

ARBITRATION AWARD

Case No: PSHS2-15/16

Commissioner: Anna Maria Fourie

Date of award: 12 December 2015

In the matter between:

HOSPERSA obo Mmako Daniel Nkosinkulu

(Union/Applicant)

and

The Department of Health- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] The Applicant referred a dispute about the interpretation and application of a Collective Agreement to the Council for arbitration. The Collective Agreement, Resolution 3 of 2011, provides in clause 13 that a dispute about the interpretation or application of the agreement may be referred to the Council to be resolved in terms of the dispute procedure of the Council. The matter was set down for arbitration at Bophelo House, Bloemfontein, on 24 July and 7 December 2015.
- [2] The Applicant was present and was represented by Adv PJ Blomkamp on instruction of Llewellyn Cain Attorneys from Pietermaritzburg. The Respondent was represented by Mr JB Mncube, a Senior Labour Relations Officer of the Respondent. The proceedings were conducted in English. There was no Interpreter. The proceedings were recorded electronically and by means of handwritten notes.

ISSUE TO BE DECIDED

- [3] The Applicant's dispute originated from him being elected to be a full time Shop Steward for the Union. The Respondent refused to second the appointment of the Applicant as a full time Shop Steward (FTSS), claiming that the Applicant occupied a critical post and could thus not be released to perform the duties required of a full time Shop Steward.

- [4] I must determine whether or not the Applicant occupied a Critical post as defined in Resolution 3 of 2011.

BACKGROUND

- [5] Mr Nkosinkulu started working for the Respondent as a Volunteer at the Welkom ambulance station in September 2002. He was a Basic Ambulance Assistant and obtained a certificate in Basic Life Support from the Emergency Care Academy in Johannesburg after completing a four-week-long course in September 2002. Whilst working as a Volunteer he was not paid. He only became an Employee of the Respondent on 1 August 2004 and only then started to earn remuneration. His job level did not change since he started working as a Volunteer in 2002. He was on the lowest level at the workplace.
- [6] It was the Respondent's case that Mr Nkosinkulu could not be released to perform the duties of a full time Shop Steward. The Respondent referred to the Council's ratification of Collective Agreement, Resolution 3 of 2011 (the Resolution), which was signed at Centurion on 21 October 2011. The Respondent's Representative referred to clause 3.4.1 of the Resolution, which reads as follows:
"Once the relevant department has received the notification, considered it and approved the release of the employee as an FTSS, the appointment of the FTSS will be confirmed in writing by the executing authority, or his or her delegate, to the relevant Trade Union."
- [7] The Respondent's Representative further referred to clause 3.3.4 of the Resolution, which reads:
"The relevant department is allowed thirty days from the date of receipt of the notification for the executive authority, or his or her delegate, to consider the request to release the FTSS, based on 3.1. above."
- [8] The Respondent's Representative further stressed that there was a limitation in clause 3.1.4 of the agreement, namely that Mr Nkosinkulu held a critical post. The Respondent indicated that a witness would testify why Mr Nkosinkulu could not be released. It was the contention of the Respondent that it could not afford to lose Mr Nkosinkulu, unless he resigned, in which case his post could be filled. Furthermore, the Respondent was of the view that HOSPERSA was a big Union and could thus second any other employee to be a FTSS.
- [9] The Applicant's case was that Mr Nkosinkulu was not in a critical post. Adv Blomkamp referred to the definition of a critical post in the definition clause of the Resolution, namely:
"**critical post** is a post which if vacated in any manner will have the effect of compromising the provision of an adequate, effective and efficient service to the public and will endanger the life, personal safety, health or well-being of the whole or any part of the population"
- [10] The Applicant further referred to the criteria listed in clause 3.1.5 of the Resolution to determine whether or not a post was critical, namely:
"In determining whether a post is critical, the following criteria should be considered:
1. The number of employees performing similar work in the relevant Department;
 2. The type of services provided;
 3. The nature of work performed;
 4. The current and expected allocation of resources; and
 5. The non-availability of similar skills to replace the employee in the relevant Department."
- [11] It was the argument of the Applicant that if the above mentioned criteria were applied to Mr Nkosinkulu, it could not be found that he held a critical post. Mr Nkosinkulu was on the lowest level of experience

and in addition there was a great pool of people who were able to perform his duties. The skills required were not scarce.

- [12] It was further the case of the Applicant that Mr Nkosinkulu was elected by the Union to be a FTSS. It was not for the Respondent to instruct the Union to choose someone else. It would be a serious matter if the Respondent adopted that stance as it would constitute an invasion of ILO conventions that Unions must have the full freedom to choose representatives and that Employers cannot interfere with such elections.

SURVEY OF EVIDENCE AND ARGUMENT

- [13] I only summarised the evidence which I regarded to be relevant to the dispute I had to determine. Both parties submitted bundles of documents into evidence.

EVIDENCE FOR THE RESPONDENT

Petrus Lazarus Moshou testified as follows under oath:

- [14] He was the District Manager for Emergency Care Services in the Lejweleputswa district. Mr Nkosinkulu was appointed as a Basic Ambulance Assistant. According to his job description, his key responsibilities were emergency management, treatment and transportation of the ill and injured. Emergency Care Practitioners performed essential services and could not work without assistance as a single practitioner could not optimally perform procedures such as ventilation and resuscitation.
- [15] There was a critical shortage of Ambulance Drivers, to the extent that it was difficult to grant people leave, except for trade union activities. He could not release Mr Nkosinkulu, since the Department experienced financial constraints and could no longer allow other employees to work overtime in order to fill the gap left by Mr Nkosinkulu. Complaints that the Emergency Services did not respond timeously to emergency situations were received daily.
- [16] The Department must meet the standards conferred on it by legislation. However, the Department is experiencing a staff shortage, which might expose the Department to litigation. His division could not cope with the service demands. If one person were absent from work, it could compromise a life. There should be one ambulance for every ten thousand community members. Presently there is one for every hundred thousand community members. Mr Nkosinkulu's duty could be compared to that of an Intensive Care Unit Nurse. He dealt with human lives.
- [17] The Department is presently under administration and cannot afford to lose any employees. The position in question requires registration with the Health Professions Council of South Africa. Mr Nkosinkulu was skilled for emergency driving and emergency care. When he received the request to have Mr Nkosinkulu released to be a FTSS, he responded that he could do so if Mr Nkosinkulu resigned. However, he could not allow that Mr Nkosinkulu go to a position that would not be to the benefit of Emergency Services.
- [18] The issue was not about Mr Nkosinkulu, but about the position he held. He could be released on leave, but not constantly. He should be retained in Emergency Services or vacate his post. Releasing Mr Nkosinkulu would compromise the efficiency of the division due to irregular expenditure and the loss of critical skills, knowledge and experience. There was no such thing as an Ambulance Driver. Mr Nkosinkulu was an Emergency Care Practitioner. Emergency Services in the Free State should have 3 620 employees. However, there are only 1 860 staff members at present. It was illegal to have one Emergency Care Practitioner alone on an ambulance.

- [19] The Welkom station were in need of eighty more staff members in order to effectively render Emergency Services. Mr Nkosinkulu could not be released since the division was optimally utilising its resources.
- [20] Under cross-examination it was put to him that in terms of the Resolution the Union did not have to ask for the release of the FTSS, but merely had to notify the Respondent of whom was elected to be a FTSS. He agreed. He further conceded that in terms of the Resolution the Respondent had thirty days to respond to the notification of the Union. He could not recall whether the Respondent complied within thirty days.
- [21] He conceded that the Union obtained an interdict from the Labour Court to compel the Respondent to recognise Mr Nkosinkulu as a FTSS for now. He did not respond to a question whether or not he received any complaints from the Welkom station due to Mr Nkosinkulu's absence.
- [22] There were eight operational ambulances at the Welkom station for Emergency Care. More were required. There were eighty staff members at the station at the time that Mr Nkosinkulu's secondment was requested. However, the number was lowered due to staff members resigning and dying. There was a moratorium on further appointments in the Department due to financial constraints. He conceded that the shortage could be attributed to financial constraints and not to a shortage of skills.
- [23] He conceded that Mr Nkosinkulu was appointed as a Basic Ambulance Assistant, which was an entry level position that needed one month's training. According to protocol he could only administer oral glucose, oxygen and pain medication. He was trained to conduct emergency management of patients. He could administer shock in the case of heart arrest, by means of an Auto Defibrillator. The next level was that of Intermediate Life Support, which required four months' training and one thousand hours' experience as a Basic Ambulance Assistant. The next level was that of Critical Ambulance Care, which required training for nine months. This was followed by an Emergency Care Technician which required two years' training. There was a National Diploma in Emergency Care, which required three years' training and the highest level was a full time four year B-Tech degree.
- [24] He submitted that the majority of staff members at Emergency Services in the Free State were Basic Ambulance Assistants, with only six percent accounted for by Intermediate Life Supporters and one percent by Advance Life Supporters. It was put to him that, given the amount of training required, it could not be argued that a Basic Ambulance Assistant was a scarce skill. He would not agree.
- [25] He conceded that each of the eight ambulances needed two staff members to man it. He further conceded that it would require sixteen staff members to man the eight ambulances per shift. He also agreed that, given the fact that there were eighty staff members at the station and four shifts, there would be twenty staff members per shift. He would not agree that it would leave four staff members free, after all available ambulances were manned. He submitted that there was also a rapid response service and a rescue service, which required one staff member per vehicle. He submitted that he could release Mr Nkosinkulu if there were Volunteers. However, there was no Volunteers to replace Mr Nkosinkulu.
- [26] He submitted that forty skilled staff members' services were terminated due to financial constraints. He conceded that it meant that those staff members were now in the pool of available skilled people. He further conceded that the Respondent contracted with Buthelezi Ambulance Services to outsource its ambulance services. He also agreed that that meant that a private entity would make profit whilst the Respondent could not perform the Service itself due to financial constraints. When asked whether

it would not serve the Respondent better to employ people to reduce the shortage of skills, he submitted that Buthelezi Ambulance Services could respond faster than the Respondent. He further repeated that the Respondent could not obtain the skills it lacked. He could not explain why the Respondent could not rather expand its own infrastructure in order to deliver the service instead of contracting a private entity.

- [26] It was put to him that Mr Nkosinkulu would testify that the Welkom station had six ambulances on a good day and four on an average day. He agreed and added that they had to split the staff and some manned the call centre. It was put to him that there was no shortage of staff, but ambulances were non-operational. His response was that he had to provide ambulances to other stations.
- [27] It was put to him that Volunteers could assist with the shortage of staff. At first he submitted that the Respondent no longer made use of Volunteers, due to possible labour disputes. However, later he would not bind himself to answer a question whether or not the Respondent could still make use of Volunteers.
- [28] It was put to him that Mr Nkosinkulu would testify that those staff members who did not man the ambulances would stay at the base and assist the Supervisor with admin related tasks. He denied it.

Filippus Engelbrecht testified as follows under oath:

- [29] He was the Manager of the Emergency Services Station in Winburg. He was also the Acting Sub-district Manager for Lejweleputswa district.
- [30] There was a lot of HOSPERSA Shop Stewards in the department who did not perform essential services. The contracts of the control room staff were not renewed, resulting in a huge staff shortage which made it difficult to have enough ambulances on the road. There had to be enough people on a shift in order to render the day-to-day services. Mr Nkosinkulu rendered an essential service.
- [31] Under cross-examination he submitted that he was an Intermediate Life Supporter. He did admin as well as operational duties. He conceded that the basic problem in the department related to a shortage of staff. When the contracts of workers expired, they were not allowed to appoint them permanently.
- [32] He submitted that there were six operational ambulances in Welkom and sometimes only three. There should be between ten and fifteen. He agreed when it was put to him that Mr Nkosinkulu would testify that there were six ambulances on a good day and normally only four. He submitted that the additional ambulances were in a good state and could be utilised were it not for the staff shortage.
- [33] He submitted that Buthelezi was contracted for inter-hospital transportation of patients. Previously the Department had ambulances for that purpose. An ambulance is replaced after three to five years, depending on how it was maintained. They kept replacement vehicles which were in a good condition to remain in the pool.
- [34] He submitted that there were all together ninety staff members at Welkom. Between seventy and eighty of those staff members were shift workers. That allowed for sixteen to eighteen workers per shift. It meant that eight ambulances could be manned, but there was no one left to man the emergency rescue vehicle or the call centre. In order to render a good service, they needed fifteen workers in the call centre. The call centre needed qualified staff members, since they had to understand the complaint received in order to dispatch the relevant staff members to attend to the complaint.

- [35] He submitted that there were thousands with Basic Ambulance Assistant certificates. However, the Respondent would not take them in as Volunteers as they expected to be appointed. Furthermore, Volunteers could not be trusted, since they worked when they wanted to.

EVIDENCE FOR THE APPLICANT

Mmako Daniel Nkosinkulu testified as follows under oath:

- [36] He was employed as an Emergency Care Practitioner, stationed at Welkom in the Lejweleputswa district. It was an entry level position. He held a Basic Ambulance Assistant Certificate which he obtained in September 2002 after undergoing training for four weeks at the Emergency Care Academy in Johannesburg.
- [37] He worked as a Volunteer at the Welkom Emergency Medical Services station from September 2002 until he was permanently appointed in August 2004. During the period that he worked as a Volunteer, he was not paid. At the time there were lots of other Volunteers working at the Department.
- [38] His qualification was followed by Intermediary Life Support, then Critical Care Ambulance Assistant, Emergency Care Technician, who are trained for two years on full time basis to obtain a National Diploma. Staff members with different qualifications administered different types of treatment. He could only assist a person to a certain level, e.g. he had to be supervised. He could only administer oxygen. People who had higher qualifications than him could perform more duties.
- [39] He was elected by his Union in 2014 to be a FTSS from January 2015 for a period of three years. The Department would not release him, claiming that he held a critical post. However, since January 2015 he did not work as an Ambulance Assistant for the Respondent, but as a FTSS for the Union. This was as a result of a Labour Court order that the Respondent had to release him pending the outcome of the arbitration proceedings.
- [40] He did not obtain a higher qualification during his twelve years of service even though he applied to further his studies. The District Manager would not approve any of his applications.
- [41] There were at most six operational ambulances at the Welkom station. There were four shifts of twelve hours and each ambulance had to be manned by two crew members, which included the Driver. There was no need for a communication person at the station, since all calls were handled by the Provincial call centre. The station only needed two people for each ambulance, which made it in total twenty four people per day.
- [42] If allowance was made for annual leave, the station would need fifty one staff members to function. Presently there were eighty eight staff members at the Welkom station. (This information was testified to with reference to a document which did not form part of any of the bundles of documents. Mr Mncube objected to the witness reading from the document. He also claimed that it was a confidential document which was not obtained through the appropriate procedures. The Applicant explained that he was referring to a list of names and telephone numbers. He further explained that the document's purpose was to have all staff members' contact details. The document was posted on notice boards in the rest room, control room and the Manager's office. He requested the document from the Station Manager, who gave it to him. I found that it was not a confidential document if it was so readily available and allowed the witness to refer to the document.)

- [43] Based on the number of staff members at the Welkom station, there would be roughly twenty one staff members per shift. Only twelve were needed to man the ambulances. The remaining staff members would be allocated to the control room or do administrative duties.
- [44] Prior to being elected to be a FTSS, he was an ordinary Shop Steward for ten years. As such he was aware that the Respondent at some stage contracted the services of Buthelezi. The Unions were concerned about this, as it was thought that the members' posts would become redundant.
- [45] Under cross-examination he submitted that his duties included driving the ambulance, checking the roadworthiness of the vehicles, reporting problems with vehicles to the Supervisor and attending to calls. With his qualification, he could treat patients, record their details and transfer them to hospital. He could only treat patients on the scene and whilst being transported to hospital and only to the extent of looking at the mechanism of the injury, binding wounds, splinting, stopping bleeding, administering oxygen and calling for back-up if the injuries did not fall within his scope of practice. He further had to phone the hospital to alert it that a patient was on his way.
- [46] He submitted that anyone who had a driver's licence could perform his duties, since it was normal. Even taxi drivers could stop bleeding, splint and bandage a wound. He would also have to improvise in an emergency if he was in his own car.
- [47] He submitted that he could only try to save a life, but sometimes people died. He understood that there could be legal action if one did not treat a patient. However, he was not aware of any such an incident in his district. He had heard about a case like that in Gauteng. He was aware that one could be charged if there was a complaint.
- [48] He applied several times to further his training. An application entailed that one had to write an entry examination. Despite the fact that he obtained higher marks than some of the other people, he was overlooked. His District Manager explained that, due to gender equity, women were given preference. However, they were informed that obtaining higher marks was one of the criteria.
- [49] It was put to him that Moshou's referral to 3 200 staff members related to the National standard set. He disagreed. He submitted that not even half of that amount of people were employed.
- [50] He submitted that there were five people in his district's call centre. Their qualifications varied from Basic Life Supporters or Ambulance Assistants and the shift leader had to be an Intermediate Life Supporter. He submitted that on shift A there were three Intermediate Life Supporters, one Emergency Care Technician and thirteen Basic Life Supporters. On shift B there were two Intermediate Life Supporters, two Emergency Care Technicians and sixteen Basic Life Supporters. On shift C there were one Intermediate Life Supporter, one staff member with a National Diploma, fourteen Basic Life Supporters and six Intermediate Life Supporters who did administrative work. On shift D there were three Intermediate Life Supporters, one Emergency Care Technician, three Emergency Care Technicians in training and thirteen Basic Life Supporters. The totals for the shifts were: Shift A: 17, Shift B: 20, Shift C: 22 and shift D: 20.
- [51] He submitted that, even considering the different types of leave, it would not put a strain on the personnel, since they agreed that no more than three people could be granted leave at any time. Even on shift A, if three people were on leave and someone needed leave for unforeseen reasons, it would not place strain on the personnel, since the Shift Leader could also take part in the operational duties. He disagreed that pulling the Shift Leader into operations would place a strain on the personnel, since,

according to him there were two Shift Leaders per shift. He conceded that it might be possible for too many people to be off due to family responsibility or sick leave.

- [52] It was put to him that, if people were dismissed, there would not be enough people left to perform the duties. He agreed that it might be a problem during peak times, such as Easter and the December holidays. He conceded that the fact that the Respondent contracted Buthelezi meant that more people were needed to perform the service.
- [53] Under re-examination he said that when a person was dismissed for misconduct, the post could be filled again. He added that there were many people who wanted to work as Emergency Care Practitioners.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [54] The question that I must determine is whether or not Mr Nkosinkulu's post was critical as defined in the Resolution. The parties seemed to agree that at the Welkom station there were six ambulances in operation. Although Mr Moshou initially testified that there were eight ambulances at the station, he later conceded that there were at most six operational ambulances at the station.
- [55] In interpreting a document, one should give the ordinary grammatical meaning to the words contained in the document. In **Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (A)**, the Court held that according to the golden rule of construction, the words of a statute must be given their ordinary, literal and grammatical meaning and if it is clear and unambiguous effect should be given to the ordinary meaning. The only exception would be if such a construction would lead to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.
- [56] In **UCWASU & others v University of the Western Cape [2002] 5 BLLR 487 (LC)** it was held that the language of a document must be given its ordinary and grammatical meaning unless it would lead to an absurdity, repugnance or inconsistency with the rest of the document.
- [57] The word "absurdity" in the passages quoted above, could be replaced with any of the following words in this context: illogicality, irrationality, silliness, ridiculousness, farcicality.
The word "manifest" could be replaced with any of the following words: obvious, apparent, evident, noticeable.
The word "repugnance" could be replaced with any of the following words: disgust, revulsion, repulsion, distaste.
- [58] The document to be interpreted is a Collective Agreement contracted between the parties in the Public Health and Social Development Sectoral Bargaining Council, namely **Resolution 3 of 2011. Agreement on the appointment of Full Time Shop Stewards and Office Bearers.**
- [59] A Collective Agreement is defined in section 213 of the Labour Relations Act, No 66 of 1995 (the LRA), as amended as: "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand-
- (a) one or more employers;
 - (b) one or more registered employers' organisations; or
 - (c) one or more employers and one or more employers' organisations."
- [60] The legal effect of a Collective Agreement is set out in section 23 of the LRA, namely:

“23(1) A collective agreement binds-

- (a) The parties to the collective agreement;
- (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
- (c) the members of a registered employers’ organisation that are party to the collective agreement if the collective agreement regulates-
 - (i) terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
- (d) employees who are not members of the registered trade union or trade unions party to the agreement if-
 - (i) the employees are identified in the agreement;
 - (ii) the agreement expressly binds the employees; and
 - (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers’ organisation for the duration of the collective agreement.

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.”

[61] One of the objectives of the LRA is to provide for collective bargaining. The purpose of the LRA is set out in section 1 as follows:

“The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) to provide a framework within which employees and their trade unions, employers and employers’ organisations can-
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (ii) formulate industrial policy; and
- (d) to promote-
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) employee participation in decision-making in the workplace; and
 - (iv) the effective resolution of labour disputes.”

[62] The Aims of the Resolution are recorded in clause 1, namely:

“1.1 Give effect to PSCBC Resolution No 11 of 1998 on the appointment of FTSS in the public service;
1.2 Provide for the appointment of FTSS in the Public Health and Social Development Sector;
1.3 Provide for the release of Provincial and National Office Bearers in the Public Health and Social Development Sector;
1.4 Develop the capacity of Trade Union representatives in the Public Health and Social Development Sector in order to engage effectively in the labour relations arena as provided for in the legislation regulating employment;
1.5 Enhance sound labour relations, social cohesion and promote the effective delivery of services in the Public Health and Social Development Sector;
1.6 Ensure co-operation between the Employer and FTSS as provided for in clause 4.5 of this agreement.”

- [63] In terms of the Resolution, in order to be eligible to be appointed as a FTSS, an employee must:
“3.1.1 Be employed in a permanent capacity in the Public Health and Social Development Sector;
“3.1.2 Have been duly nominated in writing by the relevant Trade Union;
“3.1.3 Be a member in good standing of the relevant Trade Union;
“3.1.4 Not hold a critical post; and
“3.1.5 In determining whether a post is critical, the following criteria should be considered:
1. The number of employees performing similar work in the relevant Department;
2. The type of services provided;
3. The nature of work performed;
4. The current and expected allocation of resources; and
5. The non-availability of similar skills to replace the employee in the relevant Department.”
- [64] In terms of the Resolution, one of the obligations of the Employer, as set out in clause 5.1 is the protection of the employment of the FTSS which includes that the Employer must ensure that the position that the FTSS occupied prior to being seconded as an FTSS is protected for the period during which the FTSS is in office.
- [65] The definition of a critical post as contained in the definitions clause of the Resolution is:
“a post which if vacated in any manner will have the effect of compromising the provision of adequate, effective and efficient service to the public and will endanger the life, personal safety, health or well-being of the whole or any part of the population.”
- [66] The Employer’s main reason for not agreeing to second the release of Mr Nkosinkulu as a FTSS, is that, according to the Employer, Mr Nkosinkulu occupied a critical post. The question is, whether the evidence presented support that argument. If giving the ordinary grammatical meaning to the definition of a critical post, read with clause 3.1.5, it appears rather unambiguous to me that one should consider the number of employees performing similar work in the Department. The evidence pointed out that in the Welkom station, there were more or less 79 staff members in the Emergency Medical Services Division. It was evident that at most six ambulances at a time were operational from the said station. The evidence was further that each ambulance had to be manned by at least two qualified staff members. The evidence also pointed out that there had to be a Supervisor on each shift and someone to man the control room. It was not in dispute that there were four shifts. That would mean that three out of the four shifts could be manned by twenty staff members whilst the fourth shift would be manned by nineteen staff members. Furthermore, provision had to be made for the release of three staff members on leave at any given stage. If it was to be assumed that three staff members were on leave at any given time, it would mean that there would be seventeen and sixteen staff members per shift. Twelve to man the ambulances, one Supervisor and three to four staff members to man the control room per shift. This was at the Welkom station only. It seemed to me from the wording of clause 3.1.5,

that the number of people performing similar work in the entire Department had to be taken into account.

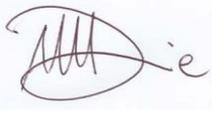
- [67] It was not disputed that Mr Nkosinkulu occupied the most basic of posts in Emergency Services. He needed to pass a four-week training course in order to perform his duties. It was further confirmed by one of the Respondent's witnesses that there were many qualified Basic Ambulance Assistants. It was also not in dispute that in the past, the Respondent made use of Volunteers to work as Basic Ambulance Assistants. This was indeed the manner in which Mr Nkosinkulu first worked for the Department. The nature of the work to be performed related to the response to emergency situations and entailed the provision of basic patient care at the scene of an accident for example.
- [68] It was common cause that the nature of the services was the provision of emergency medical care to members of the public. One could thus say that the services entailed the establishment of back-up for the provision of medical care in the case of a crisis. By its very nature, an emergency is usually an unpredictable occurrence or event. According to the evidence, a Basic Ambulance Assistant could record patients' details, treat them on the scene and whilst transported to hospital by, identifying the apparent extent of the injury, binding wounds, splinting, stopping bleeding, administering oxygen and calling for back-up if the injuries did not fall within his scope of practice. He further had to transfer them to hospital and phone the hospital to alert it that a patient was on his way.
- [69] I have no doubt that the position in question is an important one. I also have no doubt that the post in question could be the cause of a life being saved or not. However, the medical field has no guarantees. At best the provision of dedicated care could be promised. The post in question was the most basic. If one considered the period of the training that a person had to undergo, it was only logical that the trainee would be equipped to give basic care only. It was the case of the Applicant that there were many qualified Basic Life Supporters who were available to perform the duties of a Basic Ambulance Assistant on Voluntary Basis. It was further the case of the Applicant that the post in question was by no means one that could be said to require a scarce skill and further that the skill to perform the job in question was by no means in short supply. The Respondent's first witness, Mr Moshou, conceded that the shortage could be attributed to financial constraints and not to a shortage of skills. He submitted that there was a moratorium on the appointment of more staff members. The second witness of the Respondent, Mr Engelbrecht confirmed this by testifying that the contracts of the control room staff were not renewed which resulted in a huge staff shortage. Mr Engelbrecht confirmed that there were thousands of people with a Basic Ambulance Assistant Certificate. He submitted that the Respondent would not make use of Volunteers, as they expected to be appointed and they were not trustworthy. This was in contradiction to what Mr Moshou testified, namely that the Respondent could use Volunteers to assist.
- [70] The evidence established that there were at most six operational ambulances at the Welkom station. I accept that it might not be in compliance with the number required by the law. However, the fact that the Respondent does not ensure that the required numbers of ambulances are available cannot be cited as an excuse not to release Mr Nkosinkulu to be a FTSS. The number of staff members required to perform the duties in question, should match the number of available functioning ambulances. It would make no sense, in the light of the Respondent's argument of financial constraints, to appoint more staff members than practically needed in relation to the available resources to perform the services. There was no evidence before me to suggest that the position relating to the availability of operational ambulances would change in future. It could thus not be argued that the Respondent had to ensure that enough staff members were available to provide for a proposed increase in operational ambulances. The very argument of the Respondent was that financial constraints were to blame for the reduction of staff members.

- [71] I found that, according to the criteria in clause 3.1.5 of the Resolution, the post held by Mr Nkosinkulu cannot be a critical post, if only for the fact that there was no shortage of qualified people to be appointed in similar posts. The only alleged hindrance to appointment was the Respondent's alleged financial constraints. However, it was not disputed that the Respondent contracted the services of a Private Ambulance Service to assist it with the provision of Emergency Medical Services. I fail to understand how such an endeavour could assist to improve the Respondent's financial predicament. It was not in dispute that the Respondent had to pay the Service Provider for its services. This poses the burning question, whether the Respondent could not rather have utilised the funds to ensure that its ambulances were properly serviced and maintained and to retain the services of former staff members, whose services were terminated due to the alleged financial constraints, in order to perform the services from within its own ranks. This would no doubt also have served one of the objectives of our labour legislation, namely job creation.
- [72] It was the argument of the Applicant that, based on the number of shifts per day, there would be in total 8 670 shifts per year. If one considered only the number of people needed to man the available ambulances at the Welkom station for four shifts, it would calculate to 48 people. That would translate to 182.5 shifts per staff member per year. If the number of staff members was reduced by the releasing of Mr Nkosinkulu, it would translate to 186.3 shifts per staff member per year. The difference was minute namely 2.12% increase in the number of shifts for each remaining staff member. One should further bear in mind that there were two twelve hour shifts per day and that staff members worked for four consecutive days and rested for four consecutive days, which meant that four teams of at least twelve were needed to man the available ambulances. If I interpret and apply clause 3.1.5 correctly, I am of the view that it could not be argued that Mr Nkosinkulu held a critical post.
- [73] The value of sound labour relations cannot be over-emphasised. It could no doubt assist in the improvement of effective service delivery. This was indeed also one of the objectives of our labour legislation. I am concerned about the Respondent's dedication to the issue of creating sound labour relations. The legal effect of Collective Agreements are unambiguously set out in section 23 of the LRA quoted above. It is binding on the parties to the agreement for the duration of the agreement. One of the objectives of the Resolution, as set out in clause 1.5, is to enhance sound labour relations. Thus the parties contractually bound themselves to enhance sound labour relations. In addition to the legislative provision, the parties contractually recorded their commitment to enhance sound labour relations.
- [74] It is further evident from clause 3.1 of the Resolution that one of the requirements for eligibility to be seconded as a FTSS is that the person must be a permanent employee of the Department. I cannot reconcile this requirement with the Respondent's argument that Mr Nkosinkulu could only be released to perform his duties as a FTSS if he resigned from his post. To insist on such a condition, would create the impression that the Respondent is not acting in good faith and in support of the enhancement of sound labour relations.
- [75] In addition, one of the obligations of the Department as set out in clause 5.1 of the Resolution, is to protect the employment of the FTSS, by ensuring that the position he or she occupied prior to being seconded as a FTSS is protected and that the FTSS may return to the position at the end of the period of secondment.
- [76] Based on the evidence before me, I could see no valid and sensible reason why Mr Nkosinkulu could not be released by the Respondent to perform his duties as a FTSS. Especially, considering the fact that a Labour Court order prevented the Respondent from not releasing Mr Nkosinkulu pending the

outcome of the arbitration proceedings, which in effect meant that Mr Nkosinkulu did not work at the Welkom station for roughly a year now. There was no evidence before me to suggest that his absence during the past year had a noticeable effect on service delivery by the station. Many other reasons were cited for hindering service delivery in general, but none related to Mr Nkosinkulu's actual absence for the past year.

AWARD

[77] Based on the evidence before me, I found that the post held by Mr Nkosinkulu was not a critical post as defined in the Resolution. His secondment as a Full Time Shop Steward could thus not be refused by the Department of Health, Free State, in terms of clause 3.1.4, read with clause 3.1.5 of Resolution 3 of 2011.

Signature: 

Commissioner: Anna Maria Fourie