



# ARBITRATION AWARD

Arbitrator: **Mr. Anand Dorasamy**  
Case No.: **PSHS542-11/12**  
Date of Award: **30 MARCH 2012**  
In the ARBITRATION between:

**HOSPERSA O B O SOMERS T D**

(Union / Applicant)

and

**DEPARTMENT OF HEALTH: KZN**

(Respondent)

**Union/Applicant's representative** : MR H LESHABA  
Union/Applicant's address : P.O.BOX 231  
KLOOF  
3640  
Telephone : 031 765 4625  
Telefax : 031 765 4629

**Respondent's representative** : MR T D NTSHANGASE  
Respondent's address : PRIVATE BAG X 9051

PIETERMARITZBURG

3200

Telephone : 033 395 3045  
Telefax : 033 395 3220

PAGE 1

**DETAILS OF HEARING AND REPRESENTATION**

1. This arbitration hearing took place on the 7 March 2012 at King Edward Hospital, Durban Mr H Leshaba of Hospersa represented the applicant/employee and Mr T D Ntshangase represented the respondent /employer.
2. The parties agreed that no oral evidence will be tendered and that the matter be determined on their Heads of Arguments as follows:  
The parties agreed to submit written Heads of Arguments on or before the 21 March 2012 and the award will be rendered on their submissions.

**BACKGROUND TO THE MATTER**

3. The respondent raised a Point in Limine that the council does not have requisite jurisdiction to rule over the matter as it relates to salary.
4. The applicant contends that dispute is about the interpretation and application of the collective agreement of the PUSDSBC, Resolution 3 of 2007 (Commonly known as OSD for Nurses).  
The applicant joined the employer in March 1993 and therefore had 24 years appropriate experience as at 01 July 2007. In terms of PHSDSBC Res 3 of 2007 Part B translation key, the applicant, based on the number of years of appropriate service which is 24 years, should have been translated to salary notch R228,795.00(Rpa)

**ISSUE TO BE DECIDED**

5. I am to decide whether the PHSDSBC has the requisite jurisdiction to entertain the applicant's dispute.  
Should I find in the affirmative then I am required to direct on the future conduct of the proceedings.

**SUMMARY OF THE EVIDENCE**

6. APPLICANT'S (EMPLOYER) SUBMISSION

**01.**

The Applicant declared a dispute relating to interpretation and or application of collective agreement, Resolution 03 of 2007. The matter was heard on the 07<sup>th</sup> of March 2012 at King Edward Hospital.

**02.**

The respondent rose that the council does not have requisite jurisdiction to rule over the matter as it relates to salary.

**03.**

The introduction of Occupational Specific Dispensation (OSD) was aimed at increasing the remuneration of nurses and the applicant was translated accordingly and she was paid equivalent to what she was qualifying for. But the applicant wants increase in her salary.

**04.**

It is clear that this dispute is about salary. There is nothing suggesting that this dispute is about anything else other than salary, the PHSDSBC lacks jurisdiction in matters relating to salary. It is on this basis that this application is made.

## 05

It is respondent's prayer that the applicant's case be dismissed accordingly, in line with legal principles gleaned from the latest judgments on this aspect of law.

### 7. RESPONDENT'S (EMPLOYEES) SUBMISSION

#### BACKGROUND

- 1 Mrs Somers is employed at the CHC since 01 March 1983 as a Professional Nurse. She is in possession of the following post basic qualifications namely viz: **Diploma in Psychiatry** and a **Degree of Bachelor of Arts in Nursing Science (Community Nursing Science (1987))**. Both qualifications have been registered as post basic qualifications with the South African Nursing Council.

#### FACTS

1. The dispute is about the interpretation and application of the collective agreement of the PUSDSBC, Resolution 3 of 2007 (Commonly known as OSD for Nurses). When this agreement was signed the applicant (Mrs TD Somers) was employed and serving as professional nurse in her current place of employment, ie, Phoenix Community Health Centre.
2. The applicant was translated as General Stream nurse working in the Community Health Centre. According HOSPERSA this translation is incorrect. It has been reported that the manner in which this translation was implemented was influenced by the several circulars that were issued by the Department of Health: KZN Provincial Government.
3. As a result, the applicant's remuneration remains incorrect and therefore, subject her to undue and unfair economical prejudice. HOSPERSA is of the view that the influence by the circular as far as the translation of the applicant is concerned was unlawful and should be corrected.
4. The correction should be informed by the facts as contained in the applicable collective agreement which in this instance is PHSDSBC Resolution 3 of 2007 and nothing else as the resolution is the only legal document permissible to give guidance in the implementation of Occupational Specific Dispensation for the Nurses.
5. In terms of Resolution 3 of 2007, clause 3.2.5.2, the translation could be done by means of two phases, i.e. 3.2.5.2(i)(ii)
  - (i) 1<sup>st</sup> Phase

Minimum translation to the appropriate salary scale attached to posts (and grades in respect of production levels), as contained in Annexure B to this agreement. This implies an implementation adjustment in salary to at least the next higher notch on the salary scale attached to the post to which the employee is translated.

(ii) 2<sup>nd</sup> Phase (in respect of production levels/grades)

Re-calculation of relevant experience obtained by a person who occupies a post on a production level after registration in the relevant nursing category, based on full years service/experience as on 31 March 2007, in order to award a higher salary at a production level subject to and within the limits of the measures for such recognition contained in Annexure C.

This phases applies to all production nurses based on the area where the Nurse is employed on the 30 June 2007, regardless whether she was in possession of the post qualification or not. See 3.2.5.3(i)(b)

The diagram illustrates how the applicant was supposed to be translated in terms of the 1<sup>st</sup> phase.

Chief Professional Nurse (Speciality General Nurse) Salary Level 8 (01-07-2007) (Before OSD)  (Notch)  <b>R153,312</b>	Professional Nurse Grade 1 (Speciality Nursing) PNB1(01-070-2007)(after translation)  (Notch)  <b>R170,244</b>
--	---

Due to the fact that the applicant is employed in the Community Health Centre she qualifies to be translated in terms of 1<sup>st</sup> phase as per Part 1 of the Collective Agreement (PHSDSBC Res 3 of 2007). i.e. Speciality Stream whether she has or no post basic qualification, but by the mere fact that she in the area that is deemed specialty at this point in time (30-06-2007) she is entitled to this translation see item 3.2.5.3(i)(b).

6. In terms of Resolution 3 of 2007, clause 3.2.5.3(i)(a):

**3.2.5.3 Translation of Professional Nurse (Registered Nurse) to speciality posts**

**(i) A Professional Nurse (registered nurse) who occupies a post in a nursing speciality and who-**

**a. is in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, shall translate to the appropriate specialty post; and**

7. In terms of annexure C item 1.2 Part B, provides a translation key for the occupation Professional Nurse who are in possession of the prescribed post basic qualification. Accordingly the applicant is in

possession of the appropriate post basic qualifications and is employed as a Professional Nurse, in the Community Health Care centre which is undisputedly a Specialty Stream, therefore qualifies for the translation in terms of the PHASE 2 OF TRANSLATION-RECALCULATION OF SALARIES BASED ON RELEVANT EXPERIENCE.

8. The applicant joined the employer in March 1993 and therefore had 24 years appropriate experience as at 01 July 2007. In terms of PHSDSBC Res 3 of 2007 Part B translation key, the applicant, based on the number of years of appropriate service which is 24 years, should have been translated to salary notch R228,795.00(Rpa)
9. The circulars that were issues by the employer have no legal standing to influence or introduce any different meaning to the collective agreement. Any amendments to the resolution shall have no force or effect unless agreed to by parties to the agreement and such an agreement is reduced to writing.
10. It is therefore horrendous to see employer instructing institutions to interpret and apply the collective agreement in terms of his circulars which were never part of the negotiations leading to the collective agreement.
11. HOSPERSA is of the conviction that these circulars were no less that unlawful and illegitimate instruction with the intention to create havoc and pandemonium in the process of the implementation of PHSDSBC Resolution 3 of 2007. Therefore these circulars should be disregarded and the argument suggesting that the translation was based on the circulars should be met with the same fate, that is, condemned and be declared unlawful.

HOSPERSA trust that you will find this version more probable to believe and thus find in our favour.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

8. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolutions have been read and taken into account in arriving at my decision. Further I have taken note of the recent decision of Minister of Safety & security v SSSBC & Others (2010) BLLR 705 (LAC). The following are recorded verbatim from the practice notes for completeness:
9. In this matter the LAC dealt with the issue of whether bargaining councils have jurisdiction to arbitrate a dispute referred as an "interpretation" or "application" dispute when in fact the interpretation/application is not the real issue before it but that the real issue is disguised as the interpretation/ application of a collective agreement.
10. In this case Ms Badenhorst applied for a transfer from Zwelitsha Safety and Security Provincial office to Port Elizabeth. Resolution 5 of 1999 regulates transfers. Ms Badenhorst's application was refused and she then referred a dispute concerning the interpretation or application of a collective agreement to the SSSBC. Part of her main argument related to questioning the fairness/ appropriateness of the decision not to approve her application and consequently that the decision maker did not apply his mind. The

arbitrator found in Ms Badenhorst's favour. The matter was then reviewed and the Labour Court dismissed the application for review and the SAPS took the matter on appeal.

11. The SAPS grounds for appeal were that the SSSBC lacked jurisdiction to arbitrate the dispute because it was not an interpretation or application dispute. The true dispute was about the fairness of the SAPS decision to refuse the transfer. In its judgement the Court dealt with the distinction between *a dispute* and *an issue in dispute*. The Court uses an example of a person who has been dismissed for operational reasons, and the person challenges the dismissal on the basis that the employer failed to follow a procedure that is in a collective agreement in terminating the employee's services for operational reasons.
12. In this case the Court says the real issue is about the fairness of the dismissal and the issue in dispute is the interpretation/ application of the collective agreement that provides for the process of the termination. Simplified, the issue in dispute needs to be decided in order for the real issue to be resolved.
14. This issue is important because it deals with jurisdiction. In the operational dismissal dispute the Labour Court will have jurisdiction and in the interpretation / application disputes the matter would have to be arbitrated.
15. The Court concluded that the dispute before the SSSBC arbitrator was about the fairness of SAPS refusal of Ms Badenhorst's transfer. The application of the provisions of the collective agreement was, according to the Court, an issue in dispute and not the main/real dispute.
16. The Labour Appeal Court overturned the decision of the Labour Court, set the arbitration award aside and held that the SSSBC had no jurisdiction to arbitrate this matter.
17. In the present case the applicant's main dispute is about the employer's decision not to give employee the benefit that she seeks which would affect her salary. The subsidiary /secondary issue in dispute is the matter of the ambit of the collective agreement, the factors that the employer had to take into account ect. In any event the employer ought to have considered the guiding principles of the collective agreement and arrived at a decision not favoured by the applicant. In reality she are unhappy with the employer's decision not to give/ favour her with the Part B translation key, based on the number of years of appropriate service which is 24 years, she should have been translated to salary notch R228,795.00(Rpa)
18. In line with the above and taking note of the decision of the LAC I determine that the Council does not have jurisdiction to arbitrate this matter.

#### AWARD

19. The Council does not have jurisdiction to arbitrate this matter.
20. There is no order as to costs.

THIS DONE AT DURBAN ON THIS 30 DAY OF MARCH 2012.

*aSDorasamy*

Commissioner: : ANAND DORASAMY  
(I&A NEW NO JURIS SOMERS)