Director.

[44]. The Respondent argued that Mr. Sefuba characterised his dispute under section 186(2) of the LRA as a promotion dispute, despite the fact that he admitted under cross-examination that a notch increase would not result in moving to a new higher position, but rather that it is an increase in the notch at various salary levels. Therefore, it was submitted that a dispute concerning a notch increase within the same post does not constitute a dispute about “promotion”, as it does not result in an elevation to a higher position⁸.

⁷ *Cullinan Holdings Ltd v South African Road Passenger Bargaining Council (SARPBAC) and another* (C598/2018) [2020] ZALCCT 24

⁸ *Sukhdeo v Department of Social Welfare & Population Development, KZN* [2006] BALR 525 (PHWSBC)

[45]. It is critical in any dispute to first and foremost ascertain the true nature of the dispute. In directing this enquiry, consideration must be given to the substance of the dispute and not necessarily the form in which it is presented⁹. Hence the enquiry does not end with how the representative classified the dispute. The labels that are attached to a dispute, cannot change its underlying nature. Consideration must be given to all facts including the description of the nature of the dispute, the outcome requested by the Applicant and the evidence presented during the arbitration¹⁰. Having regard to the issues before me, I am inclined to accept that the alleged failure of the Respondents to assess Mr Sefuba and implement a notch increase, falls within the ambit of section 186(2) of the LRA. Any right, advantage or privilege that is subject to the employer's discretion constitutes an unfair labour practice that is open for scrutiny¹¹.

[46]. The Respondent argued in the alternative, that, if it is accepted that the Applicant's claim for a notch increase falls within the definition of an unfair labour practice, that on the uncontested evidence presented by the Respondent, the Applicant has not demonstrated any unfairness in this respect:

1. *"D Holby testified on behalf of the Respondents that employees are not simply entitled to notch increases, a process is followed. The process begins with the employee drawing up a performance contract which the employee takes to his or her supervisor, once there is agreement on the performance contract the employee will be assessed in terms of that performance contract.*
2. *In terms of the assessment a number of processes must be complied with, which ultimately result in the assessment by the employee's supervisor being moderated and after moderation it will be determined whether to implement or change the supervisor's assessment.*
3. *As Holby testified, the assessment is not based on the employee's performance alone but on the performance of the entire unit.*
4. *As Holby further explained, an employee can only be assessed based on the work he has carried out. In the case of the Applicant, he cannot be assessed and approved for a notch increase in circumstances where he has not carried out any duties".*

⁹ *Pelindaba Workers Union v SA Nuclear Energy Corporation and others* (JA 73/2018) [2020] ZALAC 31; [2020] 10 BLLR 1024 (LAC); (2020) 41 ILJ 2602 (LAC)

¹⁰ *CUSA v Tao Ying Metal Industries and others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) ; [2009] 1 BLLR 1 (CC) ; (2008) 29 ILJ 2461 (CC)

¹¹ See *Apollo Tyres South Africa (Pty) Ltd v CCMA and others* (DA 1/11) [2013] ZALAC 3; [2013] 5 BLLR 434 (LAC); (2013) 34 ILJ 1120 (LAC) where the definition in terms of section 186(2)(1) is clarified.

[47]. As mentioned elsewhere in this award, in the absence of an application for condonation, the only period that does not require an application for condonation, is the period 90 days before the date of referral. Since the referral was made on 19 December 2012, the dispute in question in relation to this aspect of the dispute is the period from September 2012.

[48]. It is common cause that Mr. Sefuba was not fulfilling any duties during the time in question. Although he explained that he lodged a grievance, no reference was made to the specific date on which the grievance was made, nor any explanation as to whether he insisted to be placed in a position where he would be able to fulfil his duties and where he could be assessed accordingly. I am inclined to accept that it was of no doing of Mr. Sefuba that he found himself in the first place in the position he was in, however, I am not prepared to accept that he proved the existence of an unfair labour practice. Mr Holby's uncontested evidence was that the performance assessment process must be completed, and both the employee and the unit must have performed to standard to qualify for a notch increase. It is common cause that this process was not undertaken. Mr. Sefuba proved the first part of his version, however that is not where the matter ends. He must establish the existence of a decision or conduct by the Respondent that was unfair towards him. Once the decision or conduct was proven, the next question is whether or not the conduct was fair¹². The difficulty the Applicant is facing is, without performing any duties, it would be impossible to assess performance. It would have been a different scenario altogether had he shown that he actively pursued the matter and that he insisted on being given duties, and the Respondent then made the decision not to give him duties. Mr Sefuba explained his pursuit of being given duties commenced with Adv. Jiyane, but thereafter it is apparent that he declined to apply for positions when told about it, because according to him it was on the same level as the position, he occupied at the time.

[49]. That being the case, I am inclined to accept the submission from the Respondent, that the Applicant failed to discharge the onus in proving that the Respondent perpetuated an unfair labour practice in failing to assess him and granting him a notch increase.

Failure to shortlist and invite Mr Sefuba to an interview for the Secretary General of the Office of the Chief

Justice position:

[51]. It is common cause that Mr. Sefuba applied for the Secretary-General position advertised by the COJ. It is further common cause that he was not shortlisted, nor interviewed for the position.

¹² *Department of Justice v CCMA and others* (2004) 25 ILJ 248 (LAC)

- [52]. Mr. Sefuba insisted that he met all the requirements for the position, be it qualifications, or experience. He however admitted under cross-examination that he did not have experience in media communication, and he was not responsible for the budget in the position of Chief Director. His duties at the time entailed *inter alia* to manage conferences, and complaints from the public. Although he disputed that he did not have experience in managing budgets, no evidence was presented by Mr. Sefuba to show that he is the most suitable candidate, except to mention same in response to the questions posed to him under cross-examination. It is trite that the mere say-so of Applicants may not be sufficient to discharge the onus. In order to be successful, Mr. Sefuba must show that he is the most suitable candidate for the position and that he was treated in an arbitrary, capricious or otherwise unfair manner¹³. The sum total of the Applicant's evidence is that his word, and for this onus to be discharged a detailed comparison is required, one to show all requirements for the post are met, and two to show that the Respondent acted unfairly when refusing to appoint him.
- [53]. The Applicant appears to hold the view that merely because he applied for the position he was entitled to be shortlisted and interviewed. In fact, he goes further to state that had he been shortlisted for the position, he would have been the successful candidate.
- [54]. Section 186(2) of the LRA sets the obligation to act fairly towards an employee in the selection and promotion process, however the Respondent argued that it is the prerogative of the employer to make appointments¹⁴.
- [55]. The promotion or appointment of employees lies within the prerogative of the employer, and interference is only warranted when good cause exists¹⁵. It is trite that there are only limited grounds on which a commissioner may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised¹⁶.

¹³ *Monyakeni v SSSBC and others* (JA 64/13) [2015] ZALAC 17

¹⁴ *Goliath v Medscheme (Pty) Ltd* [1996] 5 BLLR 603 (IC) at 609 – 610 where it was held: “*Inevitably, in evaluating various potential candidates for certain position, the management of an organisation must exercise discretion and form an impression of those candidates. Unavoidably this process is not a mechanical or mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness, which leads the court to draw an inference of mala fides, this court should be hesitant to interfere with the exercise of management’s discretion.*” Also see *Ncane v R Lyster NO* [2017] 4 BLLR 350 (LAC)

¹⁵ *Pamplin v Western Cape Education and others* (C1034/2015) [2018] ZALCCT 13

¹⁶ *Arries v CCMA and others* (2006) 27 ILJ 2324 (LC)

- [56]. In the absence of evidence that the COJ acted on the basis of some unreasonable, irrelevant or invidious consideration; or the decision was arbitrary, capricious or unfair; or failed to apply its mind to the promotion or acted in bad faith, interference is unwarranted and should be avoided¹⁷.
- [57]. The test to be applied is one of fairness, and in deciding whether or not the COJ had acted unfairly in failing or refusing to promote Mr. Sefuba, relevant factors to consider include: whether the failure or refusal to promote was motivated by unacceptable, irrelevant or invidious considerations on the part of the employer; or whether the employer's decision was motivated by bad faith, was arbitrary, capricious, unfair or discriminatory; whether there were insubstantial reasons for the employer's decision not to promote; whether the employer's decision not to promote was based upon a wrong principle or was taken in a biased manner; whether the employer failed to apply its mind to the promotion of the employee; or whether the employer failed to comply with applicable procedural requirements related to promotions¹⁸.
- [58]. Having regard to the evidence of the Applicant I am all but persuaded that the onus was discharged. Mr. Sefuba failed to refer to his current Curriculum Vitae (CV) to demonstrate that he met the criteria for the position of Secretary-General. The only evidence to this extent from Mr. Sefuba is a mere bald proclamation that he met the criteria for the position. This proclamation is however unsupported by facts and evidence to show for one that he had the necessary experience for the position.
- [59]. Mr. Sefuba seems to argue that the position he occupied, that of General Executive Manager, was similar to the position of Secretary-General and therefore he holds the necessary experience required for the position. The submission from the Respondent, through the testimony of Dr de Wee is that the experience Mr. Sefuba would have acquired in his position is different from the experience required for the position of Secretary-General, which required experience and knowledge of the functioning of the superior and lower courts; knowledge and experience of judicial research, policy, norms and standard development practice and extensive knowledge of the legislative framework governing judicial and financial management.
- [60]. This version of Mr. Sefuba does not sit comfortably with the fact that he had to apply for the position and that he would have been given greater authority. Furthermore, the uncontested evidence of Dr de Wee was that the position of Secretary-General is two levels higher than the position occupied by Mr. Sefuba.

¹⁷ *Department of Rural Development the Agrarian Reform v GPSSBC and others* (PA 3/2018) ZALCPE 2; [2020] 4 BLLR 353 (LC)

¹⁸ *City of Cape Town v SA Municipal Workers Union obo Sylvester and others* (2013) 34 ILJ 1156 (LC)

[61]. Having regard to the evidence before me and the reasons provided above, I am of the opinion that the Applicant failed to show that the decision of the Respondent not to shortlist or appoint him to the position of Secretary-General was grossly unreasonable, or that the Respondent acted with *male fides*. Accordingly, I am hesitant to interfere with the decision of the Respondent.

Failure to pay Mr Sefuba the cellular phone benefit:

[62]. Mr. Sefuba argued that the Respondent committed an unfair labour practice when Ms. Sejosengwe, without any justifiable reasons, abruptly and unilaterally, decided, during 2013, to discontinue the cellphone benefits that he had enjoyed since his appointment in the public service.

[63]. The Respondent argued that the fundamental difficulty the Applicant is facing in this argument is that no reference to the documents in support of the cell phone claim was made in evidence. There was no evidence presented in respect of the amount of the claim; that the telephone calls claimed for are work related and proof that such claims were submitted to Mr. Sufuba's supervisor. There is no evidentiary basis upon which a finding in favour of the Applicant can be made.

[64]. The evidence of Mr. Holby was that the policy is applicable to those employees who need to make work related telephone calls outside of working hours and outside of the office. Where calls are made at the office and during work hours, the normal landline should be used. Given that the Applicant does not carry out any duties, he does not qualify for a reimbursement in terms of the policy given that the policy confines its application to work related telephone calls.

[65]. In evaluation of the facts before me, I am inclined to accept the version of the Respondents, that, the Applicant just did not prove his case. In the absence of any quantification, and motivation for qualification, the most logical inference to draw, is that the case was not proven by Mr. Sifuba.

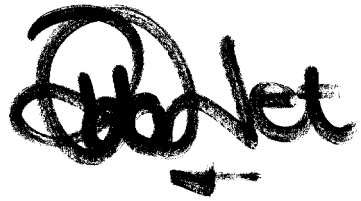
[66]. Regard to the above, it follows that the Applicant, Mr. Sefuba failed to discharge the onus vested in him and it must therefore be concluded that the Respondents did not perpetrate an unfair labour practice against Mr. Sefuba.

AWARD:

[67]. In light of the above, I am inclined to accept the Applicant failed to prove the existence of an unfair labour practice.

[68]. The Respondents are not ordered to compensate or instate the Applicant, Mr Sefuba to his position.

[69]. The matter is dismissed.

A handwritten signature in black ink, appearing to read 'R de Wet'. The signature is stylized with a large, circular initial 'R' and a long, horizontal stroke extending to the right.

Name: R de Wet

Council Arbitrator