



# ARBITRATION AWARD

Commissioner: **Archibald Ngoako Mafa**

Case No.: **PSHS863-11/12**

Date of Award: **08 October 2017**

In the matter between:

**MOTLALEPULE MIDAH MABUNDA AND 11 OTHERS**

(Union / Applicant)

and

**DEPARTMENT OF HEALTH – MPUMALANGA**

(Employer / Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This matter was set down for arbitration at Mametlhake Hospital on various dates and was concluded on 4 August 2017
2. Both parties attended the proceedings. Mr. S.Sambo from Sambo-Mahleke Attorneys represented the applicants and Mr. R. Khoza appeared on behalf of the respondent.
3. The proceedings were digitally recorded and detailed handwritten notes were also taken which form part of the record.

4. Both parties were directed to file closing arguments which will be taken into account in arriving at my findings

### **PRELIMINARY ISSUES**

5. The matter of Nosipho Makhani and S.A Nkuna has been settled and both applicants were not part of these proceedings

### **ISSUES TO BE DECIDED**

6. I am asked to determine whether the translation of applicants was fair or not.

### **BACKGROUND TO THE ISSUE**

7. Mrs. Raphasha and Mabunda were translated into operational manager's grade 1 general stream. They were working at hybrid wards because they were dealing with patients that represent multiplicity of ailments like oncology, neurology, mental health, orthopedic etc.
8. These are specialist areas and in terms of years of experience they were both more than 15 years with the respondent.
9. Miss Bellah Molai was translated into professional nurse grade1 speciality. She had 10 years experience and advanced midwifery which were not taken into account during her translation.

10. Mrs. Julia Mambane was translated into a clinical program coordinator grade 1. She has more than 20 years experience coupled with her qualifications but was not considered yet she is 11 years as clinical program coordinator
11. Sister Kolokoto was translated into professional nurse grade 2 specialty and her 24 years experience in primary health specialty was not taken into account during her translation.
12. Mabunda was in a female ward which includes pediatrician as at 30<sup>th</sup> June 2007
13. Raphasha was in the male ward attending to orthopedic patients, oncology, neurology and etc
14. Molai was at the clinic as of 30<sup>th</sup> of June 2007 working at primary health care where she was doing her advanced midwifery.
15. Mambane was working as Infection Controller of the whole hospital as of 30<sup>th</sup> June 2007.
16. Kolokoto in 2004 she was dedicated to start a wellness clinic as operational manager primary health care
17. The respondent concedes the qualifications of Raphasha, Mabunda and Molai but for Mambane and Kolokoto.

## **SURVEY OF EVIDENCE AND ARGUMENT**

**Mmatlhanole Elizabeth Raphasha** was the 1<sup>st</sup> witness

18. She was employed by the respondent from the 4<sup>th</sup> March 1998 as Operational Manager in male ward which she regard as a hybrid ward since they were mixing patients in that ward.
19. They were admitting medical cases, surgical case, oncology cases, neurology cases, and orthopedic cases, mental health care and maternity patients.
20. She has a diploma in general nursing, diploma in midwifery, diploma in nursing management, diploma in community nursing science and other certificates in occupational health nursing. She has been translated to Operational Manager Grade1 in terms of OSD.
21. According to her she declared a dispute because she was working in a hybrid ward and qualify to be on notch R235 000 once off in terms of the grandfather clause.
22. It was her evidence that she cannot tell for other hospitals but in Mametlheke Hospital each and every male/female patient they are admitted in one unit.
23. According to her in respect of mental health care nurses they were suppose to transfer them to Witbank Hospital but it could not work because they were told there are no beds and also maternity care patients were taken back to their respective hospitals by doctors in Witbank Hospital.
24. She testified that they dealt with both general and specialty cases in one unit.

25. According to her currently the situation is still the same and records are available to confirm that. She confirmed that her situation is the same as one of Mrs. Mabunda as she also treats pediatric patients in her ward.
26. She once raised the issue internally with Mr. Mashishi HR officer in 2008 after the implementation and he verbally said there was nothing he can do.
27. They kept on engaging the respondent until they sought assistance from their attorneys. Their expectations or outcome desired is to be paid for hybrid ward not general stream.
28. During cross examination she conceded that she is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212 as per clause 3.2.5.3 (i) (a) of Resolution 3 of 2007.
29. She however insisted that she is covered in (b) as she works in a hybrid ward and that female ward is a specialty ward.
30. She conceded that specialty ward has specialty equipment but contended that they were nursing specialty patients by improvising even though they did not use any specialty equipments.
31. She could however not identify anyone who was translated under hybrid clause.
32. Under re-examination she distanced herself from a Provincial Task Team report which confirmed that there is no hybrid ward which was agreed to by a union which represented her.

**Motlalepule Midah Mabunda** was the second witness. She testified as follows:

33. She started working in 1980 as a Nurse at George Mukhari Hospital.

34. On 2 August 1993 she started working at Mametlhake Hospital and assigned to open a female ward.
35. In the female ward they were nursing females with different conditions including oncology, orthopedic and pediatrician patients but the list.
36. In 1998 she was appointed a Chief Professional Nursing which is a managerial position in the hospital.
37. In 2006 she was redeployed to the female ward and this time as Operations Manager including the period 30 June 2007.
38. She holds a Diploma in general nursing, Diploma in Midwifery, Degree in Nursing Education and Community Health Nursing Science, Certificate in Nursing Administration and Certificate in Human Resource Management.
39. She was translated to Operational Manager grade 1 with a notch of R187 000.00 instead of R235 000.00 as she understand to be working in a hybrid ward.
40. According to her they nurse all kind of conditions unless the doctor directs that a patient be transferred.
41. She knows of employees who were translated by virtue of working in a hybrid ward and the same employee does not possess specialty qualifications being E.A Ntuli, Mabusela L.L and Nyalungu K.C.
42. During cross examination she conceded that employees on the same level must be treated equally and that two wrongs does not make a right though she insisted that she does not believe their translation was wrong.

43. She conceded also that in terms of the Provincial Task Team report the ward she was working in is a non-specialty ward in Mamethake Hospital.

**MOEPENG BELLAH MOLAI** was the 3<sup>rd</sup> witness

44. She is a registered nurse, midwife and advanced midwifery and also qualified in Neonatal Nursing Science. She joined the nursing profession in 1982 as enrolled nursing assistance

45. She became a staff nurse in 1990 until 1998 when she qualified as a general nurse after obtaining her diploma.

46. She qualified as a midwife in 2002 and continued to study the post basic midwifery neonatal nursing service and passed in 2007 Advanced Midwifery and Neonatal Nursing Science.

47. She started practicing and as a Post Basic Midwife since March 2007 and she was delivering the complications and managing some. By delivering complications she means a bridge where a baby is delivered through front and not head.

48. As of 30<sup>th</sup> June 2007 she was working at Marapyane Health Center as an Advanced Midwifery.

49. Her complaint is that in 2007 when OSD was implemented Minister of health said all the post basic courses in specialties are going to be paid and she was not paid for specialty as advanced midwifery.

50. She was translated into professional nurse grade1 specialty. Her translation letter recognizes her 8 years experience as of 31 March 2007.
51. She was translated to R160 470-00 per annum instead of R170.000 per annum and only paid her in terms of the grandfather clause without taking into account her 8 years of experience.
52. She confirmed that on 30 June she was in possession of post-basic nursery qualification and was registered as professional nurse in 1998 and from 1998 to 2007 the experience is 8 years.
53. In her view she feels disadvantaged in that in terms of the table on page 72 she was to be on salary notch R170-244 instead of R160-470 because she has 8 years of experience.
54. Under cross examination she conceded that a clinic (health care centre) under OSD falls under primary health care and that the relevant qualifications for a nurse who work in a primary health care centre are a primary health care qualification.
55. She conceded that if she was in hospital maternity ward with 8 years experience she would have been translated in terms of phase 2.
56. She however contended under re-examination that there is nothing in the resolution which suggests that if one is from a health centre she cannot translate in terms of phase 2.

**JULIA SELEME MAMBANE** was the 4<sup>th</sup> witness

57. In 1985 she obtained a diploma in general nursing, in 1991 a diploma in midwifery, in 1995 a diploma in community nursing, in 1995 a diploma in nursing education and nursing management and in 1997 she obtained her degree in Bachelor in Nursing Science.

58. Her work experience includes working in Mametlhake Hospital from 1994 as a professional nurse, in 1996 as Infection Control Nurse until 2008.

59. From 2008 she worked as a TB Coordinator at Dr JS Moroka till to date. According to her TB Coordinator and Clinical Coordinator are the same.

60. As of 30 June 2007 she was still in Mametlhake and she conceded that Infection Control nurse is not a specialty that is recognized as a clinical qualifications.

61. Her dispute is that in terms of OSD, 7 years of experience was required as a professional nurse to become a Clinical Programmer and at the time she had 20 years of experience.

62. She was translated to grade 1 on R186 000 notch and she did not receive a translation letter.

63. Paragraph 1.5 of Exhibit 3. Annexure 'A' of the remuneration is the basis of her dispute. According to her she should have at least been at R197 358-00 notch taking into account her 7 years experience yet she is not sure how she would have come to this notch.

64. She confirmed during cross examination that as at 30 June 2007 she had a post qualification as an Infection Control nurse and her understanding was that for OSD purposes what was considered is what one was doing at the time.

65. She conceded that by 30 June 2007 she was not a Clinical Program Coordinator.

66. She conceded further that paragraph 1.5 of Exhibit 3 (Resolution) applies to Operational Managers Nursing and Clinical Program Coordinators but contended that it does not exclude Infection Control nurse because it falls under clinical program though she could not substantiate her allegation.

67. Under re-examination she reaffirmed the fact that in June 2007 there were Clinical Program Coordinators and at the time she was a Infection Control nurse.

## **RESPONDENTS CASE**

**MICHAEL MOLEFE KGAPI** was the 1st witness

68. By 30 June he was employed by the respondent in Human Resource as a Principal Human Resource Personnel Officer aware of the OSD Resolution 3 of 2007

69. He was not part of the people who implemented the resolution.

70. He is aware that in terms of the resolution there are two scenarios being general and specialty.

71. His understanding of a nurse to translate as per paragraph (a) are those with post basic nursing qualification and (b) nurse without qualification but work on a specialty

wards like causality in the hospital but if a person works in a medical ward or orthopedic they need no qualification.

72. Under cross examination he conceded that he did not play any role in the translation of applicants and did not know how they were translated and testified on his understanding of the resolution.

**MDENI AGRIPPA DHLADHLA** was the 2<sup>nd</sup> witness

73. He is the Assistant Director HRM on Nkangala District which from 1<sup>st</sup> August was transferred to Gert Sibande.

74. In 2007 he was a professional personal officer. He is aware of OSD for nurses being resolution 3 of 2007

75. He is also aware of the arbitration award between government and labour in the matter.

76. It was his evidence that general wards would be (medical) female and male wards and OPD. Specialty would be theatre, maternity, casualty and children ward as per exhibit 2 clauses 3.2.5.3.

77. He testified that paragraph (i) (a) relates to nurses who has post qualifications and relates to nurses who works at theatre, maternity, casualty and children.

78. According to him (b) create grandfather clause to nurses who do not have qualifications. According to him translation of the nurses in different fields are with the same clause 3.6 of the award [clustering of wards]

79. His understanding of a hybrid ward is that it must have a multi specialist and the agreement in the right side of the ward in clause 3.6 is how the translation has to be implemented.
80. In respect of Mabunda she was working in a female ward which is a general stream.
81. In regards to Raphasha he testified that she was Operations Manager in male wards with 15 years of experience and a general stream.
82. It was his evidence that primary health care (PHC) falls within specialty and applicable to primary health care faculty but if one works at Mamehlake Hospital even with PHC she will translate to general stream
83. According to him program coordinators are based in a district office but if an employee is based in a hospital and have no letter of appointment as a program coordinator and portfolio of evidence will translate to general stream and as a result Julia Maubane does not meet the requirements to translate to specialty hence general stream.
84. If one work in a hospital in maternity ward advanced midwifery qualification is relevant for one to translate to specialty.
85. If one work at PHC the relevant qualification would be advanced PHC qualification to translate to specialty.
86. He testified that Molai is in possession of advanced midwifery and based at PHC faculty therefore she would have to translate to general stream.
87. He is aware that Mamahlake Hospital is a district hospital and if one combines a medical and surgical ward one will not necessarily get a hybrid ward (specialty ward).

88. During cross examination he confirmed that he was not involved in the practical translation process but he was involved in the verification process in relation to the implementation of the resolution.
89. He contended that he is able to attest to the difference between wards but not ailments and did not want to comment on anything that relates to ailments.
90. He contended further that OSD does not make reference to different ailments in both general and specialty wards hence he could not comment when it was put to him that Mbunda and Raphasha worked in a male and female ward where both general and specialty ailments presented themselves.
91. He explained his understanding of a hybrid ward as a ward with multiple specialized activities not general and specialty cases when trying to determine his understanding of clause 3.6 of the resolution.
92. He insisted that in terms of OSD all cases relating to clustering of wards the grandfather clause is applicable because they admit mixed patients with, for example, mental health, oncology, orthopedic patients.
93. He confirmed that in terms of Provincial Task Team report there are no hybrid wards in the province and it was signed by NEHAWU and HOSPERSA.
94. He confirmed that Mametlhake is a small district hospital and complex cases of patients are to be referred to tertiary hospitals.
95. He confirmed that an Advance Midwifery is relevant in a hospital but since the management of the patient who is on maternity starts at the clinic the duty of Advance Midwifery within primary health care facility is to manage the complications, prevent death and thereafter arrange for the transfer of that patient to a hospital for further management..

96. He confirmed further that a nurse who has been translated in terms of the grandfather clause does not go to phase 2 as it is a once off translation.
97. He did not want to comment on his understanding of the area of dispute because in his view the remarks in the document reflect what was agreed upon.
98. He confirmed that Program Coordinators are based in a District Hospital and that appointment letters apply to all applicants and not only coordinators.
99. Under re-examination he contended that even if one find a psychiatric patients in a combined male and female wards it does not qualify to be a hybrid ward.
100. He contended further that a position of Midwifery within the PHC facility does not qualify anyone to be a specialty and no portfolio of evidence was presented for Maubane in this regard.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

100. The factual matrix in this matter is that the Department of Health in its capacity as the employer concluded a collective agreement with the respective trade unions representing the nurses employed by the Department in 2007. The collective agreement was incorporated into Resolution 3 of 2007 and was commonly referred to as Occupational Specific Dispensation for Nurses (“the OSD”).
101. Clause 3.2.5.3 of the OSD for nurses which deals specifically with the translation of professional nurses (Registered nurses) provided that:

‘3.2.5.3 Translation of Professional Nurse (Registered Nurse) to speciality posts

- i. A Professional Nurse (Registered Nurse) who occupies a post in a nursing speciality and who –
    - a. is in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, shall translate to the appropriate speciality post; and
    - b. is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been permanently appointed in a post in a speciality unit and has been performing these duties of the speciality post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level.
102. A Professional Nurse (Registered Nurse) referred to in (i)(b) shall not progress by means of grade progression to the higher salary scale attached to a post in the clinical speciality without first having obtained the required educational qualification in the clinical speciality listed in Government Notice R212.
103. A Professional Nurse (Registered Nurse) who is managing a nursing speciality unit, and who is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been performing these duties of managing the speciality unit satisfactory on 30 June 2007, shall be translated as a once-off provision to the appropriate salary scale attached to the corresponding management level.”
104. The objectives of the OSD Agreement are listed in Clause 1 as, inter alia, to –

2.1.1 introduce an occupation specific remuneration and career progression system for professional nurses, staff nurse and nursing assistants with a view to attracting and retaining nursing professionals in all identified

categories through:

- (a) career pathing;
- (b) pay progression;
- (c) grade progression; and
- (d) recognition of appropriate experience.

2.1.2 introduce differentiated salary scales for the various nursing categories based on a new remuneration structure; and

2.1.3 incorporate into salaries the scarce skills allowance payable to specialty nurses.

105. For purposes of translating nurses in terms of the OSD Agreement, the following translation measures are provided for in Clause 3.2.5.2:

“3.2.5.2 Translation could be done by means of two phases

(i) 1st Phase

Minimum translation to the appropriate salary scale attached to posts (and grades in respect of production levels) as contained in Annexure B to this agreement. This implies an implementation adjustment in salary to at least the next higher notch on the salary scale attached to the post to which the employee is translated.

(ii) 2<sup>nd</sup> Phase (in respect of production levels/grades)

Recalculation of relevant experience obtained by a person who occupies a post on a production level after registration in the relevant nursing category, based on full years’

experience as on 31 March 2007, in order to award a higher salary at a production level subject and within the limits of the measures for such recognition contained in

Annexure C.”

106. The individual employees are employed at Mametlhake District hospital and they complained that their employer in applying the OSD translated them to the general stream instead of to the speciality stream which would have made them to benefit in terms of the OSD.
107. Labour and employer concluded an award in 2009 which unpacked areas of dispute and remarks. In the same award certain issues were agreed upon on the interpretation and application of the Collective Agreement.
108. In terms of clause 3.6 of the award parties agreed that Hybrid wards which represent wards in which multiple specialties are provided for will require of all Nurses with specialty qualifications to translate to the specialty dispensation. That not in possession of specialty qualification will translate under the Grand Father Clause as per clause 3.2.3.5 (i) (b) of PHSDSBC Resolution 3 of 2007.
109. In 2012 a Provincial Task Team deliberated on the issue of hybrid wards and agreed that there are no hybrid wards in the Province. The applicants' employees distance themselves from the report notwithstanding the fact that their union was a party to the conclusion of such report.
110. The applicants met most of the requirements for translation in terms of OSD either under clause 3.2.5.2 (a) and/or (b).
111. The issue that seem to be crisp if whether there are hybrid wards in Mpumalanga Province and if so, whether each of the applicants were employed in a hybrid ward or not.
112. The OSD agreement is a product of collective bargaining and not something that an employer or employee may, unilaterally, vary or interpret.

113. It was not disputed during the proceedings that applicants are members of a trade union which is a party to the OSD Collective agreement, the Award and the Provincial Task Team report.
114. In terms of the Provincial Task Team Report concluded around June 2012 after the date of the OSD Collective Agreement and the award there is no hybrid ward in the province.
115. It is not the applicant's case that they were employed in a specialty unit or that in Mametlhake Hospital there is a specialty unit/ward.
116. In *Northern Cape Forests v SA Agricultural & Allied Workers & others* (1997) 18 ILJ (LAC) it was held that:

*“In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all time take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.”*

117. In *Western Cape Department of Health v MEC Van Wyk and Others* CA1 2013 (LAC) Western Cape the principle relating to interpretation of Collective Agreement was reinstated. The Court held that the employer has no prerogative to interpret the Collective Agreement without a specific authority in the collective agreement to do so.

118. Herein, the parties to the Collective Agreement being the employer and labour agreed after deliberating on the issue and after investigations and visits at the hospitals in the province that there is no hybrid wards province.

119. Clearly this was not a unilateral decision and as such applicants as members of the union are bound by the agreement.

120. In my view, I am persuaded and incline to agree that the translation of the applicants is practical and fair under the circumstances.

121. Accordingly, I proceed to render the following award:

### **AWARD**

122. The Applicants has failed in making out a case for interpretation/application of OSD Resolution 3 of 2007 against the Respondent in respect of their translation.

123. The applicants have been correctly translated in terms of Resolution 3 of 2007.

124. The Applicants' case is hereby dismissed.

125. I make no order as to costs



Signature:

Commissioner: *Archibald Ngoako Mafa*

Sector: *Public Health & Social Development*

