



ARBITRATION AWARD

Case No: **PSHS103-20/21**

Commissioner: **Anna Maria Fourie**

Date of award: **22 September 2020**

In the matter between:

DENOSA obo Mvadla Meriam Motsi and Two Others

(Union/Applicant)

and

Department of Health- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The Applicants referred a dispute regarding the interpretation and application of a Collective Agreement, PHSDSBC Resolution 1 of 2002 (“the Resolution”), read with PSCBC Resolution 9 of 2001 to the Bargaining Council. The dispute was set down for arbitration at the Free State Psychiatric Complex, Bloemfontein on 24 August 2020 at 10h00. The Applicants were present and were represented by Mr. Mohoje of the Union. The Respondent was represented by Mr. M Mothokwane, Labour Relations Officer of the Respondent.
2. The hearing was conducted in English and was recorded electronically and I made notes by hand.

ISSUE TO BE DECIDED

3. The Applicants sought an order indicating whether or not they were entitled to an acting allowance for acting in a higher position.

BACKGROUND

4. The first Applicant, Mvadla Meriam Motsi, was appointed by the Respondent as a Professional Nurse. In February 2016, she was appointed Acting Operational Manager at Molefe Tau Clinic in Botshabelo. She is presently still remunerated on the scale applicable to a Professional Nurse.
5. The second Applicant, Kesebelwang Elizabeth Miya, was appointed by the Respondent as a Professional Nurse. On 1 April 2012, she was appointed Acting Operational Manager Harry Gwala Clinic Botshabelo. She is presently still remunerated on the scale applicable to a Professional Nurse.
6. The third Applicant, Mahlape Ambrosina Mpiti, was appointed by the Respondent as a Professional Nurse. In January 2013, she was appointed Acting Clinic Manager, Winnie Mandela Clinic. She is presently still remunerated on the scale applicable to a Professional Nurse.
7. The following issues were common cause:
 - All three of the Applicants were appointed to act in higher positions and were issued with appointment letters in that regard.
 - All three of the Applicants are presently still acting in higher positions.
 - All three of the Applicants are continuing to submit monthly reports which are still accepted by the Respondent.
8. The only issue in dispute was whether the three Applicants were entitled to be paid an acting allowance.

SURVEY OF EVIDENCE AND ARGUMENT

9. The parties initially agreed to rely on documentary evidence and arguments only. However, the Respondent later indicated that they wished to call two witnesses to testify. After hearing the testimony of the Respondent's witnesses, the Applicants were given an opportunity to call witnesses, but they opted to not call any witnesses. The Applicants submitted two bundles of documents, "A" and "A1" which were admitted. The Respondent submitted two bundles, "B" and "C", which were also admitted. After analysing their submissions, I issued a directive to the parties to submit a stated case regarding the issue of whether the posts were vacant and funded. Such had to be submitted by 14 September 2020. To date no stated case was received from either party.

EVIDENCE ARGUMENT FOR THE APPLICANTS

10. The Applicants did not call a witness to testify in support of their case. They relied on the documentation submitted. Mr. Mohoje argued as follows:
11. The dispute related to the payment of an acting allowance in terms of a Collective Agreement, Resolution 1 of 2002, which provides in clause 3 as follows:
- "3.1 An EMPLOYEE appointed in writing to act in a post of a higher grade than the grade of the employee by the Head of Department or his / her delegate at provincial or national level (here-after the "appointing authority") shall be paid an acting allowance to act in vacant posts provided that:
- 3.1.1. the post is a vacant and funded post,
 - 3.1.2. the acting period is longer than 6 weeks,
 - 3.1.3. the appointing authority is a level higher than the acting appointee,
 - 3.1.4. The EMPLOYEE must accept the acting appointment."
12. The three Applicants act in posts left vacant after their predecessors left the posts. All three of the posts in question were funded and are still funded. The Applicants have all been acting in the posts for longer than six weeks. They were appointed to act by the Acting Local Area Manager at the time, which was a position higher than the positions that they are acting in. All three of the Applicants signed in acceptance

on their letters of appointment, see pages 16, 21 and 26 of bundle “A”. The appointments were thus in compliance with the provisions of Resolution 1 of 2002.

13.[8.3] In reply to the Respondent’s closing argument, he referred to the Delegations Register on page 3 of “C” and submitted that the Respondent made no submission to prove that the Head of Department (HOD) did not delegate the power to appoint employees in acting posts to the Chief-Director Human Resources and Planning, as provided for in the Delegations Register. There was also no indication that the Respondent had stopped the Applicants from continuing to act in the posts when the Respondent became aware of them acting. The Applicants have been acting in the posts for longer than six weeks. They were appointed by the Local Manager who had written their letters of appointment on behalf of the Respondent and they accepted their appointments. No evidence was presented indicating that Mr. Koalepe had been reprimanded for having acted ultra vires in appointing the Applicants to act. When the Applicants received no assistance from Mr. Koalepe regarding their acting allowances, they reported directly to the National Council of Provinces to seek their assistance and were continuously informed that the issue of their acting allowances were in the “pipeline”. Even when they filed grievances about not receiving their acting allowances, the Respondent still did not do anything to correct their alleged wrongful appointment. It thus appears that the Respondent deliberately chose not to correct the alleged flawed process. In addition, the Respondent benefitted from the Applicants working in higher posts, but paid at the rate of lower posts.

14. The Respondent ignored the provisions of clause 3.6 of Resolution 1 of 2002, which reads as follows:

“3.6 An EMPLOYEE may not act in a higher vacant post for an uninterrupted period exceeding twelve months.”

15. The Respondent cannot claim ignorance, as they have been receiving reports from the Applicants during all of the years that they have been acting in higher posts. Ms Miya even won an award for service excellence.

16. He referred to case law, *Gauteng Department of Local Government and Housing v IA Sirkhot NO*, GPSSBC (JR408/2012, handed down on 14 October 2014). In the said case the employee was not paid an acting allowance and an award was granted in her favour. The Employer took the award on review, claiming that the employee did not qualify, as the person who had appointed her to act had not had the requisite authority to do so. However, the review application was dismissed and the award was upheld.

EVIDENCE AND ARGUMENT FOR THE RESPONDENT

17. The Respondent's representative submitted that he wished to call witnesses in support of his case. He claimed that the Human Resources processes relating to grievances and the Department's opportunity to respond in writing to the issue was not followed. Furthermore, he wished to call a witness to explain the acting procedures.

18. The Applicants' representative objected to the calling of witnesses, as the Respondent indicated at the outset of the arbitration that no facts were in dispute and that they would rely solely on documentation and arguments. However, they would not deny the Respondent an opportunity to call a witness.

19. In the interest of fairness, I allowed the Respondent to call witnesses, provided that the Applicants would be afforded the same right, should they wish to present viva voce testimony in response to the testimony presented by the Respondent. After hearing the testimony of the Respondent's witnesses, the Applicants indicated that they did not wish to testify or call any witnesses. Their representative was adamant that this was their position when I asked whether he was certain that he did not want to call any of the Applicants to testify.

20. Tatolo Aron Mokoqo testified as follows under oath:

21. In order to be paid an acting allowance, an official had to act in a vacant and funded post. Acting for a period of longer than six weeks has financial implications, thus, the

highest authority had to approve acting. The Employer would have to make submissions and request the payment of an acting allowance. Acting had to be in a post one or two levels higher than that of the person acting. An acting allowance is paid on the first notch of the higher level. The Head of Department (HOD) or Chief Director per delegation, could approve an acting allowance if the post was vacant and funded.

22. Under cross-examination he conceded that acting was not always in a post one or two levels higher, but variation could be allowed. He could not say whether the Applicants were made aware that their acting had not been in terms of a proper process. He conceded that the Applicants have been acting for longer than six weeks. He could not say whether they were advised on the proper procedure to be followed. He submitted that the Respondent should have addressed the problem the moment they became aware of it. He submitted that it was not wrong for the Applicants to expect payment of acting allowances. The problem was on the side of the Respondent.

23. Nkalimeng Ramarea Makhoali, District Director: Mangaung Metro, testified as follows under oath:

24. When she was appointed to act in her post in 2017, the process relating to the Applicants' acting was already ongoing. She enquired about the issue, as well as payment of the acting allowances by submitting a query to Labour Relations. The matter was escalated to the Chief Financial Officer at which level the question of who had signed the acting letters was raised. She was informed that Mr Koalepe who had signed the letters appointing the Applicants to act, was not authorised to do so. There was also a letter in which the authority of District Managers to appoint people in acting positions was revoked. Only Provincial Managers could approve acting. Local Managers were informed of this and also that acting had to stop. She unfortunately did not have the said letters at the arbitration. The posts in question were still active on the system. However, if a post was not filled within six months, it would be rendered frozen and no one could be appointed in it.

25. Under cross-examination she confirmed that when she commenced in her post, she found people acting in funded posts, yet they were not paid. She had not been aware of all of the issues at the time. She explained that when a post was frozen, they could write a submission for it to be unfrozen. Depending on the budget, available funds could be recommended for the post. At the time, the Department had been under administration, thus, the process could not be followed. When asked whether she specifically wrote to the Applicants to inform them that their acting periods have ended, she submitted that she had written a submission regarding all of the people who were acting in the district. A letter later came from the HOD to stop all the acting. The employees were informed of this by their local area managers, including Mr Koalepe. It was put to her that not one of the Applicants were informed that their acting periods have ended, whether formally, informally or otherwise and that they were still acting in the posts. She insisted that a letter was compiled and said that the local area managers should be called.
26. She conceded that at the time that she had written a letter to enquire about the issue of acting allowances, she had believed that due process had been followed in the appointment of the Applicants. She only learned later that the processes were not followed.
27. The Respondent did not make any further submissions or argument in support of their case.

ANALYSIS OF EVIDENCE AND ARGUMENT

28. The Resolution makes provision for the resolution of disputes relating to its interpretation and application in clause 4, which reads as follows:
- “Any dispute about the interpretation or application of this agreement may be referred by any party to the Council, for resolution in terms of the dispute resolution procedure of the Council.”
29. Since the resolution was concluded in the Public Health and Social Development Sectoral Bargaining Council, I thus had jurisdiction to determine the dispute.

30. In essence, the only issue in dispute was whether the three Applicants were entitled to be paid an acting allowance.
31. It was not in dispute that the Applicants have all been issued with appointment letters to act in the positions that they were currently in. It was also not in dispute that all of the Applicants were still acting in the same positions. It was further common cause that all of the Applicants submitted monthly reports which were accepted by the Respondent. Finally, it was common cause that not one of the Applicants were paid an acting allowance.
32. Clause 2 of the Resolution stipulates the scope of the agreement and states that it binds the employer and all employees that fall within the registered scope of the bargaining council.
33. The witnesses called by the Respondent confirmed that appointment letters were issued to all three Applicants and not one of them were paid an acting allowance. Their claim that the appointment letters were signed by a person lacking the requisite authority to do so, does not change the prejudice caused to the Applicants. They were appointed in writing by their local manager. They reasonably believed that their appointments were procedurally affected.
34. The resolution provides that an appointment must be made by the HOD or his or her delegate at provincial or national level:
“An EMPLOYEE appointed in writing to act in a post of a higher grade than the grade of the employee by the Head of Department or his / her delegate at provincial or national level (here-after the “appointing authority”) shall be paid an acting allowance to act in vacant posts provided that:
- 3.1.1. the post is a vacant and funded post,
 - 3.1.2. the acting period is longer than 6 weeks,
 - 3.1.3. the appointing authority is a level higher than the acting appointee,
 - 3.1.4. The EMPLOYEE must accept the acting appointment.”

35. The Respondent's first witness testified in general and did not contribute any material evidence on the situation involving the Applicants. He argued that it was not wrong for the Applicants to expect to be paid an acting allowance. The second witness of the Respondent also had no knowledge of what in fact was the position at the time of the Applicants' appointment. She confirmed that at the time of her arrival in the division, she found many employees acting in higher positions without being paid. She further submitted that she had been under the impression that the Applicants were entitled to be paid an acting allowance until she inquired about the situation and was then informed that there was an issue relating to the Applicants' appointment. Her submission that only provincial managers could authorise acting was in line with clause 3.1 of the Resolution. However, the Amendment to the Human Resource Management Delegations, the Respondent relied upon in support of their case, was only signed on 16 April 2019 and thus not applicable at the times that the Applicants were appointed to act. The question is thus, whether Mr Koalepe qualified as the HOD's provincial or national delegate.

36. Mr. Koalepe was the Acting Local Area Manager Botshabelo PHC. Thus, he was not a provincial manager, as suggested by clause 3.1 of the Resolution. It thus appears that the appointment letters were not signed by the appointing authority. However, no Delegation document of the applicable periods were presented as evidence, only a document that was signed in April 2019, years after the Applicants were appointed to act. The question thus is whether their appointments were invalid.

37. There was no evidence before me that the Respondent at any time notified the Applicants in writing that their appointments were not procedurally correct and thus that they were not entitled to an acting allowance. The only document they received was a response to their respective grievances, stating merely that attempts were made to obtain approval to pay them acting allowances, but no response was received and that they could pursue the matter further in terms of the grievance rules or refer a dispute to the Council. Thus, it appears improbable that the Respondent at any stage informed the Applicants that they were not correctly appointed to act. In fact, the evidence suggests that the Applicants' grievances were seriously considered and they were assisted by the District Director of Mangaung Metro Health

District from where a request for approval of payment of their acting allowances were sent to the approval authority for consideration.

38. The Applicants submitted that the posts they were acting in were vacant and funded. Despite the fact that both parties were directed to submit a stated case on this particular issue, neither of them made use of the opportunity to supplement their respective cases in this manner. The Respondent's main argument from the onset was that the Applicants failed to follow internal grievance procedures and that their appointments were not according to correct procedure.
39. The Applicants should not be prejudiced because the Respondent might have failed to ensure that the correct procedure was followed in their appointment. It is a woeful situation that a government department as employer can shamelessly exploit competent employees by nonchalantly failing to follow the correct procedure to appoint employees in acting capacities and then relying on the lack of proper procedure to get away with not paying them acting allowances. Whether the posts were vacant and funded could not be determined. However, it was plain from the submissions of the parties that the Respondent was aware of the fact that the Applicants have been acting in higher positions and the Respondent reaped the rewards of their acting.
40. Clause 3.6 of the Resolution provides that Employees may not act in higher positions for an uninterrupted period of longer than twelve months. It was not in dispute that all of the Applicants have been acting in higher positions for a period exceeding twelve months. The Resolution does not provide for the situation where clause 3.6 was deviated from. Specifically, the situation where an employee acted in a higher post for an uninterrupted period exceeding twelve months. This issue might be a question to be determined in a different dispute. The fact that the Applicants submitted monthly reports since they were appointed to act, was not disputed by the Respondent. It was also not disputed that clause 3.6 of the Resolution was not complied with.

41. Based on the scope of the Resolution, as well as a consideration of the parties' submissions on a balance of probabilities, it appears that in terms of the provisions of clause 3 of the Resolution, the Applicants did not qualify for an acting allowance. However, in *Gauteng Department of Local Government and Housing v IA Sirkhot NO and others* (JR408/2012) handed down on 14 October 2014, the Labour Court held that the arbitrator's finding that the employer would be unfairly enriched if it was not ordered to pay the employee an acting allowance, was a reasonable finding. In the said case the argument of the employer was that the employee's appointment was never formalised and thus, he was not entitled to payment of an acting allowance, paragraph [34]. Some of the findings of the arbitrator were:

"33.2 Mr De Beer remained in the acting position for a period exceeding 3 (three) months and the conduct of the Applicant demonstrated that that they were content with Mr De Beer remaining in that role. This is further compounded by the fact that the Applicant accepted that Mr de Beer had indeed acted for a period longer than 3 (three) months, and once that period lapsed; the Applicant was under an obligation to inform Mr de Beer of same. I do not share the same views of the Applicant to the effect that Mr de Beer was aware that he would not be entitled to an acting allowance if he continued to act after the 3 (three) months period had expired. The Applicant did nothing to stop Mr de Beer's acting role when they could have done so."

"33.4 The basis for the Applicant's refusal to make payment of the acting allowance is premised on the fact that the appointment letter was not signed by Mr Seabi, the Head of Department, and that it was not signed by Mr de Beer. Consequently, the Applicant asserted that the appointment was unauthorized. However, the Applicant's refusal is based on a technicality which if upheld would absolve the Applicant from paying Mr de Beer even though he had worked tirelessly in that acting position. This would be unfair as notwithstanding non-compliance with the Resolution, Mr de Beer still acted in that capacity and the Applicant had the full benefit of his services in that acting capacity."

"33.5 Non-compliance with clause 3.1.1 did not mean that Mr de Beer was not entitled to an acting allowance. The intention of the parties was for Mr de Beer to act as Director, even beyond the initial 3 (three) month period."

42. In light of the above, I am of the view that the intention of the parties was indeed for the Applicants to act in the respective acting positions. There seems to be no valid reason, other than the Respondent's reliance on the technicality of compliance with the resolution, that the Applicants should not be paid an acting allowance. The Respondent reaped the rewards of the Applicants' acting. Thus, the Applicants should each be paid an acting allowance at the lowest notch of the applicable remuneration scale for the respective posts that they were acting in for a period of at least twelve months. This would amount to a payment of R55 677.00 to each of the Applicants, calculated as follows:


43. R499 953.00 per annum payable to as per the Occupational Specific Dispensation for Operational Managers Nursing, Primary Health Care the less R444 276.00 (annual remuneration actually paid to all three of the Applicants individually) = R55 677.00.

AWARD

44. The Applicants Mvadra Meriam Motsi, Kesebelwang Elizabeth Miya and Mahlape Ambrosina Mpiti are entitled to an acting allowance. The Respondent is ordered to pay the Applicants an acting allowance at the lowest notch of the applicable remuneration scale for the posts they were acting in as follows:

- Mvadra Meriam Motsi: Acting allowance in the amount of R55 677.00 as calculated in paragraph 28, for a period of twelve months, acting position: Operational Manager at Molefe Tau Clinic in Botshabelo.
- Kesebelwang Elizabeth Miya: Acting allowance in the amount of R55 677.00 as calculated in paragraph 28, for a period of twelve months, acting position: Operational Manager Harry Gwala Clinic Botshabelo.
- Mahlape Ambrosina Mpiti: Acting allowance in the amount of R55 677.00 as calculated in paragraph 28, for a period of twelve months, acting position: Clinic Manager, Winnie Mandela Clinic.

45. The Respondent must pay the Acting allowances to the Applicants by no later than 19 October 2020.

A handwritten signature in black ink, appearing to read 'AMF' followed by a flourish and the letter 'e'. The signature is written on a light blue background.

Anna Maria Fourie