



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

COMMISSIONER: SCELO V MKHIZE

CASE NO: PSHS55-17/18

DATE OF AWARD: 1 NOVEMBER 2017

In the matter between:

T. S . MLOTSHWA

APPLICANT

and

DEPARTMENT OF HEALTH-KWAZULU NATAL

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This is an arbitration hearing into an alleged unilateral change to terms and conditions of employment in terms of section 64(4) of the Labour Relations Act 66 of 1995 (The Act), held under the auspices of the PHSDSBC. The arbitration was initially held on 13 July 2017 at Manguzi Hospital. Subsequently, it was held on 08 August and 03 October 2017 at Jozini Health District office.
2. The Applicant, Thokozani Siphon Mlotshwa, appeared in person and was represented by Mr T A Mthembu, a trade union official from NEHAWU. The Respondent, on the other hand, was represented by Mr E Z Ndabandaba, a human resources practitioner from the Department of Health.

3. The proceedings were held in English and were mechanically recorded. The proceedings were not interpreted at the first sitting, as the witnesses did not require the services of an interpreter. However, as from the 08th August 2017 onwards, the proceedings were interpreted by Ms P M Hunsely.
4. At the end of the proceedings, the parties requested to make their closing submissions in writing on or before 10 October 2017. The Respondent's submissions were received by the Council on 10 October 2017. However, the Applicant's submissions were received on 17 October 2017.

ISSUES TO BE DECIDED

5. In these proceedings I am required to decide whether the Council has jurisdiction to arbitrate this matter, if so, whether the Applicant's terms and conditions of employment were unilaterally changed by the Respondent.

BACKGROUND TO THE DISPUTE

6. The Applicant is Thokozani Sipho Mlotshwa who was employed by the Respondent on 01 November 2001. On 01 August 2005, he was appointed as an Emergency Medical Service shift leader at level 9, grade 5. The Applicant is currently based at Manguzi Hospital.
7. The Respondent is Department of Health- KwaZulu Natal, a department duly established in terms of section 104 of the Constitution, read with schedule 4 and in terms of the KwaZulu-Natal Health Act 4 of 2000, with its provincial office at Natalia, 330 Langalibalele Street, Pietermaritzburg. The Department operates various hospitals in various districts of KwaZulu –Natal including Umkhanyakude and Zululand Health districts. In each district there are various hospitals incorporating Emergency Medical Services (EMS).
8. The Applicant allege that the Respondent unilaterally changed his terms and conditions of employment on 31 March 2017. As a result, he referred his dispute to this Honourable

Council on..... The matter was set down for conciliation, but it remained unresolved, hence this arbitration.

9. The Applicant want the Respondent to restore the terms and conditions of employment that were in existence prior to 31 March 2017.

Introduction of new evidence

10. During the examination in chief of the Respondent's first witness, Mrs Dlamini, the Respondent sought to introduce a new document, circular 62 of 2016, which according to the Respondent provides that a transfer on persal cannot be processed with the approval of the Head Office. The introduction of this document was heavily objected by the Applicant's representative. I therefore directed the parties to make their submissions on whether this document must be allowed for evidence or not. The following submissions were made:
 11. The Respondent's representative submitted that they wish to supplement their bundle of document by introducing circular 62, which was the ratification policy. He submitted that this document would assist the arbitration process with the facts in order to get to the truth of the matter. He further submitted that the transfer policy was on page 18 and 19 of bundle B. The ratification policy which they sought to introduce was not available to the Respondent at the commencement of the proceedings and they did not foresee that they would need to use this document. The relevance of this document would assist the sitting and the Applicant will not suffer any prejudice as a result of introduction of this document.
 12. The Applicant's representative submitted that the Applicant had already closed its case. The introduction and admission of this document will be prejudicial to the Applicant. He disputed that the document was not available to the Respondent on the first sitting, because these documents are available on the Respondent's website; they could have easily access the document. Despite that, HR is the custodian of the Respondent's policies, they should have provided this document to the Respondent.

13. I considered the parties' submissions and held that it is trite that the new evidence would be allowed where there is an adequate explanation as to why it was not produced at the commencement of the proceedings, the introduction will not cause prejudice to the other side which cannot be cured by an order of costs, the evidence is relevant and after having considered the importance of finality of the matter¹. In the present case, there was no adequate explanation as to why this document was not produced at the commencement of the proceedings and its introduction would have caused prejudice to the Applicant. This was so because the Applicant had already led three witnesses and he had already closed his case. The acceptance of this document would have required that all the three witnesses be recalled so that they would have commented on the document. This would have been against the purpose of the Act which is to resolve dispute expeditiously. I further held that the prejudice that the Applicant would have suffered, had this document been accepted, would not have been cured by an order of costs. The application was therefore dismissed.

SUMMARY OF EVIDENCE AND ARGUMENT

Applicant's version

First witness

14. The Applicant, Thokozani Siphon Mlotshwa, was the first witness who testified in support of his case and he testified as follows:

15. He applied for a transfer from Umkhanyakude Health District to Zululand Health District on 26 October 2015. The reasons for requesting a transfer was that he had a property at Vryheid which was left unoccupied most of the time. There had been several attempts of burglary in the property. This had forced him to travel each and every time he was day off in order to safeguard the house. This had also caused him a financial strain due to long trips he had to travel, while at the same time he was still paying bond on the property. After the request, he received a response to his application from Mr Nkala, advising him

¹ Billiton Alumium SA Ltd t/a Hilside Aluminium v Khanyile and Others 2010 (5) BCLR 422 (CC), Sondolo IT (Pty) Ltd v Howes & Others 2009 (5) BLLR (LC).

to look for a vacant post in Zululand District. Mr Nkala was the then manager of Umkhanyakude District. He referred the Council to page 4 of bundle A. He stated that page 4 is also a letter which he wrote to Mr Nkala applying for a transfer and advising him that there was a vacant post of a shift leader in Zululand District, because a certain Mr L A Buthelezi had resigned. Mr Buthelezi was also a shift leader in Zululand district at salary level 7. After that he was advised that the Mr Buthelezi's post would be advertised and it was indeed advertised in September 2016.

16. On 08 March 2017, he received a call from Adv Kunene, a district manager for Zululand district, advising him to report for duty at Nongoma Benedictine Hospital on 15 March 2017. After this instruction, he went to Nongoma to look for accommodation. He found accommodation next to the hospital and paid rent accordingly. On 09 March 2017, he moved from Umkhanyakude to Zululand District. After he had moved he received a letter from Av Kunene advising him that they are still ratifying his transfer.
17. On 14 March 2017, he resubmitted another letter requesting a transfer to Mrs T P Buthelezi. Mrs Buthelezi was an EMS sub district manager. He referred the Council to page 6 of bundle A. Mrs Buthelezi forwarded his request to the district manager, Mr Nkala and she recommended that his transfer be granted due to reasons he stated in his letter. This appeared in page 5 of bundle A. He further referred the Council to page 7 of bundle A, which was the letter written by Mr Nkala to Mr F G Cele who was the Human Resources Manager for Umkhanyakude district. The letter was advising Mr Cele that the Applicant had applied for a transfer and he requested that he must follow all the due processes to release the Applicant to Zululand District with immediately.
18. On 09 March 2017, Adv S O Kunene had also written a letter to Mr Shezi, a Deputy Director General, advising him that the Applicant had requested a transfer; his manager had agreed to release him and he was prepared to accept him in the Zululand district. Adv Kunene was a district manager of Zululand District. He therefore requested Mr Shezi to authorise the request for a transfer. In this regard, the Applicant referred the Council to pages 8, 9 and 10 of bundle A. On 13 March 2017, Mr Shezi authorised the request for a transfer via email which was sent to Adv Kunene and Nozipho Mthembu. On 14 March

2017, Adv Kunene forwarded the email authorising the transfer to Mrs Dlamnini, an assistant director of Zululand Human Resources department

19. On 14 March 2017, he received a call from Adv Kunene advising him that the Deputy Director General, Mr Shezi, had approved his transfer; he must therefore report for duty on 15 March 2017 at Zululand district. However, later on that day, Adv Kunene telephoned him advising that he must wait because the HR was still sorting the issue of transfer. As he had already moved to Zululand district on 09 March 2017, he had to move back again to Umkhanyakude district. He moved back on 18 March 2017. On 31 March 2017, he received a letter advising him that his transfer request had been declined because the District Manager had decided to re-advertise the post after the previous challenges he had with the post. This letter appears on page 12 of bundle A. He therefore decided to refer a dispute for unilateral changes to terms and conditions of employment to this Honourable Council.

20. During cross examination, he admitted that there was nothing in writing which instructed him to report for duty at Zululand district, but he was telephoned by Adv Kunene to report for duty. He denied that he did not report for duty. He stated that after receiving Adv Kunene's call, he made arrangement for accommodation and he indeed moved with all his belongings to Zululand district.

Second witness

21. The Applicant's second witness was Mr Mzikayise Mabaso who testified as follows:

22. He is employed the Respondent as a Provincial Operations Manager for EMS. He started in this position on 01 November 2009. He is responsible for EMS policies and strategies, direction of EMS operations and he is overall in charge of EMS in the province. He is currently running EMS in the absence of the Chief Director.

23. He stated that the procedure on request for transfer is that the relevant districts would agree for the swop or transfer and inform his office. If there had been agreement between

the relevant districts, he would just give them his blessings. He was aware of Applicant's request for transfer and after the two district managers had agreed, he approved the Applicant's transfer. He was referred to page 18 bullet number 1 of bundle B, which he read on record. He stated that page 18 is a prescript guiding personnel in inter institutional transfers. Bullet number 1 provides that the request for transfer is to be supported by the District Managers for the release and acceptance of the applicant. He was referred to page 8 of bundle A. He stated that page 8 was a letter written to Deputy Director General because there is a procedure that all transfers must be reported to the Deputy Director General. He said page 9 of bundle A was a letter accepting the Applicant to the Zululand District and page 11 was a letter releasing the Applicant from Umkhanyakude District. He stated further that there was no one else to decline the Applicant's request because his application had been approved by Deputy Director General, Mr Shezi.

24. During cross examination, he admitted that his evidence about what transpired during the request for transfer was hearsay because he heard it from other people. He was further referred to page 11 of bundle B and it was put to him that the post that the Applicant had applied for was in dispute, as another employee had contested the post. He said he was not aware that the post was in dispute. Had he knew, he would have dealt with the issue differently.

Third witness

25. The Applicant's third witness was Adv Sipho Kunene who testified as follows:

26. He is the former employee of the Respondent. He left the Department on 31 March 2017. However, he was requested to offer voluntary services to the Respondent in order to finalise pending disciplinary cases, arbitrations and Labour Court matters. His voluntary services will cease on 31 May 2018. He was employed by the Respondent as a District Manager for EMS Zulu-land.

27. He stated that the Applicant applied for a transfer from Umkhanyakude to Zululand District through his supervisor. The Applicant's supervisor forwarded the application to Mr B E Nkala. Mr Nkala released the Applicant and he accepted the Applicant in his District,

Zululand, because they had a vacant funded post of the same rank as the one occupied by the Applicant at Umkhanyakude District. He then advised Human Resources for Zululand District to accept the Applicant on the persal system because his application had been approved. However, Mrs Dlamini from Human Resources advised him that the transfer had to be approved by the Head Office ratification committee. He then approached the chairman of the ratification committee Deputy Director General, Mr Shezi, to request approval of the transfer. Mr Shezi responded through an email, advising that if Umkhanyakude District was prepared to release the Applicant and Zululand was prepared to accept him, he had no problem; the transfer can be finalised. Subsequently, he sent an email to Mrs Dlamini appraising her about Mr Shezi's email.

28. Since the Applicant's transfer had already been approved, he therefore advised the Applicant to report for duty at Nongoma base, Zululand district. However, the Applicant advised him that he would look for accommodation since Nongoma was far from his place.
29. Seeing that Mrs Dlamini had not responded to his email, he decided to phone her to ask whether she received his email. Mrs Dlamini confirmed that she received his email. He asked her whether there were any problems about the transfer. She confirmed that there was no problem. That is when he advised the Applicant to move to Zululand.
30. He further stated that in December 2016, he advised the Respondent that he would leave his employment with the Respondent. On the last day of his notice, he was advised by the Applicant that the Respondent had declined his application for transfer. He was amazed about that decision because since he had agreed with Mr Nkala about the transfer of the Applicant, nobody else had authority to decline the transfer. He stated that he was the manager of the post to be occupied by the Applicant and the transfer had no financial implications. To say that the transfer was declined was simple to undermine his authority because he had already accepted the transfer. The Human Resources department had nothing to do with the transfer and they had no authority to decline the transfer. Their duty was to accept the Applicant to Zululand District.
31. During cross examination, he was asked, as the District Manager, how did he linked with HR. In response, he stated that HR was offering support to him as his support component.

When it was put to him that the Respondent would lead evidence to say that the reason for decline the transfer was that the post in question was in dispute, he that was new to him. Nobody ever advised him, whether in writing or telephonically, that the post was in dispute. He was the one who was supposed to know better about the post and even to appoint any investigating officer. How would they conduct any investigation without him because he was the one who should have issued a directive that the post must be re-advertised. He further confirmed during cross examination that the Applicant indeed reported at Nongoma base as per his instruction.

32. When it was put to him that the management committee decided to re-advertise the post, he said that would be nonsensical because he was supposed to be part of that management.

Respondent's version

33. The Respondent called Mrs Lucia Ntombizethu Dlamini as its witness and she testified as follows:

34. She is employed by the Respondent at Zululand District as an Assistant Director for Human Resources. She is responsible to oversee recruitment, service conditions, human resources development and labour relations. As part of her duties, she also deals with transfers because they fall under service conditions. Service conditions deals with leaves, transfers and exits from the department.

35. She stated that when there is a transfer between the two institutions, the following procedure would be followed:

- The employee must make an application in writing
- He must give it to his or her supervisor
- The supervisor would indicate whether he supports it or not
- It will then be sent to HR of the releasing institution by the supervisor
- The HR will send it to the HR of the receiving institution

- The HR of the receiving institution will contact the supervisor or manager of that institution
- If the supervisor supports the transfer, it will be sent to Head Office for ratification by the ratification committee.
- HR would also make submissions to the District Director who is dedicated to approve
- Once all the above had been done, the institution who requested a transfer would be sent a letter advising that the application had been accepted
- The HR of that institution would communicate with the supervisor who would then advise the employee when to start in the new institution. The employee would then come and resume his or her duties.
- When the employee arrives at the receiving institution, he or she must report to his immediate supervisor who will then bring him or her to the HR official of that institution.

36. He stated that on the Applicant issue, she received an email from the District Manager, Adv Kunene, instructing her to put the Applicant as a shift lead at Nongoma base. She phoned Umkhanyakude District HR to ask if they had the Applicant's application for transfer. They said they did not have the application. She then phoned Kunene to advise him that she cannot put the Applicant in the post because there is no application or ratification. The District manager had not approved the transfer.

37. After she had informed Kunene that the Applicant must follow due processes, she received an application and a letter supporting the transfer from Umkhanyakude human resources department. It had all documents showing that the application was supported by both institutions. She then asked for a meeting with the management of Zululand District to present HR issues. The calling of the meeting was a result of an internal process because sometimes the District Director is not available. Then his acting management can continue with his duties in his absence. When she presented the Applicant's application in the meeting, the District Director and management declined the transfer request. The reason for the refusal of the request was that there was a dispute about the post and there was a grievance. She said the District Director had already responded to the Head of the

Respondent that the post must be filled through re-advertisement. That is why he would not accept the transfer. She referred this Council to page 11 of bundle B. But she stated that the author of the document was not available to give evidence due to work commitment. She stated that EMS Zululand was not called in the meeting. The reason was that EMS had its own admin, HR, SCM and Corporate services. In 2015, the Head of Health issued an instruction that the corporate services must fall under the District office. EMS Zululand only dealt with the operation part. When asked what would she say if someone says Deputy Director General, Mr Shezi had approved the transfer, she said Mr Shezi had no authority to approve the transfer, but Mr Vilakazi.

38. During cross examination, she was referred to pages 1 and 2 of bundle A. She did not dispute that the Applicant made his initial transfer application on 26 October 2015, but she said it was her first time to see the correspondence in page 2 of bundle A. She also said it was her first time to see the document in page 3 bundle A. She admitted that according to the document in page 1 of bundle A, the Applicant did apply for the transfer. She admitted that in light of pages 5,6,7,9 and 11 of bundle A, Umkhanyakude district followed the proper procedure in relation to the Applicant's application for a transfer.

39. She admitted that the Applicant's application for a transfer would fall under bullet number 2 of the transfer procedure appearing in page 18 of bundle B, except that it would have had to be ratified in terms of circular 62. She also admitted that the management committee and ratification committee are two different structures. The management committee comprised district director and management of the institutions. When asked who were members forming the ratification committee, she stated that there was no longer a committee. The Deputy Director Generals for the clusters were responsible for their clusters. In this case, Deputy Director General was Dr Simelane. It was no longer Mr Shezi, but the cluster was submitting to Dr Moji.

CLOSING SUBMISSIONS

Applicant

40. In closing, the Applicant's representative, Mr Mthembu, made the following submissions:

41. The Applicant applied for the transfer from Umkhanyakude EMS Health district to Zululand EMS Health district. Both Districts through their managers granted the transfer and it was supported by the provincial EMS operations manager.
42. In terms of the Act, the Respondent is guilty of an unfair labour practice if he commits any form of unfair conduct relating to change of conditions of service.
43. The Applicant has demonstrated that he consistently applied for the transfer from Umkhanyakude Health district to Zululand Health district. The Respondent's submissions that the transfer was declined because there was a dispute in relation to the post concerned should be dismissed because as to date, the post has not been filled. The Applicant's application for transfer was approved by both EMS Districts.

Respondent

44. On the other hand, the Respondent's representative, Mr Ndabandaba made the following closing submissions:
45. The Respondent had established that there was a well published and established departmental policy on transfers which appears on pages 18 and 19 of bundle B. The Respondent had applied the instruction of this document in line with the transfer procedure.
46. In terms of step number 4 of the transfer procedure, the receiving institution must advise the releasing institution whether they are prepared to accept the person being transferred, if so, to issue a letter of transfer. Authority to fill the post must be obtained prior to accepting the person. In the present case, step number 4 was not followed because the Zululand District manager, Advocate Kunene, instructed Mrs Dlamini to effect the transfer without approval from the Head Office. As a result, Advocate Kunene acted *ultra vires* by overlooking circular 62 which guides on the process to be followed to obtain ratification from the Head Office.

47. He further submitted that it was impossible to fill the post concerned because the post was in dispute and Advocate Kunene was aware of that because he testified that the post could not be filled through normal recruitment, but only by means of transfer. An investigation was conducted and the investigating officer recommended that the post must be re-advertised. The authorisation by Mr Shezi through an email message was not in line with the procedure because the procedure required that the transfer must be initiated and communicated in writing. It was procedurally incorrect for Advocate Kunene to verbally instruct the Applicant to report for duty at Nongoma base.

ANALYSIS OF EVIDENCE

48. In these proceedings I am required to decide whether the Council has jurisdiction to arbitrate this matter, if so, whether the Respondent unilaterally changed the Applicant's terms and condition of employment.

49. The general rule in civil proceedings and arbitration proceedings is that whoever alleges a fact must prove it on balance of probabilities. Therefore, the onus of proof rests with the Applicant.

Whether the Council has jurisdiction

50. The Applicant referred a dispute of unilateral change to terms and conditions of employment in terms of section 64 (4) of the Act. The question of jurisdiction raised by the nature of the dispute as pleaded by the Applicant is twofold. The first question is whether, in light of section 64(4) of the Act, does the council has jurisdiction to arbitrate the dispute. Secondly, does the conduct of the Respondent amount to unilateral change to terms and conditions of employment as pleaded by the Applicant.

51. In terms of section 64 (4) of the Act, any employee who or any trade union that refers a dispute about unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1) (a) may , in the referral, and for the period referred to in subsection 1 (a)-

- Require the employer not to implement unilaterally the change to terms and conditions of employment; or
- If the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

52. Subsection 1(a) provides that every employee has the right to strike and every employer has recourse to lock-out if-

- the issue in dispute has been referred to a council or to the Commission as required by the Act, and a certificate stating that the dispute remains unresolved has been issued; or a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission.

53. In *Mukwevho v Eccawusa* (1999) 4 BLLR 358 (LC), it was held that before a referring party can rely on section 64 (4) the employer must expressly be required not to implement the change or to restore the conditions of employment. A demand to that effect must be communicated to the employer in the document which the referral is lodged. However, the employer cannot be required to do so for a period of more than 30 days unless the parties have agreed to a longer period. Thereafter the parties can exercise their right to strike or lock-out

54. Section 65(1) (d) of the Act provides that no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if that person is engaged in an essential service.

55. In terms of section 74 of the Act, any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to a council, if the parties to the dispute fall within the registered scope of that council. If the dispute remains unresolved at conciliation, any party to the

dispute may request that the dispute be resolved through arbitration by the Council or the Commission.

56. In the present case the Applicant is employed as a shift leader by Emergency Medical Services (EMS). It is therefore common cause that the parties to a dispute are engaged in an essential service. The nature of the dispute that the Applicant referred to the Council for conciliation in terms of section 64(4) read with section 64 (1) (a) requires that if the matter remained unresolved at conciliation, the Applicant may resort to a strike. Since the Applicant is precluded from participating in a strike in terms of section 74, the Applicant has a right to refer his dispute to this Council for arbitration. I therefore find that the Council has jurisdiction to arbitrate this dispute.

Whether the Respondent unilaterally changed the terms and conditions of employment

57. In *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* (1998) 6 BLLR 616 (LC), it was held that in terms of section 64 (4) an employee must show, firstly that unilateral changes were effected to the terms and conditions of employment contract and secondly, that there was no consent to the change. In order to determine whether the unilateral changes were effected and that there was consent or not, one must first determine whether there were such term and condition of employment in existence.

58. In *Cape Clothing Association v SA Clothing and Textile Workers Union and Another* (2012) 33 ILJ (LC) it was held that in order to invoke the remedy in section 64(4) of the Act, it is necessary to establish both an existing term and condition of employment and the fact of a variation of that term and condition by the employer, in circumstances where the employee has not consented to the variation. In *Unitrans Supply Chain Solution (Pty) Ltd v SATAWU and Others* (2014) 53 ILJ 265 (LC), it was held that in order for a unilateral change to terms and conditions of employment to exist, there must be an actual act of variation of existing employment conditions by the employer. The issue of existence of a unilateral change to conditions of employment is thus one of a contractual entitlements or rights being infringed. A party claiming the change would have to show

that he had an actual and existing contractual entitlement or right to the issue alleged to have been unilaterally changed. In *Numsa v Lumex Clipsal (Pty) Ltd, unreported, J1070/98, Labour Court, 24 August 2000*, it was held, with reference to the Namibia case, that a unilateral change to terms and conditions will be illegitimate where it is so fundamental as to amount to a change in the contract.

59. In the present case, the Applicant's evidence was that he applied for a transfer from Umkhanyakude health District to Zululand district as a shift leader. On 08 March 2017, he received a call from the Zululand district Manager, Advocate S O Kunene, advising him that his transfer had been approved; he must therefore report for duty at Zululand district on 15 March 2017. As a result, he made arrangement for accommodation and moved to Zululand District in order to commence his duties. He relied on pages 5, 8 and 10 of bundle A. Page 5 is a letter supporting the Applicant's transfer from T P Buthelezi, a Sub District Manager-EMS for Umkhanyakude district. Page 8 is a letter from the Zululand District Manager, Adv Kunene, agreeing to accept the Applicant in the Zululand district. Page 10 is an email from the Deputy Director General, Mr Shezi, approving the transfer of the Applicant. The Applicant further relied on page 18 of bundle B. Page 18 is a procedure for transfers between institutions within the Department of health. According to page 18 procedure the following is applicable when the transfer is effected:

- The official is to submit his/her request for transfer via his/her supervisor
- The supervisor is to hand in the request to the Human Resource Office once supported by the supervisor
- The releasing institution is to send the transfer documents, with a proposed date of release
- The receiving institution is to advise the releasing institution if they are prepared to accept the person on transfer, if so, issue the letter of acceptance of transfer. Authority to fill the post must be obtained prior to accepting the person. It is important to ensure that the post level is the same as that of the official who is being transferred.

60. The Applicant's version was corroborated by Adv Kunene in its entirety. In fact, Adv Kunene confirmed that the Applicant's transfer was approved by the Deputy Director

General, Mr Shezi. As result, he informed the Applicant of the approval and that he must report for duty at Zululand district.

61. On the other hand, the respondent through the evidence of Mrs Dlamini, did not dispute that the Applicant made the application for transfer and that the application was supported by both Umkhanyakude and Zululand district management. The Respondent did not dispute further that the Applicant transfer was approved by Deputy Director General Shezi and that as a result of the approval, the Applicant was informed to report for duty at Zululand District on 15 March 2017. However, the Respondent disputed that Mr Shezi had authority to approve the Applicant's transfer. The Respondent's version is that Mr Shezi did not have authority to approve the transfer as the transfer was supposed to be approved by the ratification committee. But it was not dispute that Mr Shezi was the chairperson of the ratification committee. In fact Mrs Dlamini testified that she presented the Applicant's request for transfer to the management of Zululand district. The District Director and management declined the transfer on the basis that the post in question was in dispute. When she was asked who would have approved the Applicant's transfer, she stated that the district Director, Mr Vilakazi had authority to approve the transfer, but she did not provide any proof in that regard. She admitted that the management committee and the ratification committee are two different structures.

62. Section 14(1) of the Public Service Act 103 of 1994 (the PSA), provides that every officer or employee may, when the public interest so require, be transferred from one post or position occupied by him or her to any other department, irrespective of whether such a post or position is in another division or is of a lower or high grade, or is within or outside the Republic. In my view, the provisions of section 14 (1) implies that an employee's physical location or place of employment within the public sector is not a term and condition of employment which cannot be changed unilaterally. In fact the Applicant's case is that he was transferred from Umkhanyakude District to Zululand District, Nongoma base. After he had been transferred, his transfer was declined by the Respondent. Consequently, he had to move back to Umkhanyakude District. To me, this seems to be an unfair conduct related to a transfer, not a unilateral change to terms and conditions of employment. I therefore find that the Applicant has failed to show that there was a term and condition of employment which cannot be unilaterally changed by the Respondent.

However, this does not mean that the Applicant is without a remedy. In *Simelane and Others v MEC for Education, Province of the Eastern Cape and Another* (2001) 9 BLLR 1085 (LC), it was held that , in addition to fair administrative action, state employees are afforded a constitutional right to fair labour practices. Although the unfair transfer of an employee is not catered for expressly in the LRA, an employee is not precluded from relying directly on the constitution to enforce his or her right not to be subjected to unfair labour practices. The Applicant is therefore entitled to approach the Labour Court in this regard.

AWARD

63. The unilateral change to terms and conditions of employment has not been established and therefore, the Council does not have jurisdiction over this matter.

64. The Applicant's application is hereby dismissed

65. There is no order as to costs

PANELIST'S SIGNATURE