



# Arbitration Award

Panelist: Mulima Denga  
Case No.: PSHS 138-11/12  
Date of Ruling/Report: 10.09.2012

In The Matter Between

HOSPERSA obo MN Selekane  
Applicant

And

Department of Health Respondent

Applicant's Representative : c/o Mr. Leshaba  
Applicant's address : Strangeways Office Park  
6 Delamore Road  
Hillcrest, 3610  
Telephone : 083 225 1945  
Fax : (031) 765 4625

Respondent's Representative : c/o Mr. Malinga  
Respondent's address : Department of Health  
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## **PARTICULARS OF THE HEARING AND REPRESENTATION**

The applicant party forwarded a dispute in terms of section 191(1) (a) (i) of the Labour Relations Act, Act 66 of 1995 (as amended). The arbitration hearing was set down and indeed took place on various dates, the last being on the 29<sup>th</sup> of August 2012 in Tintswalo Hospital in Ackornhoek. The applicant was represented by Mr. H Leshaba (HOSPERSA official). The employer was represented by Mr. S Malinga (Labour Relations Manager). Present were as well Messrs. Mnisi and Mola (constituting employer team). See the attached attendance register dated the 29<sup>th</sup> of August 2012

## **ABBREVIATIONS & USAGE OF WORDS**

NB: Below abbreviations are not in alphabetical order and that they are not for any other purposes other than dealing with this arbitration hearing.

HOD : Head of the Department of Health in Mpumalanga  
CEO : Chief Executive Officer – Tintswalo Hospital  
Resolution : Public Health & Welfare Sector Bargaining Council Resolution 1/02  
LRA : Labour Relations Act, Act 66 of 1995  
PSA : Public Service Act  
Post : Chief Admin Clerk – Patience Administration.  
Institution : Tintswalo Hospital

## **ISSUE TO BE DECIDED**

The applicant declared a dispute citing allegations of unfair labour practices. The grounds for his dispute are the following, that:

- ✓ The employer made him to act in the post
- ✓ Failed to pay him accordingly

I must decide on whether or not the above mentioned allegations stand, and further issue the necessary relief, depending on my findings.

## ***ISSUES NOT IN DISPUTE***

Parties agreed that there is no dispute onto the following facts, that:

- ✓ Mr. Selekane was verbally appointed to act in the post by Ms. Baloyi
- ✓ The post was at a higher level (level 7) than his official position (level 6)
- ✓ The post was vacant and funded
- ✓ There were a number of efforts by the employer, writing towards his acting role being reduced into writing as is required by the enabling resolution
- ✓ Eventually he is permanently appointed into that post

## ***SURVEY OF EVIDENCE AND ARGUMENTS***

Parties presented their positions through both orally and bundles of documents for me to consider. This is a summary of the evidence tendered. They further agreed to that the Respondent Party furnishes their closing arguments in writing and such was done on the 2<sup>nd</sup> of September 2012.

### **Submission by the Applicant Party**

**Mr. NM Selekane** testified that he was verbally requested by Ms. Baloyi to perform the services into the vacated post of Chief Administration Clerk. She impressed onto the three of them that it was a result of consultation that she preferred him to act. Ms. Baloyi was taking these decisions in her capacity as his supervisor managing amongst other, the vacated post. Had she choice to relieve him and appoint any one of his colleague, he would have abided with such a decision.

He previously raised his concerns for not being paid and it culminated into this dispute. He was comfortable and rested onto the efforts by the employer, writing and directing motivations to the relevant authorities seeking approval towards him being duly offered a written appointment as well as receiving the necessary emoluments.

In his acting role, there were no objections and or disapproval from both his colleagues and management, they all appreciated his acting roles. All the above efforts did not yield to him being issued with the necessary written appointment letter, equally, he was not paid accordingly. However this did not fail him to work into that higher position. The furthest effort (last one) came with the answer that “the Acting Head of Department is unable to approve as she was not acting during the period” in question.

### **Submission by the Respondent Party**

The employer did not call any witness to substantiate on their case, they however argued and pointed to the following, that:

- The employer has a process called building the third generation, involving arrangement to impart knowledge to members of the staff mainly to gain experience
- The Applicant was never appointed and or that they are not aware of him acting in the post
- The employer appointed the Applicant to act into such higher position
- Powers to appoint officers to act into higher position resides with the Head of Department and onto this case, the HOD never issued the Applicant with the necessary appointment letter

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

The Respondent has tendered and it is equally not in dispute that the Applicant has no letter appointing him to act into the post. They argue that the move to use him into the post was mainly to help him gain experience. I reject this argument, solely on the basis that the intentions and all the efforts by the employer in all the writings before and after the Applicant started acting, never presented an inch of words suggesting and or pointing to that the move was mainly to empower him with the experience. However, from this

argument, I deduce the acknowledgement by the employer, acknowledging that they have indeed used the services of the Applicant into a higher position.

The enabling resolution provides amongst others the below mandatory conditions:

*“An employee appointed in writing to act in a post of a higher grade than the grade of the employee by the HOD or his/her delegate at provincial or national level shall be paid an acting allowance to act in vacant posts provided that:*

- *The post is a vacant and funded post*
- *The acting period is longer than 6 weeks*
- *The appointing authority is a level higher than the acting appointee*
- *The employee must accept the acting appointment*

*An employee may only be appointed to act in a higher post that is one post level higher than her/his current position”*

In relation to the above enabling provisions all such mandatory requirements are fulfilled except but one element, that there is nothing written down talking to the Applicant's appointment to act into the post.

In this matter, there is neither contradiction nor dispute to the following evidence tendered by the Applicant (Mr. Selekane):

1. His supervisor (Ms. Baloyi) requested him to act and he accepted. This request was made and honoured immediately, i.e. without first reducing it into writing.
2. The whole institution uniformly wrote to seek blessing from HOD to appoint and accordingly pay him.
3. He acted from August 2006 until June 2007
4. Number of motivations towards appointing him to act went further to point to that the difference in salary works to a total of R17 293.75

Other than that the motivations that came back unapproved, there is no instruction and or effort terminating his role of servicing the post as was requested by Ms. Baloyi. The management in the institution had the opportunity to terminate his acting role, i.e. during many times their motivations were unsuccessful, but they left it that way and instead pursued (in so many times) to get such necessary approval.

It is important to note that during the time the institution started writing the necessary motivations, it was a month before the Applicant was to act and such numerous motivations continued whilst his services were being used in the post. Onto all the answers that were solicited by all those motivations, there was none that instructed that such acting role should be terminated.

For a fact is that there is nothing presenting that the Applicant is incompetent to act and therefore should not act and should stop acting. In the efforts by the employer, there has not been a stage onto which they reversed their decision of appointing him to act in the post. He acted up until such a position was filled and it happened to be him filling such post.

I have assessed all the efforts and motivations that were duly written to fulfill all the requirements of the enabling resolution. Into all such motivations, there was nothing that the Applicant did to fail management to issue him with such a written appointment letter.

For a fact is that he was not going to appoint himself, the employer was vested with such authority. It is the same employer that requested him to perform into the post.

On the basis of the above, it is my finding that the failure to appoint the applicant (in writing) was an act exclusively within the total control of the employer and that the Applicant never contributed in failing them to issue him with such written appointment. The absence of such a letter and the failure to craft one and issue to the Applicant could not be blamed onto the Applicant. Further, it is my finding that the employer acted unfairly when they both failed to appoint him to act and further prejudicing him from reaping the inherent benefits brought about by such role, i.e. of using him into such a higher position.

In dealing with the matter, it is important to note and consider with appreciation all the efforts (numerous motivations directed to the HOD) by the institution towards appointing him as such. It is just that it would not be enough up until the necessary blessing would have been acquired. Such motivations were used and remained pieces of evidence relied upon by both parties, i.e. there was neither a contradiction nor any dispute onto the validity of such documents. They remained valid and instrumental into the arbitration process. I am informed and relied onto these official documents (motivations) crafted by the employer. In these submissions the employer quantified the amount due to the Applicant as is provided above, i.e. in the region of R17 293.75.

#### **Award**

As per the above findings, I accordingly determine that the employer was unfair in not finalising and thereby appointing (in writing) the Applicant into the post. I then order as follows:

- The employer duly pays the Applicant an amount of R17 293.75 (the difference in salary for the period he acted)
- This payment be made on or before Monday the 15<sup>th</sup> of October 2012



**Denga Mulima**  
**Commissioner for the PHSDSBC**