



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS1474-17/18**

Commissioner: **Zuko Macingwane**

Date of award: **22 May 2019**

In the matter between:

NEHAWU obo Mothlatsi Justinus Mohapi

APPLICANT

and

DEPARTMENT OF HEALTH – FREE STATE

RESPONDENT

Details of the parties and representation

1. The matter was set down for arbitration on three occasions as follows: 25 January, 8 March and on 24 April 2019 and scheduled to commence at 10:00AM at the Respondent's offices at Thabo Mofutsanyana District in Phuthaditjaba. The applicant, Mr. Mothlatsi Justinus Mohapi, was present and represented by Mr. Kgololo Andries Mokala, the union official with the National Education Health & Allied Workers Union (NEHAWU).
2. The respondent, Department of Health- Free State, was represented by Mr. M Nhlapho, its Senior Employment Relations Officer. The proceedings were digitally recorded. The applicant submitted its bundle of documents which was marked as bundle "A". The respondent's bundle was marked "B". On the second sitting the applicant submitted bundles "C" and "D" as the annexures and there was no objection. The parties were given an opportunity to submit closing arguments in writing on 1 May 2019. I applied for extension on submission of the award, such was granted and I had to submit the award to the Council on or before 22 May 2019.

Issues to be decided

3. I am to determine whether or not the applicant is entitled to danger allowance and provisional special allowance respectively in terms of clause 4.1 and clause 4.5 of Resolution 4 of 2017 (herein referred to as the Agreement and or Resolution), a Collective Agreement concluded under the auspices of the Council. I am also required to determine whether the respondent complied with the provisions of the said collective agreement specifically the clauses mentioned above and correctly interpreted and a collective agreement when it refused to pay the applicant the said allowances.

Background and opening statements

4. At the time of the dispute, the applicant was employed by the Provincial Department of Health, the respondent as a Forensic Pathology Officer: Grade 2 at Bethlehem Mortuary in the Forensic Pathology Unit at a Salary notch of R322 575 per annum. The applicant is still in this position. The applicant was transferred to the respondent's employ in 2006 from the South African Police Service. As per the 7.11 referral form, the dispute arose in 13 March 2018 and the referral was filed on 13 March 2018.
5. In the opening statements, the applicant's contention was that the dispute that they have referred is about both the interpretation and application of resolution 4.1 and 4.5 of the agreement. The applicant further submitted that their dispute is guided by the objectives in clause 2.1 and 2.4 of the resolution / agreement and in line with that purpose they believe that clause 4.1 and 4.5 of the danger allowance (payment of R397-00) and the provisional special allowance (payment of R594-00) enable the applicant to qualify for the payment of the said amounts. The applicant further submitted that in the resolution there is no where it talks of one to fully perform functions, the resolution does not list other functions and does not list qualifying Forensic Pathology Officers (FPO) for payment. The resolution does not preclude any FPO from claiming and the applicant indicated that it will testify that the functions which are in his job description and the function/ s that the applicant is not performing is because of the recommendation of the Medical Specialists. The applicant is the sole witness that testified.

6. The applicant sought a relief of the respondent being found in contravention of the resolution and be ordered to comply with the resolution and comply with clause 4.1 and 4.5 of the resolution by paying the said allowances.

7. The respondent submitted in its opening statements that it would rely in clause 2.1, 4.1, 4.5 and 4.5.1 of the resolution. In clause 4.1 the broad principle of the resolution is to cater for broader employees of the industry which are Forensic Pathology Officers. The objectives are clear that it covers only them as per clause 2.1. The once-off payment in clause 4.2 is neither here nor there, the once-off remedial allowance has been paid to the applicant and was paid as a remedial redress in spirit of redressing, even the non pathological workers were paid, so it is not part of this dispute. The respondent submitted that it is not a straight cut that as an FPO you should qualify. The respondent contended that it would rely on the job description as it outlines the functions of an FPO, which are broken up to tasks for one to qualify. The respondent would also rely in oral evidence of the witnesses regarding functions of an FPO and the job description and witnesses will elaborate on the nature of the functions to be performed. The understanding is that the resolution does not have a job description, so everything depends on the professional functions of an officer who is trained as a FPO. The resolution is silent on the issue of performing functions for one to be categorised as a FPO. Therefore, the criteria for qualifying in clause 4.1 will be the nature of tasks performed as such will be the determining factor. If one is not performing those functions then one cannot be paid overtime without working overtime. The respondent also indicated that it is of the view that the applicant is not performing those functions.

8. The respondent also contended that in clause 4.5 of the resolution for a FPO to qualify for that allowance one must carry out special task of dissecting, so one should do that through a medical officer. Therefore, the applicant will not qualify because of not performing those specified functions. The respondent also mentioned that it will rely on medical certificates to prove that the applicant is not able to perform those functions as they are physically demanding, he cannot perform the said functions due to medical evidence. The respondent initially stated that it will call 3 witnesses, the first witness was to rebut the claim that the applicant performs functions that make him to be entitled to danger allowance, the second witness was to explain about the qualifying others and why the cleaners are receiving the danger allowance and the third witness is an occupational category performing same functions as currently performed by the

applicant. However, the respondent abandoned its wish of calling three witnesses because on the last sitting of the arbitration it did not attend and indicated that it has closed its case. Only its first witness testified.

9. In the relief sought, the respondent submitted that in the absence of performance of those tasks for danger allowance to be claimed or paid, one should be exposed to danger, so the applicant is not exposed to danger. The applicant does not dissect, therefore he does not qualify. Therefore, the application of the applicant should be dismissed.

Survey of evidence

10. It is not the purpose or the intention of this award to provide a detailed transcription of all evidence placed before me at arbitration, even though all evidence was considered. I have however summarized the portions of evidence that are relevant to me in making a determination in this dispute.

Applicant's case

11. The applicant testified under oath that he is employed by the respondent as a Forensic Pathology Officer and has worked for the department for 33 years as he started on 1 December 1985. The applicant confirmed and read on record that it his job description that reflects in pages 1-3 of bundle 'B', the respondent's bundle, which enlisted and elaborated on the following items: the job information and summary, job purpose, dimensions, key responsibilities, communication and working relations, working conditions, material and equipment used, competency profile and career path possibilities. The applicant also confirmed that those were the functions he was supposed to perform and have signed for those functions.
12. The applicant testified that he does not perform item number 3 in the job description as he is not working on stand by and does not work overtime. He does not collect bodies from the crime scene and does not perform items 4, 5, 7 (iv), 8, 9, 10 & 11 because he was not assigned by his manager to execute such functions. The applicant explained that the reason he does not perform the functions in item 3 is because he is not assigned in the duty list for standby and overtime, such was done by his Manger, Mr Mohlolo

Andrew Komako. The applicant further explained that he is not performing item number 4, which deals with fetching corpses from the crime scene because of the back injury and has arthritis. The applicant clarified that he can collect bodies if there is someone to assist him but not when he is alone, due to the back injury. The applicant testified that such is confirmed by the medical certificate in bundle 'B', page 4, issued on 22 December 2016 by a family doctor, confirming that he is suffering from arthritis and must not lift heavy objects.

13. The applicant testified that he produced the medical certificate to his manager so that he can attend to the issue, his manager referred him to Dhlabeng Hospital and to the Occupational Health Professionals. The applicant stated that he can dissect the bodies during office hours but could not perform item 5 because he was not assigned for standby by his manager and also not assigned to dissect. The applicant stated that his manager did not give him reasons for not assigning him and such work can only be done by someone authorized by the manager. The applicant also testified that he cannot perform item 7 (iv) because he is not assigned to drive a state vehicle, as well as item 8 was not assigned to him by his manager. The applicant testified that he does not do post-mortems because it is Mr. Komako and Ms. Masisi Leotlela who do post-mortems. The applicant testified that he is executing item 11 which is about handing out bodies after the post-mortem.
14. The applicant stated that he has worked with Mr. Komako for about 3 years, their working relationship is poor and it started to be poor in 2017 after he complained to Dr Khoali. The applicant testified that the doctors did not tell him whether his injury was permanent or temporary.
15. Under cross-examination, the applicant confirmed there are certain tasks that he does not perform. The applicant also confirmed that he performs the minority of the functions and he does not perform post-mortems because Mr. Komako did not assign him for standby, such was done because there were corrupt activities that he reported. When asked which version to be accepted as the applicant earlier said he did not know the reason why he was not allocated to perform the said functions but later raised the above reason, he said his later version should be the one considered. The applicant confirmed that his supervisor could not let him pick up bodies as his doctor's letter stated that he must not lift heavy objects. The applicant confirmed that he cannot perform functions

related to the bodies, dissecting entails lifting of the bodies. The applicant testified that it could be possible that his manager did not assign these tasks to him because of his medical certificate. The applicant admitted that handing over the body to families does not entail lifting the body, it only entails pointing the body. The applicant also confirmed that his manager could not defy his doctor's orders and there is no letter coming from his doctor stating that he has recovered and can resume duties. The applicant confirmed that his relationship with his manager was good prior to 2017, it started to be bad from 2017 onwards. When the applicant was asked which functions he is executing, he said he is handing out bodies and answering queries. The applicant stated that the relationship with his manager became poor after he had asked his manager the reason why he did not pay him his danger allowance while another employee was paid. Such an employee was involved in an accident and was not at work. The applicant confirmed that his manager wanted to transfer him to Phekolo Hospital and he understood the letter drafted for the transfer. The letter that the applicant wrote to Dr Kgoadi was for danger allowance.

16. During re-examination, the applicant emphasised that if his manager had paired him with another person to lift the body it would have been better and he would have performed those functions. The applicant explained that Mr. Komako and Ms Masisi should have assisted him. The applicant confirmed that Selina, the Cleaner was receiving the danger allowance and she showed him the proof that it was paid as from April 2017. The reason that he was not dissecting is because his manager could not authorize him to dissect. The applicant agreed that the person entitled to claim in clause 4.5 of the resolution is someone who is dissecting the bodies.

Respondent's case

17. Mr. Mohlolo Komako testified that he is a Facility Manager responsible for four facilities which are Phuthaditjhaba, Harrismith, Bethlehem and Ficksburg and he was the supervisor of the applicant. Mr. Komako testified that clause 4.1 of the resolution talks about risks associated with FPO, for example the risk of being knocked down when removing a body in the road from the scene and risk of being involved in an accident when driving the deceased from the scene to the mortuary and the risk in the mortuary when dissecting the bodies. The FPOs get direct contact with the deceased in the dissecting rooms. They cut the body open under the supervision of the doctor. They take

blood samples from the body under the supervision of the doctor, the risk is the exposure to the bacteria which might infect the FPO. There is also the needle prick if you are puncturing something with the needle and also the cleaning of all the blood in the dissecting rooms. Regarding the qualifying criteria of others in clause 4.1 of the resolutions, in this case the cleaners, Mr. Komako testified that after the FPO has done everything with the doctor, the cleaners clean the area, which means the cleaners get direct contact with the fresh blood as one has to clean that blood. The paper shroud has to be taken away by the cleaner and the dissecting table used, body cabinets must be cleaned by the cleaner. So, such are part of the qualifying criteria for the cleaner to get the allowance. The FPOs and cleaners do get the standard allowance. There is another category which includes Admin Clerks. The Admin Clerks do all their work in the office and for that reason they are not entitled to the standard danger allowance. The admin offices are separate from the refrigerators and they do not have contact with samples and bodies.

18. Mr. Komako testified that clause 4.5 of the resolution which deals with the provisional special allowance is based on the allowance for dissecting the bodies, removal of organs from the body and for putting back the organs after the doctor has finished examining the organs. The applicant does not do any of these functions mentioned above, he does not go to the accident scene, he is not in control of the vehicle that removes the bodies from the scene and does not dissect the bodies. Mr. Komako confirmed that the applicant is a Forensic Pathology Officer: Grade 2. For an FPO to qualify to fetch a body from the scene to the mortuary he must be on standby, which is from 4PM to 7AM the following morning and are paid an allowance called a standby allowance. Depending on hours worked, one would earn overtime which is normally 30% of an FPOs salary. Mr. Komako testified that after a resolution was passed they were instructed to compile a list of employees who qualified for the allowances as the employer was aware that there were FPOs who did not qualify. Mr Komako also testified that in Free State there are two officials who do not qualify for the allowance based on the criteria he has mentioned; they are based in Bloemfontein and in Bethlehem. He submitted the applicant's name as an FPO that does not qualify as he was not performing the functions of an FPO and at that time he was about to place the applicant at Phekolong hospital and the applicant's union was notified. In Bloemfontein he was told that he can only place the applicant in Phokolong hospital when there is an advertised vacancy so that there could be no contestation, such a process is now being restarted. The applicant did not qualify based

on the medical report from his doctor and orthopaedics specialists in Dihlabeng hospital where the department had referred the applicant. The medical certificates confirmed that the applicant must not lift heavy objects and such was also confirmed telephonically with the doctors.

19. The applicant could not get assistance from the FPOs because during that time as Masisi was on leave. Mr. Komako testified that he would be violating the medical certificate if he would allow the applicant to carry the bodies, he did not want a situation of being accountable if the condition of the applicant happens to deteriorate and they were under staffed during that time. The applicant would have been allowed to lift bodies if there can be another medical certificate stating that the applicant is capable of lifting the bodies. Mr. Komako disputed the version of the applicant that there was an employee who was paid overtime and an allowance while on leave and also clarified that the matter was cleared. Mr. Komako testified that his relationship with the applicant started to sour in August 2016 when the applicant refused to collect the body at Toeleng, saying he is not on standby. The body remained there the whole day. The applicant did not challenge the process. Mr. Komako stated that he did not exclude the applicant from executing the functions of a FPO because of the strained relationship. Mr Komako testified that as from December 2016 the only work done by the applicant which he saw is that he only filled in three burial orders in the office, the applicant is just sitting and he leaves the office at 14h:00 but in the register he would insert 16h:00.

20. During cross-examination, Mr. Komako confirmed that there are four employees working in the Bethlehem facility, which are the applicant, the Cleaner, Moses Lotlela, an FPO and him and also confirmed that there is no Admin Clerk in the Bethlehem office. Mr. Komako confirmed that he could not assign the applicant to fetch bodies because of the medical certificate which was stating that he must not carry heavy objects. Mr. Komako stated that the head office instructed him to place the applicant somewhere else because there was no light duty at the forensic department. However, in the hospital that he was going to place the applicant there was no available post. Mr. Komako also confirmed that the applicant does not get contact with the bodies when he hands them out. Mr. Komako denied that Ms Masisi got danger allowance while on sick leave for 5 months. Mr. Komako confirmed that there was no circular issued about the criteria for qualifying FPOs, but stated that there were road shows conducted. Mr. Komako stated that he does not know whether the applicant entered the dissecting area or not since 2016, but he

never entered the dissecting area in his presence. Mr. Komako confirmed that they pay the FPOs danger allowance when they are on annual leave and confirmed that when he is on leave, he is not exposed to those risks. Mr. Komako also confirmed that the applicant is still working in the Forensic Pathology Services and that the objective in clause 2.1 of the resolution provides for employees operating in the forensic pathology services within the health sector.

21. During re-examination, Mr. Komako clarified that the purpose of the workshop in Pretoria was to orientate them about the resolution and how to apply it and they got an opportunity to pose questions directly. Mr. Komako reiterated that he did not create the criteria to deny the applicant the danger allowance and he cannot give a person an allowance while such a person is not doing the job that qualifies him for the allowance or to earn such an allowance. Mr. Komako stated that he got the criteria when he was at the workshop and he asked the question regarding this, the response was that if a person is not exposed to the danger he does not qualify. The emphasis was on the once-off allowance and it was explained that everyone must get it.

Closing arguments

22. The applicant in its closing arguments referred to PSCBC resolution 1 of 2007, which provides that the employer shall pay the Standard Danger Allowance to an employee who in the course of her or his employment experiences a genuine risk to her or his life each and every time they undertake their duties and also listed categories of employers such as Social workers, Youth Workers, Occupational Therapists etc.. The applicant also referred to PSCBC resolution 1 of 2012 where in clause 17.1 it provides that the PSCBC will conduct a comprehensive review of annexure A of PSCBC resolution 1 of 2007, the aim being to determine which categories are exposed to a genuine risk, the nature and the extent of the risk, the frequency of the risk and the impact on the safety of the employee to ascertain which categories should receive a danger allowance.

23. The applicant argued that the cited provisions of the PSCBC resolution 1 of 2012 gave birth to resolution 4 of 2017, hence the Department of Health recognised the need to introduce danger allowance to the employees operating in the forensic pathology services. The applicant stated that “qualifying” is not defined in the resolution and opposed the argument by the respondent that where a resolution is silent the employer

can devise through policy and the job description would dictate the qualifying criteria for FPOs and other employees working in the Forensic Pathology Services, is without merit. The applicant also referred to clause 5.2 of resolution 4 of 2017 arguing that such a resolution outlines that no amendments to the agreement shall be of force until reduced into writing by the parties to the council as a resolution to the council. The risks proffered by Mr. Komako in his testimony carry no value, instead they are amplifying annexure A; clause ix of resolution 1 of 2007 further that indeed FPOS are facing genuine risk during the discharge of their duties and the justification of Mr Komako about and another employee in Bloemfontein for not receiving danger allowance is unfounded because the resolution specifies no criteria that must be fulfilled.

24. Regarding the provisional special allowance, the applicant argued that such a resolution does cover the applicant and argue that clause 4.5.1 does not say that only FPOs that are performing dissecting under the supervision and direction of the responsible pathologist or medical officers should get the provisional allowance, it states that FPOs and other employees who are currently or who had previously performed the same functions (dissecting) as they were required to perform in line with their jobs, will pending the finalization of the said clause will continue to carry out dissecting work under the supervision of the responsible pathologist or medical officers. The applicant further argued that it is or will be incorrect to deny the applicant the benefits on the basis of his medical history, which is not of his own doing.
25. The respondent submitted that the applicant is placed in an office at Bethlehem Pathology Services and whilst placed in the said office he was not exposed to any danger or lifting of heavy objects and was not performing Forensic Pathology Services as such. It is because of this that the respondent decided due to non-performance of Forensic Pathology Services and non-exposure to any danger that the applicant may not qualify for allowances relating to the said clauses in dispute. The respondent opposed the argument by the applicant that he was deprived of those benefits and functions because of the strained relationship with his Manager, Mr. Komako.
26. The respondent justified the reasons why the cleaner is entitled to danger allowance. As per the respondent, it never invited any criteria to exclude the applicant from getting the danger allowances, but it was only due to his own injuries to the back that his doctors ordered that he should not be performing, there are no documents produced by the

applicant to the contrary or stating that he may lift heavy objects, etc. The main issue is about performance of the functions. The applicant does not perform these functions under the direct supervision of a medical officer and this was due to his back injuries. The respondent never changed the job description of the applicant, it is only that the doctors ordered the applicant to be placed on light duty or alternative placement or that equipment to be catered for his back injuries. It was not practical to alter any equipment and the applicant was going to be exposed to having to lift heavy at any stage of performing forensic pathology services and respondent could not take such chances and rather chose to adhere to the orders of the medical practitioners and doctors as per the medical reports and certificates.

Analysis of evidence and argument

27. Resolution 4 of 2017, which is titled “Agreement on the payment of a special allowance and danger allowance” is the basis of the dispute referred by the applicant as it is about the interpretation and application of clause 4, in particular clause 4.1 and 4.5. Clause 4.1 reads as follows: *“To introduce a standard danger allowance to the amount of R397.00 (three hundred and ninety-seven rands) per month, to qualifying FPOs and other employees who operate in the forensic pathology services and implement it with effect from 01 April 2017. Clause 4.2 reads as follows: “To pay a remedial once-off, pensionable amount of R4 800.00 (four thousand eight hundred rands) to qualifying FPOs and other employees who are and/or were performing the same functions.”*
28. Clause 4.5 is as follows: *“To introduce a provisional special allowance to the amount of R594.00 (five hundred and ninety-four rands) pending the finalisation of the process, entailed in clause 4.5.2 of this agreement, with effect from 01 April 2017, as follows: 4.5.1 The FPOs and other employees who are and or were performing the same functions will be authorised to perform dissecting work under the direct supervision and direction of the responsible pathologist or medical officers; and 4.5.2 Parties agree to negotiate and conclude a sustainable model to allow the FPOs to register with a statutory body as professionals, to have career pathing and job evaluation within six (6) months after this agreement attains majority signature.”*
29. Regarding the interpretation and application of this agreement, it is worded as follows: *“5.1 In the event of any conflict between the provisions of this agreement and any*

agreement of the council pertaining to the content of this agreement, the provisions of this agreement shall take precedence, 5.2 No amendments to this agreement shall be of force or effect unless reduced to writing and agreed to by both parties to the Council, as a resolution of the council.”

30. The objectives of this resolution relevant to the issues in dispute are clause 2.1 and 2.4 which reads as follows: “2.1 To provide for the payment of a danger allowance to the employees operating in the forensic pathology services within the Health sector, 2.4 To provide a special allowance for qualifying FPOs and other employees who were and/or are performing the same function under the direct supervision and direction of the responsible medical officers within the Health sector.”

31. I have considered the documents submitted, all the evidence led and the closing arguments of the parties even if not pertinently mentioned in this award.

32. It is common cause that the applicant is in the forensic pathology services, such has also been confirmed and admitted by Mr. Komako, the respondent’s witness on record. It is also common cause that as per the job description and title of the applicant, he is a Forensic Pathology Officer. Both parties during their opening statements confirmed that the applicant partially performs the functions of a Forensic Pathology Officer. It is common cause that PHSDSBC Resolution 4 of 2017 does not expressly provide the definition of the word ‘qualifying’ or ‘qualifying FPOs and other employees who operate in the forensic pathology services’. Both parties agree that the applicant was paid the R4 800.00 remedial once-off non-pensionable amount in terms of clause 4.2 of the Resolution. Both parties agree that the Cleaner by the name of Selina Mahlangu is receiving the standard danger allowance. It is also common cause that the applicant has not been paid the danger allowance and the provisional special allowance. It is also common cause that there are medical certificates recommending that the applicant must not lift heavy objects, he is suffering from a chronic lower back pain caused by picking up heavy objects and the patient can still continue his daily functions at work if he can get assistance when performing his duties or if his equipment can be modified to height adjustable position or there be a lever to assist when lifting.

33. The issue in dispute is whether or not the applicant is entitled to danger allowance and provisional special allowance respectively in terms of clause 4.1 and clause 4.5 of

Resolution 4 of 2017 and whether there is a criteria to use in identifying qualifying FPOs and which criteria to use if there is any, which interpretation if there is any for the word 'qualifying FPOs'

34. *In Horspersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC) it was held that a dispute over the interpretation of a collective agreement exists if the parties disagree over the meaning of a particular provision. A dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances. This is one of the disputes where both are applicable. Under the above circumstances the courts have pronounced that 'interpretation or application' are not disjunctive terms, and ought to be read as being related i.e. disputes about what the agreement means and what it is applicable to. This fits appropriately with an understanding of the section as a device which is ancillary to collective bargaining.
35. At arbitration and in closing arguments, none of the parties produced or submitted any official document amending the said resolution in line with clause 5.2 of this resolution as mentioned in clause 22 above.
36. The respondent in its argument relied mainly on the functions executed by the applicant as the criteria to conclude that the applicant is not entitled to the danger allowance and the provisional special allowance, basing this on road shows conducted and the workshop conducted in Pretoria. The applicant did not oppose the fact that there were road shows and workshops conducted dealing with the interpretation and or application of this resolution, but insisted argued that the clauses in the resolution should not be amended as stated in clause 5. 2 of this resolution. The Oxford meaning of 'danger' is 'the possibility of suffering harm or injury'. The respondent's argument was that the applicant is not exposed to danger by virtue of the functions that he is performing and that there are functions that he does not perform or execute which are making him not to be able to claim the said allowances. It is my considered view on a balance of probabilities that the argument raised by the respondent is succinct and was not shaken as the tasks performed by the applicant does not make him eligible to qualify for the said allowances for reasons that he is not performing the qualifying tasks. The oxford dictionary interpretation of 'performing' is to carry out, accomplish or fulfil (an action, task, or function). The purpose of the allowance is to reward employees who are exposed to

danger when performing those tasks. The applicant is not exposed to danger as argued by the respondent and as per the functions currently performed by the applicant and as admitted to in the arbitration that he does not dissect, not fetching corpses and the other FPO related functions that expose one to the said danger. I concur with the above. I am mindful of the argument by the applicant that he is exposed to danger as he hands over the corpses, however such argument does not hold water under these circumstances. I am alive to the fact that the resolution does not define danger or exposure to danger and the extent of exposure. However, in giving meaning to the interpretation of the exposure to danger and danger, I concur with the respondent's submission that the assessment of danger and of exposure to danger would be done through assessing the functions performed by the said employee.

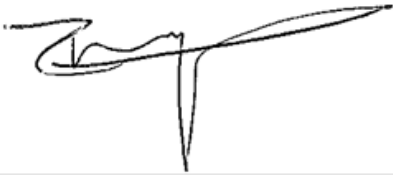
37. I am mindful of the fact that there is also no definition of the words 'qualifying' and 'operating' in the resolution. However, it is my considered view that there is a difference between amending a resolution and interpreting the clause/s in the resolution. It is my considered view that one has to apply a purposive approach to interpretation under these circumstances which would be fair to the parties, such would be based in the aim, purpose and intention portrayed in the words, objectives or definition as well as all the terms of the collective agreement. Such in this case should be done in line with the objectives of this resolution in the case in point. See the submission of the applicant in clause 23 above which give background to the introduction of the resolution in dispute as it reads as follows: the PSCBC resolution 1 of 2012 gave birth to resolution 4 of 2017, hence the Department of Health recognised the need to introduce danger allowance to the employees operating in the forensic pathology services. Such suggests that by the applicant's own admission the danger allowance is linked to exposure to danger. It is my considered view that as per the objectives in this resolution, in interpreting this resolution, for one to qualify for danger allowance he/ she must be exposed to danger while operating in the forensic pathology services within the Health sector, such would be concluded based on the functions which one performs as opposed to the title. Under these circumstances one has to zoom in in the substance as opposed to the form. In assessing the submissions and as per the evidence led by the applicant I am not convinced that he is exposed to danger in line with the purport and spirit of this resolution. It follows that in the current functions that the applicant is performing, he is not exposed to danger.

38. In *Western Cape Department of Health v Van Wyk and Others* [2014] 11 BLLR 122 (LAC) it was held that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time they concluded the agreement and that collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions and such agreements cannot be amended unilaterally. It follows that the parties to this dispute are bound by the agreement. The words of this resolution are clear except that the criteria to be used and qualifying FPOs are not defined by the drafters of this Resolution, but as mentioned above, the objectives and the background to the adoption of this resolution should be the ones considered in order to give meaning to this resolution, of which I have adopted this principle. It is also my considered view that the qualifying provision and the correct interpretation for one to qualify for a provisional special allowance is that he must be performing the dissecting work under the direct supervision and direction of the responsible pathologists or medical officers, of which in the applicant's case such is non-existent.
39. The courts have pronounced that a collective agreement would always enjoy supremacy. Section 23 (2) of the Labour Relations Act 66 of 1995 (the LRA) provides that a collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)(c). Such is also confirmed specifically about bargaining councils by sections 31 and 32 of the LRA.
40. It is my finding that the correct interpretation of Resolution 4 of 2017 is that the applicant may only qualify for such allowances if he performs the functions that expose him to the danger and when he is authorised to perform dissecting work under the direct supervision and direction of the responsible pathologist or medical officers, off which in the current set of circumstances the applicant does not perform such functions. I accordingly find that the respondent is correct in its interpretation and application of the Resolution by not effecting the standard danger allowance and provisional special allowance to the applicant.
41. I therefore find that the applicant is currently not entitled to the standard danger allowance and to the provisional special allowance.

Award

42.I find that the respondent was correct in its interpretation and application of the Resolution.

43.I therefore find that the applicant is currently not entitled to the standard danger allowance and to the provisional special allowance.



Zuko Macingwane
Council Panellist