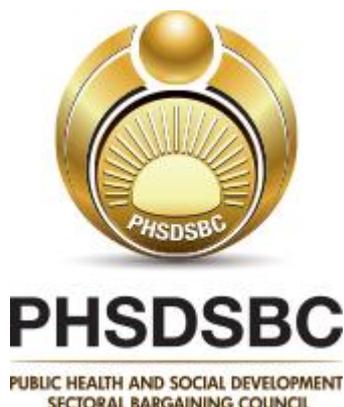


# ARBITRATION AWARD



CASE NO: PSHS152-17/18

PANELIST: W R PRETORIUS

DATE OF AWARD: 27 JULY 2017

In the matter between:

**NEHAWU obo MAHOKOTO N & 28 OTHERS**

APPLICANTS

and

**DEPARTMENT OF HEALTH- EASTERN CAPE**

RESPONDENT

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## DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration of the dispute between the Applicants, (Mahokoto & 28 others) and the Respondent, Department of Health – Eastern Cape, was scheduled at the Respondent’s Winterberg Hospital in Fort Beaufort on 25 July 2017.
2. The Applicants were represented by Ms. N Twalingca, an official from NEHAWU. Mr. M Mapisa represented the Respondent.
3. These proceedings were digitally recorded.

**ISSUE IN DISPUTE**

- 4. Whether or not, in interpreting PHSDSBC Resolution 2 of 2004, the Applicants are entitled to be paid rural allowances.

**BACKGROUND**

- 5. PHSDSBC Resolution 2 of 2004 entitled: “Revised non-pensionable recruitment allowance, referred to as rural allowance: public sector health professionals working in hospitals / institutions as managed by the Health employer in ISRDS nodes and rural areas” provides for a non-pensionable rural allowance to the value of eight (8%), twelve (12%) and eighteen (18%) of the relevant annual salary notch be payable to designated personnel in the occupational groups that are identified and who are actually involved on a full-time basis with clinical work.  
[my emphasis]

Registered Health Professionals (categories)	PSCBC designated institutions and other inhospitable areas identified by provincial departments of Health
Percentage (%) allowance rate	
Dental specialist Dentist Medical doctor Specialist	18%
Dental Technician Dieticians and Nutritionist Occupational therapist Pharmacologist Physiotherapist Psychologist	12%

Radiographer Pharmacist Speech therapist	
Professional Nurse (excluding Student Professional Nurse)	8%

**Notes:** - Community service workers and interns are included.

- 'Professional Nurse' generically refers to Nurses registered with the SANC and not to the rank. [my emphasis]

6. The following issues are common cause:

6.1 The SANC is registering the following categories of Nurses:

- General Nurse; Psychiatric Nurse and Midwife;
- Enrolled Nurse; and
- Nursing Auxiliary

6.2 The Applicants are Nurses registered with the SANC as nursing auxiliaries/assistants and enrolled nurses/staff nurses who are involved on a full-time basis with clinical work at PSCBC designated public service institutions<sup>1</sup> as listed hereunder:

- Nompumelelo;
- SS Gida;
- Victoria;
- Cathcart;
- Winterberg

6.3 Some of the Applicants as Nursing Auxiliaries/Assistants have received the rural allowance in the past but it has subsequently being stopped by the Respondent.

7 The Applicants are seeking retrospective payment of the rural allowance of 8% with effect from 1 May 2007.

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<sup>1</sup> Annexure B to Resolution 2 of 2004 signed in the Public Health and Social Development Sectoral Bargaining Council (PHDSDSBC).

## SURVEY OF EVIDENCE AND ARGUMENT

- 8 Both parties submitted documents that were admitted as evidence. The Applicants' bundle of documents consists of 29 pages and is marked as Bundle A. The Respondent submitted three pages and it is marked as Bundle B.
- 9 No witnesses were called and both representatives conducted their cases by way of argument.

### Applicant's version

- 10 The Applicants cited clause 3.1(b)(i) under the heading "PSCBC designated rural areas" that states as follows:

**"Notes:** - Community service workers and interns are included.  
- 'Professional nurse' generically refers to Nurses registered with SANC<sup>2</sup>  
and not to rank." [my  
emphasis]

- 11 The Applicants argued that they are included in the definition as referred to above. In this regard Ms. Twalingca emphasised the following points:

11.1 The above clause should be interpreted to mean all nurses that are registered with the SANC, namely professional, assistant/auxiliary and enrolled/staff nurses.

11.2 She made reference to the Nursing Act 33 of 2005 that defines 'nurse' as a person registered in a capacity under section 31(1) in order to practice nursing or midwifery. Section 31(1) refers to the following categories:

- Professional nurse;
- Midwife;

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<sup>2</sup> South African Nursing Council.

- Staff nurse;
- Auxiliary nurse; or
- Auxiliary midwife.

11.3 Ms. Twalingca produced evidence in the form of pay slips that some of the Applicants did receive rural allowances but that it was later stopped by the Respondent.

### **Respondent's version**

12 The Applicants do not fall within the definition of a professional nurse as stated above and therefore the said resolution is not applicable to them. In this regard Mr. Mapisa made the following submissions:

12.1 The Applicants are registered with the SANC, but as enrolled nurses or auxiliary nurses and not professional nurses. In other words, they are not qualified as professional nurses. In this regard, the SANC's registration fees are different for professional, auxiliary/assistant and enrolled/staff nurses as is evident in the documentary evidence submitted by the Respondent.

12.2 The meaning of professional nurse is inclusive of an ordinary professional nurse, a senior professional nurse and a chief professional nurse but is exclusive of a nursing assistant/auxiliary and enrolled/staff nurse.

12.3 'Community service workers' and 'interns' are both professional nurses. The former having completed a four-year training course and the latter are placed in institutions for one year to gain experience after completion of their studies.

12.4 The only reason the payment of rural allowances was stopped could have been that the Respondent only discovered the erroneous payments late; however the rural allowance should not have been paid because they did not qualify as nursing assistants.

## ANALYSIS OF EVIDENCE AND ARGUMENT

- 13 It is trite that the fundamental objective of interpretation of a contract is to ascertain the common intention of the parties. The common intention of the parties must be sought in the language and words which they used to express themselves. There is an assumption that the ordinary meaning of the language used by the parties in the contract is the *prima facie* and most probable meaning intended by the parties.
- 14 The “golden rule” of interpretation is that if the language of the contract is clear and unambiguous, the words are given their plain and ordinary everyday meaning as it appears from the rules of grammar and dictionaries, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the document. If the parties really desired that professional nurses should be the only recipients of the rural allowance, and not nursing auxiliaries/assistants and enrolled/staff nurses, plain words could be derived to express this intention.
- 15 In *casu* there is disagreement whether or not the meaning of the clause Nurses registered with SANC, is inclusive of the Applicants who are registered with the SANC as nursing auxiliaries/assistants and enrolled/staff nurses. [my emphasis]
- 16 In ***Department of Health v D K Dladla & Others (1132/13) [2016] ZALCD 28***, the Court dismissed the application to review the arbitration award wherein the commissioner held that Resolution 2 of 2004 covers the applicants (nursing assistants and staff nurses) and that they are entitled to rural allowances. In interpreting the clause that says professional nurse generically means or refers to nurses registered with SANC and not rank, the Court held: “This particular clause is important, it doesn’t say refers to professional nurses registered, but it says nurses registered with SANC. It specifically leaves out their rank. In my view, that rank is not limited to the classification as alluded to by Mr Pillay namely a professional nurse, a senior professional nurse and a chief professional nurse to accord that meaning to this interpretation would be erroneous. It must follow

that the ranking of nurses generically is not being referred to here. In other words, any nurse who is so qualified and is registered with the South African Council or Nursing Council.”

- 17 I am bound by the Court’s interpretation in the ***Dladla*** judgment referred to above, because the facts in the matter before me are of similar nature. I find that the Applicants some who are employed as nursing auxiliaries/assistants and others as enrolled/staff nurses are covered by the clause ‘Nurses registered with SANC’ and as a result are entitled to the payment of rural allowances as per Resolution 2 of 2004.
- 18 In terms of Resolution 2 of 2004 a rural allowance of 8% is effective from 1 July 2003, granted to professional nurses, excluding student professional nurses who are involved on a full-time basis with clinical work at PSCBC designated institutions and other inhospitable areas identified by provincial departments of Health as per Annexure B to the resolution.
- 19 It was not in dispute that the Applicants are registered with SANC and some are working as nursing assistants and others as enrolled/staff nurses in the PSCBC designated institutions referred to above. Therefore, the criteria for nurses to be covered by the resolution are a registration with SANC and working in the PSCBC designated institutions referred to above. I find that Resolution 2 of 2004 is applicable to the Applicants.
- 20 The implementation date of Resolution 2 of 2004 is 1 July 2003. The last payments of the rural allowances by the Respondent were made in April 2007.
- 21 The following Applicants who appeared under ‘Winterberg hospital’ are not working at an institution designated by Annexure B of Resolution 2 of 2004 and as such the resolution is not applicable to them:
  - Baart P           54056519
  - Mahokonto N   51193825
  - Mashiqana MS   53952782

- Ntuthu FC 54056519

22 I therefore deem it appropriate to make the following award:

### **AWARD**

23 The Applicants have succeeded in discharging the onus that the Respondent had incorrectly interpreted and applied PHSDSBC Resolution 2 of 2004.

24 The Respondent is ordered to pay each of the Applicants as per **Annexure A** hereunder a non-pensionable rural allowance of eight (8%) of their respective annual salary notches retrospective from 1 May 2007.

25 The Respondent is ordered to effect the above payment of rural allowances by no later than 31 October 2017.

26 There is no order as to costs.



**WILLIAM RICHARD PRETORIUS**  
**PHSDSBC PANELIST**

## ANNEXURE A

NO	NAME & SURNAME	PERSAL NO	REGISTERED CATEGORY	DESIGNATED INSTITUTION
1	Cossie DNS	17361044	Nursing assistant	Cathcart
2	Nkwentsha L	51199700	Staff Nurse	Cathcart
3	Nomwa LNE	51195844	Staff Nurse	Cathcart
4	Sentwa LN	51199572	Staff Nurse	Cathcart
5	Glasawe Z	54858283	Staff Nurse	Nompumelelo
6	Klaas MP	52483479	Nursing assistant	Nompumelelo
7	Lumkwana FS	53190912	Staff Nurse	Nompumelelo
8	Macwili M	17540925	Staff Nurse	Nompumelelo
9	Majiza V.A	54348803	Staff Nurse	Nompumelelo
10	Makabane N	51231492	Staff Nurse	Nompumelelo
11	Mhlomi NR	52509842	Staff Nurse	Nompumelelo
12	Ndunganae S	55747639	Nursing assistant	Nompumelelo
13	Ngcolomba ND	53545662	Staff Nurse	Nompumelelo
14	Nobebe MS	52508595	Nursing assistant	Nompumelelo
15	Qorana Z	54252288	Nursing assistant	Nompumelelo
17	Zamisa Z	54495806	Nursing assistant	Nompumelelo
18	Zitha Z	52497682	Nursing assistant	Nompumelelo
19	Kettledas S	54532169	Staff Nurse	S.S. Gida
20	Kosi M	52536530	Staff Nurse	S.S. Gida
21	Ngqu N	52537897	Staff Nurse	S.S. Gida
22	Mathabeni BN	55089356	Staff Nurse	Victoria
23	Mlanjana V	54359953	Staff Nurse	Victoria
24	Peteni T	54360064	Nursing assistant	Victoria
25	Rana SG	55069681	Nursing assistant	Victoria