



ARBITRATION AWARD

Commissioner: F.N.Bantwini

Case Number: PSHS 93-10/11

Date of Award: 17 October 2011

IN THE ARBITRATION BETWEEN

DENOSA obo Mkhwela : APPLICANT/EMPLOYEE

AND

Dept of Health- EC : RESPONDENT/EMPLOYER

Union/Applicant's Representative : Mrs. N.M.Jack
Union / Applicant's Address : PO Box 185
Bhiso
5605

Telephone : 041 484 7323/4
Fax : 041 484 2703

Respondent's Representative : Ms N.N. Siwa

Respondent's Address : P/Bag X 1207
Cofimvaba

Respondent's Telephone : 047 874 8001
Fax : 047 874 0115/086 575 5928/040 635 1128

DETAILS OF HEARING AND REPRESENTATIONS

1. This arbitration was part heard on 06 June 2011, 23 August 2011 and was finalized on 01 September 2011 at Cofimvaba Hospital in Cofimvaba. It came before the PHSDSBC in terms of Section 191 5(a) read with 186 (2)(a) of the Labour Relations Act 66 of 1995 (the LRA). The applicant, Mrs. N. Mkwela was represented by Mrs.N.M. Jack, who is an official from Democratic Nurses Association (DENOSA). The respondent, the Department of Health was represented by Ms. N.N. Siwa. The second respondent, Ms. Mantambo was present and she appeared in person. Parties agreed to submit written closing arguments on 19 September 2011.

ISSUE TO BE DECIDED

2. The issue to be decided is whether the applicant's position can be translated to a position of an Operational Manager in terms of Resolution 3 of 2007 (occupation specific dispensation OSD).

BACKGROUND TO THE DISPUTE

3. The applicant, Mrs.Mkhwela referred a dispute to the PHSDSBC through her union, DENOSA regarding failure of the respondent to appoint/translate her to a position of an Operational Manager in terms of Resolution OSD.When the dispute could not be resolved at conciliation level, and the applicant filed a request for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

4. According to Mrs. Jack's opening statement the applicant, during the implementation of OSD on 01 July 2007 for nurses, Professional Nurse Mkwelo was the sister in charge at theater. According to page 20 of the respondent's bundle. In terms of Resolution 3 of 2007, the applicant's name is listed as a sister in charge of theater. The sister in charge of the unit will be translated to a position of an Operational Manager; Nursing. During the implementation of OSD, the respondent translated Nurse Mantambo instead of the applicant. Clause 3. 4 of the arbitration award stipulates that the person who

is in charge of the unit must be translated to a position of Operational Manager. The union seeks translation of the applicant's position to an Operational Manager position with effect from 01 July 2007 with interest as a remedy.

5. Mrs. Jack submitted that the respondent refused to submit/disclose the following documents/information despite several requests that were made by the union.

- (a) Minute book
- (b) Theater time book
- (c) OPD time book
- (d) Allocation list from January 2007 to June 2007
- (e) Template on implementation of arbitration award
- (f) Maternity off duties
- (g) Maternity register 2007
- (h) Allocation book for nurses for the whole hospital in 2007
- (i) Minutes of the meeting where OSD implementation criteria was made.

6. The applicant, **Mrs. Sindiswa Mkwela** testified that she has been working for the respondent as a Professional Nurse since 06 December 1990. She was allocated by the Nursing Service Manager in theater since 2005 and in June 2007 she was still in theater performing the duties of a sister in charge. She possesses theater qualifications since 1998 and she was working with Pungula and Mkona.

7. The second respondent, Sister Mantambo was allocated in Maternity from 01 June 2007 to 16 June 2007 to assist her as she (the applicant) requested for an additional Professional Nurse. Between 2005 and 2007, Ms. Mantambo only worked for 16 days in theater. The applicant was referred to page 20 of the bundle confirming duties for Operational Manager which was compiled by the management of the hospital. In 2004, the theater was not working and all 4 employees who were working in the theater including her were allocated in other nits.

8. She (the applicant) was re-allocated in theater in 2005 to deal with minor operations and was in charge of the unit. The applicant was referred to page 15 to 18 of the bundle. She testified that she formulated policies that were used in theater and was delegated by Mrs. Mbana. She used to chair the meetings of the unit and was also responsible for skills development, teaching other nurses. She made reference of the meetings dated 16 April 2007, 17 May 2007 as well 28 August 2007.

9. According to off duties that appear on page 9, Ms Mantambo was working in Martenity and she was the night supervisor. During the implementation of OSD, she received money for specialty and she was expecting to be promoted to Operational Manager position.
10. Under cross-examination the applicant testified that in 2004 before the theater had a problem, she was working with Sister Mantambo, Mkona, Kiki and other employees. The theater was closed and employees were re-allocated to other units. In 2005, she was re-allocated in theater doing some minor operations and administration. Ms. Kiki and Adams were assisting her in theater. Ms Mantambo, Kiki and Adams including herself have theater qualifications.
11. Under re-examination, the applicant confirmed her involvement with Council of Health Service and Accreditation of South Africa (COHSASA) in 2006 and 2007. All unit heads were responsible for giving feedback to the e council and she was responsible for COHSASA inspection for theater.
12. The first witness for the applicant, **Ms. Kholiswa Mkona** testified that she is working for the respondent as a Nursing Assistant in pediatrics. In 2007 she was working in theater and the applicant was in charge. The applicant was also responsible of compiling COHSASA reports.
13. Under cross-examination, the witness testified that during May and June 2007, she was working in theater with the applicant in charge of the theater. The applicant was reporting to Mrs.Mbana. Ms Mantambo was working a night shift in maternity during June 2007 she never worked in theater during May and June 2007.
14. **Ms Nokuphiwa Nomvuyo Majokweni** the second witness testified that she started working for the respondent in 1991. The officials from COHSASA were in Cofimvaba Hospital from June 2006 to December 2007 and the applicant was in charge of theater during this period. The applicant used to attend sectional head meetings for COHSASA because she was in charge of theater.
15. Under cross-examination the witness testified that she is the head of X-Ray department. During the period of COHSASA, all sectional heads were trained on policy formulation. The sectional heads compiled policies in consultation with the subordinates. The applicant was in charge of the theater in May and June 2007.
16. In closing, **Mrs. Jack** argued as follows:
17. The applicant should have been given a position of Operational Manager due to the following reasons: Allocation list for 2007 reflects that the second respondent was allocated in OPD and maternity. The

applicant has been working in theater since 1990 and in June 2007 she was still allocated in charge of theater. She (the applicant) was dealing with formulation of theater policies and according to COHSASA report see page 21. Mrs. Mbana testified that the applicant was responsible for leading theater staff and to coordinate skills development. The applicant was allocated to be in charge of theater since 2005 when the theater was re-opened to date.

18. It is not dispute that Ms Mantambo is senior to the applicant but during June 2007, she was allocated in OPD as a night supervisor. Ms. Mantambo was a relief for emergencies throughout the hospital as she cannot be allocated to be a night supervisor and at the same time to be in charge of the theater. The theater register cannot be confirmed as an authentic record as it is not accompanied by patient's folders. According to the human resources template, the applicant is listed as in charge of theater performing duties of Operational Manager. The document appears on page 20 of the respondent's bundle. The union seeks translation of the applicant's position to an Operational Manager with effect from 01 July 2007 as a remedy.

Respondent's case

19. According to Ms. Siwa's opening statement, the applicant was not a sister in charge of theater during 01 June 2007.
20. **Mrs. Gloria Nomonde Mbana** the first respondent's witness testified as follows:
21. She started working for Cofimvaba hospital in 1992. In 1995, she was appointed as a Nursing Service Manager. In June 2007, the applicant was working in theater because the work load was minimal. Mantambo, Mkona and Adams were allocated in other units within the hospital although they have theater technique. Mantambo was the night supervisor and was working in maternity. In theater, the recommendation of an Operational Manager was based on experience; specialty and the person must be hands on. There was no OSD document that was used and this criterion was formulated by the district office.
22. In 2003 the theater was not fully functional until in 2007 where in all other employees were re-allocated back in theater. Mantambo was in charge of theater before the theater was closed although she was allocated as a Night Supervisor in maternity during June 2007. Allocations were done based on seniority.

23. The applicant was dealing with COHSASA official, dealing with policy formulation with the assistance of other nurses. The applicants' office was in theater since as she was dealing with skills development. The theater was never closed completely as minor operations were done and the applicant was always in theater. Mantambo was on leave in June 2007 and if the allocation register was available, it would reveal Mantambo's allocation. Mantambo's selection for the Operational Manager's position was fair and was based on the procedure.

24. Under cross-examination the witness testified as follows:

25. Mantambo was in charge of theater although she was allocated out in maternity. The applicant was always in theater for 24 hours. In June and July 2007 Mantambo was assisting in OPD although she belonged to theater. The applicant formulated policies and was involved in the skills development hence her office was in theater. Mantambo was assisting in OPD although she was allocated in theater. The witness was referred to page 9 of the bundle which reflects that Ms. Mantambo was allocated in OPD.

26. Under re-examination the witness submitted that the applicant was never appointed to be in charge of the theater. Ms. Mantambo was assisting in OPD and was appointed as the night supervisor. The implementation of OSD was done without using the award; the hospital relied on the criterion that was formulated by the CSC.

27. The third witness, **Ms. Pamela Mantambo** is the second respondent in this matter. She testified as follows:

28. She started working in Cofimvaba Hospital on 09 March 1987 in the OPD section. In 1991 she was working in theater and in 2006 she was allocated in maternity. In 2004 she worked in theater until it was closed and was allocated back in Maternity. In March 2007 she worked in theater. She was senior to other employees who were in theater. In June 2007 she was a night supervisor

29. Under cross-examination the second respondent testified as follows:

The rotation in Cofimvaba Hospital is 6 months for the day duty and 3 months for the night duty with the exception of theater trained nurses. In June 2007 she was allocated in maternity because the theater was closed. The applicant was allocated in theater when minor operations were conducted and was assisted by a Nursing Assistant. In June she was a night supervisor and was allocated in maternity and theater. The witness could not produce a proof to the fact that she was also allocated in the theater. Page 9 indicates that the witness was a night supervisor in OPD.

30. The witness further testified that the applicant was in theater dealing with policy formulation for theater and involved in skills development. In 2007 the applicant and Mkona were working in theater and even before the closure of theater she (the applicant) was in theater as a Programme Manager. The witness could not respond when a question as to how did she managed a unit (theater) while she was placed in maternity from June 2007 to August 2007. The union official was referring to duty allocations which appear from page 9 to 12 of the bundle.
31. The third witness, **Ms. Nomazwe Adams** testified that she is working for the respondent since 16 March 1990 in female ward and was moved to theater. In theater she was working with the applicant and Mantambo who was the sister in charge. In 2006, the theater had a problem with anesthetic machine and other employees were allocated in other units. Only minor operations were conducted. She (the witness) thought that Ms. Mantambo was recommended as Operational Manager because of her seniority.
32. Under cross-examination, the witness testified that theater staff was allocated to other units when the theater was not in operation. In 2007 she had an arrangement with management to be a night supervisor for the whole year because she was studying. The witness was referred to duty allocation lists that appear from page 22 and 23 of the bundle reflecting the applicant and Mkona in theater. The witness testified that according to duty allocations, the first employee in the list is the person who is in charge of the unit. According to this list, the applicant is listed as the Sister in charge of theater.
33. **Mrs. Leonora Mqongqo**, the fourth witness testified as follows:
 34. She is employed by the respondent and she started working for Cofimvaba Hospital on 03 December 2007 as a Deputy Nursing Manager. Mantambo was in charge of theater and the applicant was also working in theater. Other nurses like Adams and Mkona were allocated in other units most of the time.
 35. The witness further testified that she was involved in the implementation of OSD for nurses. The criteria used in the selection of Operational Manager were speciality, experience and allocation of the employee as at 30 June 2007. In Cofimvaba there were 4 nurses with theater technique.
 36. Under cross-examination the witness testified that the criteria used in the implementation of OSD for nurses were speciality, experience and allocation. She was told that Mantambo was in charge of theater in June 2007 but she was allocated outside theater because theater was not fully functional at the time (June 2007). The OSD document was not given to management of the hospital.

37. The fifth witness, **Ms. Funeka Dawn Stemela** testified as follows:
38. Before the implementation of OSD for nurses in 2008, the district office interacted with the institutions. Institutions were instructed to submit names of the employees they have recommended for the Operational Manager's positions. The guiding factor was that the employee must be a Chief professional Nurse and must be on salary level 8. The witness was referred to clause 13.2.3.1 of page 19 of the respondent's bundle.
39. Under cross-examination, the witness testified that the criteria used when implementing the OSD for nurses was experience, speciality and placement/allocation of the employee. Institutions were given the DPSA document which was a relevant document. According to page 9 Mantambo was allocated in OPD in July 2007. No proof of allocation was submitted by Cofimvaba Hospital. The arbitration award was addressing employees who were disadvantaged and no list of disadvantaged employees was received from Cofimvaba.
40. In closing, **Ms. Siwa** argued as follows:
41. Mrs. Mbana, the respondent's first witness testified that the implementation of OSD was in accordance with DPSA directive. According to Mrs. Mbana's testimony the District office also instructed management of the institution to develop a criterion based on experience and speciality which is also stipulated in Resolution 3 of 2007, item 3.1.1 2 and 3.2.5.3. Mrs. Mbana disputed that the applicant is or was in charge of theater. Mrs. Mbana also did not dispute that the applicant developed policies in preparation for COHSASA because her (the applicant) office was in theater and was involved in skills development.
42. The respondent's representative further argued that the applicant was working with other Professional Nurses in theater including Ms. Mantambo. These employees were allocated in other units due to the fact that the theater was not fully functional. The second respondent, Ms. Pamella Mantambo was in charge of theater as per Mrs. Mbana's further testimony. Ms. Mantambo's evidence corroborated with Mrs. Mbana's evidence, confirming that she was in charge of theater as she was senior to other theater staff but in June 2007 she was placed in OPD as a night supervisor due to the fact that theater was not fully functional.
43. The fact that the applicant represented theater in COHSASA meetings cannot be regarded as a determining factor that Mantambo and Adams were not working in theater.

ANALYSIS OF EVIDENCE AND ARGUMENTS

44. It is common cause that the applicant referred a dispute to the PHSDSBC when the respondent failed to translate her to a position of Operational Manager in terms of Resolution 3 of 2007. Other factors of common cause are as follows:

- >. That the institution (Cofimvaba Hospital) had a problem with anesthetic machine in 2004.
- >. Minor operations were performed as the theater was never closed completely
- >. That Professional Nurses Mantambo, Mkona, Adams and Mkwela all had theater technique
- >. That Professional Nurses Mkona, Adams and Mantambo were allocated in other units when the theater was conducting minor operations.
- >. That Ms. Mantambo who is the second respondent was the most senior Professional Nurse who had theater qualifications.

45. Issues that are in dispute which will form part of my analysis are as follows:

- >. **Whether the applicant was in charge of theater or not.**

46. It was the evidence of the applicant that she was in charge of theater and was dealing with skills development, policy formulation for theater and used to chair meetings for the theater. According to the Human Resources Department's template which appears on page 20 of the respondent's bundle, the applicant is listed as the in charge of theater and is performing the duties of an Operational Manager. The duties were compiled by management of the institution (Cofimvaba Hospital). Mrs. Mbana the main witness of the respondent testified that the applicant was responsible for leading theater staff and to coordinate skills development. The 2 witnesses for the applicant, Ms. Majokweni and Mkona testified that the applicant was in charge of theater. Ms. Majokweni further testified that the applicant used to attend COHSASA meetings with other unit heads of the hospital. COHSASA evaluations were conducted in 2006 and 2007 according to the evidence of both parties.

47. The duty allocation lists which appear from page 22 and 23 of the applicant's bundle reflect the applicant as the sister in charge of the theater unit. It is generally the policy/rule in the nursing profession that the first listed official is in charge of the unit. Mrs. Mbana as well as Ms. Adams did not deny this allocation policy.

48. Mrs. Mbana, the first witness for the respondent did not dispute the duties that were performed by the applicant. She also testified that the applicant was always in theater as her office was in theater but she was never appointed to be in charge of the theater.

> Whether the applicant was allocated in theater during 30 June 2007 or not.

48. According to the evidence adduced by both respondent as well as applicant's witnesses, the applicant was allocated in theater by 30 June 2007. The second respondent, Ms. Mantambo was allocated in OPD as a night supervisor during 30 June 2007.

> Whether Ms. Mantambo was in charge of theater or not.

48. It is the respondent's case that Ms Mantambo was in charge of theater although she was allocated in OPD and maternity during 30 June 2007. Ms. Mantambo and other theater staff were allocated in other units when the theater had a problem with anesthetic machine in 2005. Only minor operations were conducted. The applicant disputed emphatically that Ms. Mantambo was in charge of theater. Ms. Mkwelo testified that in 2007 Ms. Mantambo only worked for 16 days in theater from 01 June 2007 to 16 June 2007 when she (the applicant) requested an additional Professional Nurse. It must be noted that no documentary proof was submitted to corroborate Misses. Mbana, Mqongqo and Mantambo (the second respondent)'s evidence to the effect that Mrs. Mantambo was in charge of theater. Ms. Stemela, the fifth respondent's witness also testified that the criterion that was used on implementation of OSD for Nurses were experience, speciality and placement/allocation. She further testified that no proof of allocation was submitted by Cofimvaba Hospital.

49. Clause 3.4 of the Arbitration Award reads "Translation of Managers not formally appointed to posts of Sister –in-Charge and subsequent to advertisement of their posts in the OSD. All Nurses who were performing duties of the Unit Managers duly appointed or not must translate automatically as Operational Managers and be placed according to the streams applicable e.g. Specialty or General"

50. According to the DPSA document clause 13.2.3 and clause 13 2.3.1. read with item 3.1.12 and 3.2.5.3 of Resolution 3 of 2007 provides that the Chief Professional Nurses in designated posts of Unit Manager on 30 June 2007 must be created/converted to position of Operational Manager Nursing Speciality Unit with effect from 01 July 2007.

51. It is my view that the applicant has discharged the onus to prove the claim of unfair labour practice by the respondent based on promotion/translation from a chief Professional Nurse to Operational Manager 's position.

AWARD

I therefore make the following award:

52. The respondent, **Department of Health-EC** is ordered to translate the applicant, **Sindiswa Mkhwela** to a position of Operational Manager with effect from 01 July 2007 in terms of resolution 3 of 2007 (OSD).

52.1 The respondent is further ordered to pay all monies due to the applicant on 15 November 2011.

52.2 The applicant is ordered to assume duties of Operational Manager: Nursing Speciality with effect from 15 November 2011.

52.3 There is no order as to costs.



Signature

Faith Ncumisa Bantwini

PHSDSBC PANELIST