

16 January 2006

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CC: CINDY FOCA

CC: BERNIE TATAW

AWARD

Enclosed herewith find an award as per the details below.



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PARTY NAMES:	Theron ED v/s DOE Western Cape
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theron award 160105.doc

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CASE NUMBER:	PSES 178-05/06WC
ISSUE IN DISPUTE (main) ud, ulp etc:	Unfair Labour Practice
ISSUE IN DISPUTE (sub issue) promotion, misconduct etc:	Appointment/Promotion
DATE OF AWARD:	19 December 2005

Kind Regards

Hellen

IN THE EDUCATION LABOUR RELATIONS COUNCIL

CASE NUMBER PSES 178-05/06

DATE 19 DECEMBER 2005

SADTU OBO E.D. THERON

APPLICANT

WESTERN CAPE EDUCATION DEPARTMENT

RESPONDENT

ARBITRATION

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration took place at the offices of the Western Cape Education Department in Cape Town on 22 September 2005, 19 October 2005 and 1 December 2005. The applicant, Mr. E.D Theron, was represented by Mrs. J.C Titus, a fulltime shop steward and regional secretary with SADTU. The respondent, the Department of Education Western Cape, was represented by Mrs. W. Brink, a labour relations officer in the employ of the respondent.

THE ISSUE IN DISPUTE

The applicant alleges an unfair labour practice regarding promotion.

THE BACKGROUND TO THE DISPUTE

The dispute relates to post 0385 of vacancy list 104 (a principal's post at St. Michaels primary school Abbotsdale).

At the shortlisting stage some of the parents recused themselves because they had family connections to some of the candidates for the position. Thereafter more of the members of the school governing body recused themselves from the process. Then Mouton, the circuit manager, stopped the process in order to get advice on how best to deal with the situation.

He returned with 2 options that the respondent must redo the process or that an outside organization should, in which event it would involve costs to the school.

The school governing body (SGB) believes that it had as a consequence of this information consented to the respondent's then doing the process and that in so doing it had acted to the detriment of Theron.

SUMMARY OF EVIDENCE AND ARGUMENT

Epstan David Theron testified under oath. He did not expect to be appointed into the post as a consequence of his acting in that position. His curriculum vitae together with the letter of application is enough to achieve shortlisting. The independent panel appointed by the respondent had then not shortlisted him. His dispute was not in order that he should get the post but that he should be afforded an opportunity to demonstrate his expertise to the

panel as he is a member of the community which he knows well. He had therefore expected to be shortlisted.

He had contacted Mouton when he had heard from a parent who was not on the SGB that there was someone whom they were going to appoint in the post.

He had not filled in all the information on his C.V as it was not necessary to do so because those involved with the school's activities would know what his attributes were.

Rynold Allan Sedeman has been the chairperson of the SGB for 5 years. After Mouton had suspended the process in order to obtain advice on how to take the process forward he had called him on his cellphone on the Thursday and had told him the respondent would have to do the process. The next day Mouton advised him further that a private company could do the process but that that would be expensive. Mouton had advised him to take the two options to the SGB. The SGB had decided to let the respondent do the process as it did not want to incur any expenses.

After the SGB had been informed of the nomination one of the co-opted members, Erasmus, told him that the nomination had been on the streets prior to their being informed. After further objections by the two educators on the SGB who said that there would not have been an irregularity if Mouton had handled the process, he decided to get more information. Someone who gives training to SGB's then informed him of a third option that the SGB could have exercised viz. to co-opt further members onto the SGB and then to do the process itself.

He conceded under cross examination that he was present at a training session in August 2004 where he had been informed of this.

The secretary of the SGB, Valencia Bernadette Arendse, testified that the SGB, including herself, were satisfied with the nomination when advised thereof. The SGB had become unhappy only when they had heard that the nomination had become known publicly before the nominee had been informed. She said if Mouton had not made it known publicly then it would have had to be one of the SGB members who did so.

Regarding the third option that the SGB could have exercised she said that the trainer had said so but that there was no written proof.

Jonathan Wayne Lawrence another member of the SGB testified that Mouton had told the SGB at the shortlisting meeting that it had only the two options. He did not attend the meeting at which Sedeman had informed the SGB of the two only options.

Johannes Adriaan Mouton the circuit manager testified that he had arranged a training session for the SGB for this nomination process. At the outset of the shortlisting meeting three people including Theron had recused themselves. There were thus six SGB members present when the meeting started. Thereafter 4 more members, including Lawrence, withdrew.

As only Sedeman and Carelse were left Sedeman and he agreed that the employer would be consulted on the way forward. He said he had obtained three opinions as to what to do but that in reality there were no options. One of the core functions of the SGB was to recommend an educator to the head of department for appointment. For such a function there had to be a quorum in order to arrive at such a decision.

He said that the independent panel which ultimately took the decision was constituted of various circuit managers. It used as its criteria the documents submitted with the applications and the experience of candidates until the vacancy closed. Theron's application criteria were not apparent from his application. This was the reason for his not being shortlisted.

Under cross examination he said that Thuthukane had taken the SGB members attending the training through the relevant legislation and what to do in the event of there being no quorum. He too had done so on the day of the shortlisting meeting.

He further testified to how the panel had dealt with Theron's application.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

It is clear from the evidence presented at this arbitration, particularly that of Arendse, that Theron and the SGB are unhappy with the fact that someone other than Theron had been nominated to fill the post. Whether or not it is so that there was a third option available to the process that might or might not have had the SGB elect to have the independent panel perform the process does not detract from the fact that the process was in fact fair. In fact the evidence suggests that Theron is calling for a process which would have given him an advantage over the other candidates for the position. It is Theron's own complacency that has placed him in a position which had negated any advantage that even an independent panel would very likely have considered favourable in his application for the post.

Despite the third option that may be available to an SGB it appears that this option can be exercised only where there exists a quorum of the SGB. The letter from the secretary of the SGB signed by that secretary and the chairperson shows that there were only 2 members of the SGB left at the end of the process. The testimony of Mouton supports this and leads me to conclude that it is most likely that there were only two persons left at the shortlisting process. Mouton's decision to suspend the process is therefore acceptable and fair.

Sedeman's testimony of what transpired subsequent to the nomination and the objection by Erasmus was that the SGB had asked questions and that they had given their consent. Even if this were not the case Erasmus did not testify at this arbitration which would then have what he allegedly said to be in the realm of hearsay evidence and therefore not admissible. In this regard I must point out that Arendse could also not testify as to whether Erasmus had repeated his alleged utterances at the meeting convened by Sedeman for this purpose. Sedeman did however say that the SGB were probably satisfied with the nomination. In my view this is a further indication that this matter is probably an issue for Sederman and Theron and that the SGB was probably satisfied with the process and its fairness.

It is also clear from the testimony of Theron himself that he considered his own application inadequate. He relied particularly on the SGB having knowledge extraneous to that which he presented in his application. He accordingly must realize that his application fell far short of that which was required for a successful outcome to his job application. In this regard the process used by the independent panel and as outlined by Mouton was fair. In fact to yield to this application in respect of an alleged unfair labour practice regarding promotion would now be unfair on any candidates applying for that position together with Theron in particular were the said SGB to deal with the process. The independent panel that ultimately dealt with this process is clearly made up of what can only be considered as

experts in the field of education thus enhancing the prospects of that process having been fair. It would be unfair to allow Theron a second bite at the cherry, as it were, when he in fact had a fair first opportunity to apply for the position.

Having considered all the evidence and argument presented at this arbitration I find that the process culminating in a nomination and therefore the conduct of the respondent was fair and that no unfair labour practice had been perpetrated by the respondent.

AWARD

This application for relief in terms of the provisions of the Labour Relations Act 66 of 1995 as amended is dismissed.

L. MARTIN
PANELIST
19 December 2005