



# ARBITRATION AWARD

Panelist/s: Ananthan Sanjivi Dorasamy  
Case No.: PSHS560-11/12  
Date of Award: 12-Oct-2012

**In the ARBITRATION between:**

In the ARBITRATION between:

HOSPERSA O B O LABUSCHAGNE J M & 3 OTHERS  
(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN  
(Respondent)

Union/Applicant's representative : MR A L CHRISTISON (ADVOCATE)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration proceedings commenced at 10H00 on the 15 August 2012 at the Natalia Building Pietermaritzburg. Mr A L Christison an advocate instructed by Mr L Cain on behalf of HOSPERSA represented the applicants and Ms N A Gumede represented the Respondent (employer).
2. This matter was referred to the Council to deal with the issue of consultation but the process of separating the post has reached an advanced stage and instead of approaching the Labour Court again the parties agreed as follows:
  1. No oral evidence would be led.
  2. The respondent would approach the Head of Department to seek a stay of the process in respect of the splitting of the post pending the consultation with the affected parties.
  3. The respondent will inform the Council, Applicant and the arbitrator of the Head of Department's decision on or before the 29 August 2012.
  4. Should the stay not be granted then the parties agreed to submit Heads of Arguments as follows:
    1. The applicant /employees will serve its Heads of Arguments on the Council, commissioner and respondent on or before 5 September 2012
    2. The respondent/ employer will serve its Heads of Arguments on the Council, commissioner and respondent on or before 12 September 2012. EXTENDED TO 26 SEPTEMBER 2012
    3. The applicant will serve its answering Heads of Arguments on the Council, commissioner and applicant on or before 19 September 2012. EXTENDED TO 3 OCTOBER 2012
    4. The parties convened a pre-arbitration conference and the minute was placed on record. I determined the matter on the written submissions and felt that oral submissions were not necessary.

### **SPECIAL NOTE**

**ON THE 8 OCTOBER 2012 I CONTACTED Ms GUMEDE AND REQUESTED HER SUBMISSION AND WAS REFERRED TO Ms M PILLAI OF THE STATE ATTORNEY'S OFFICE AND ADVISED HER OF THE NON SUBMISSION BY THE RESPONDENT. I ADVISED BOTH THE REPRESENTATIVES TO APPLY FOR AN EXTENSION FOR THEIR SUBMISSIONS. WHEN THERE WAS NO RESPONSE BY THE MORNING OF THE 11<sup>th</sup> OCTOBER 2012 I PROCEEDED TO DETERMINE THE MATTER.**

5. APPLICANT'S (EMPLOYEE) SUBMISSION.

1.

The Applicant is HOSPERSA, a trade union duly registered in terms of South African law. The Applicant has referred the dispute on behalf of four of its members, being members in good standing who are all employees of the Respondent, namely:

- 1.1 JENNIFER MARGARET LABUSCHAGNE (“Labuschagne”)
- 1.2 RAJENDRA SOOKDAVU RAMHARAKH (“Ramharakh”)
- 1.3 PAUL GEORGE SHAUN COTCHOBOS (“Cotchobos”)
- 1.4 RAJANDRAN PERUMALSAMI APPADU (“Appadu”)

2.

The Respondent is the KZN Department of Health, an organ of state within the sphere of provincial government. Henceforth the Respondent is referred to as “the Department”.

3.

The dispute referred by the Applicant on behalf of its four members concerns an unfair labour practice concerning demotion, material particulars of which are as follows:

- 3.1 Labuschagne has worked for the Department for 41 years. She was appointed to the position of Finance and Systems Manager in 2006, at a district hospital / district hospital equivalent (Wentworth Hospital), said post being a level 9 post. Although she has been formally appointed to a post at Wentworth Hospital, she is on secondment as Finance and Systems Manager to Ekuhlengeni Psychiatric Hospital.
  - 3.1.1 In said post Labuschagne has ultimate oversight of 98 individuals: 28 in the Finance component; 70 in the Systems component. In respect of the Finance component, Labuschagne has 8 direct reports. In respect of the Systems component Labuschagne has 16 direct reports.
  - 3.1.2 Labuschagne obtained a performance assessment rating of 3 in respect of her performance in the most recent performance review, indicating that she was graded by the Department as “Fully effective (and slightly above expectations)”.
  - 3.1.3 In the said post, Labuschagne has had to overcome problems raised by limited funding and delays in the filling of posts. Nonetheless, she has remained within her allocated budget every year without compromising service delivery. Furthermore she has ensured that her hospital is a clean and safe environment.
- 3.2 Ramharakh has worked for the Department for 21 years. He was appointed to the post of Finance and Systems Manager in 2003, at a district hospital / district hospital equivalent, said post being a level 9 post. He is currently employed as Systems Manager. His post of Finance and Systems Manager was split into the two separate posts of Finance Manager and Systems Manager. He was absorbed into the post of Systems Manager.

- 3.2.1 As Finance and Systems Manager, Ramharakh had ultimate oversight of 104 individuals: 30 in the Finance component; 74 in the Systems component. In respect of the Finance component, Ramharakh had 1 direct report and in respect of the Systems component 2 direct reports.
- 3.2.2 Ramharakh obtained a performance assessment rating of 3 in respect of his performance in the most recent performance review, indicating that he was graded by the Department as “Fully effective (and slightly above expectations)”. His supervisor explicitly indicated that “his performance is better than normal requirements. All KRA’s were met within the financial year.”
- 3.2.3 In the said post, Ramharakh had to overcome problems raised by inadequate budget allocations prior to 2010, which he did. Furthermore, in 2006, he detected abnormal expenditure in an expenditure report. Following investigation, this revealed that a staff member had committed fraud in respect of R2m. Pursuant to said investigation, the staff member was dismissed.
- 3.3 Cotchobos has worked for the Department for 29 years. He was appointed to the post of Finance and Systems Manager in 2004 at a district hospital / district hospital equivalent, said post being a level 9 post.
- 3.3.1 Following his initial appointment as Finance and Systems Manager at Greytown Hospital, Cotchobos was transferred to take up the same post at Hillcrest Hospital whereupon he was obliged to undertake the duties of Finance and Systems Manager not only in respect of Hillcrest Hospital but also Wentworth Hospital. He divides his time between Hillcrest and Wentworth on a 40:60 basis.
- 3.3.2 In said post Cotchobos has ultimate oversight of 214 individuals. At Hillcrest, he oversees the work of 79 individuals: 11 in the Finance component; 68 in the Systems component. At Wentworth, he oversees the work of 135 individuals: 41 in the Finance component and 94 in the Systems component. At Hillcrest Hospital, Cotchobos has 1 direct report in respect of the Finance component and 2 direct reports in respect of the Systems component. At Wentworth Hospital, Cotchobos has 2 direct reports in respect of the Finance component and 2 direct reports in respect of the Systems component.
- 3.3.3 In the said post, Cotchobos has had to overcome problems raised by funding inadequate for meeting the Department’s projected service delivery as well as the Department’s unwillingness to fill vacant administrative posts because these are not seen as essential. He has worked long hours and weekends to meet deadlines imposed by the Department notwithstanding staff shortages in the Finance and Systems section. Notwithstanding the said challenges, Cotchobos has: never exceeded his budget by more than 2%; has actively trained and developed his staff such that several have them have been appointed to senior posts in the

Department; significantly improved operational performance at Greytown Hospital and oversaw the commissioning of an MDR / XDR TB hospital during his stint at Greytown Hospital; has improved operational performance at Hillcrest Hospital to the point where it won a bronze award in competition against all other hospitals in the province; and has overseen significant process re-engineering and other cost saving measures at Wentworth Hospital with the result that said hospital is now operating within its allocated budget.

- 3.3.4 Cotchobos obtained a performance assessment rating of 3 in respect of his performance in the most recent performance review, indicating that he was graded by the Department as “Fully effective (and slightly above expectations)”.
- 3.4 Appadu has worked for the Department for 31 years. He was appointed to the post of Finance and Systems Manager in 2003 at a district hospital / district hospital equivalent, said post being a level 9 post. He is stationed at GJ Crookes Hospital.
  - 3.4.1 In said post Appadu, has ultimate oversight of 148 individuals: 30 in the Finance component; 118 in the Systems component. In respect of the Finance component, Appadu has 1 direct report. In respect of the Systems component Appadu has 2 direct reports.
  - 3.4.2 Appadu obtained a performance assessment rating of 3 in respect of his performance in the most recent performance review, indicating that he was graded by the Department as “Fully effective (and slightly above expectations)”.
  - 3.4.3 In the said post, Appadu has had to overcome problems raised by the loss of experienced staff and delays in the filling of posts, and which have entailed him working late into the night during weekdays as well as during week-ends.
  - 3.4.4 Nonetheless, Appadu has taken active role in increasing the skills and performance levels of staff within his section, including subjecting his staff to written examinations and holding an annual awards ceremony for said staff; he has been gratified by his staff’s attainment of their personal goals through promotion. He also uncovered fraud perpetrated on the BAS financial system by a syndicate of senior staff, which fraud is presently being forensically investigated.
  - 3.4.5 Furthermore, Appadu has:
    - 3.4.5.1 Developed and produced a monthly financial bulletin called “The Money Train”, which provides an audited record of financial transactions and a transparent record of the use of public funds, and is published on the intranet.
    - 3.4.5.2 Developed a monthly bulletin called “The Observer” which is a consolidated record of performance and other diverse data, and which is published on the Department’s website.
    - 3.4.5.3 Introduced a monthly bulletin for mortuary data, specifically aimed at combating fraud and corruption.

- 3.4.5.4 Developed a performance management and cost indicator tool that offers a simple means of identifying weaknesses in the system.
- 3.5 During 2010, the Department indicated that it intended to split the post of Finance and Systems Manager into the separate posts of Finance Manager and Systems Manager when it issued Human Resources Circular 47 of 2010. Appadu, Ramharakh and Cotchobos learnt of the intended split from said circular.
- 3.6 Notwithstanding the issuing of said circular, no consultation in respect of the splitting of the post of Finance and Systems Manager took place either with the Applicant or with any of the four members prior to the issuing of said circular nor thereafter.
- 3.7 On 16 September 2011, the head of the Department sent Human Resources Management Circular No 97 of 2011 to all district managers, hospital managers, heads of institutions and head office managers. Labuschagne first learnt of the intended splitting of her post from the said circular.
- 3.8 A copy of the said circular has been annexed hereto, marked "A".
- 3.9 The circular states, inter alia, that the posts of finance and systems managers which were created as combined posts, have been separated into two separate posts of finance and systems manager.
- 3.10 Specifically, paragraph 2.2 of the circular deals with the case of finance and systems managers at district and TB hospitals, namely the posts occupied by the four members at the time of the issuing of said circular.
- 3.11 Paragraph 2.2 of the circular provides as follows:
- “(a) The posts of Finance and Systems Managers were initially created as combined posts on salary level 9. These posts have been separated and created as Finance Manager and Systems Manager on salary level 9.**
  - (b) If the Finance and Systems Manager posts which were initially created as combined posts are currently vacant, Head Office will advertise the posts of Finance Manager. Institutions must advertise the posts of Systems Manager.**
  - (c) If the Finance and Systems Manager posts which were initially created as combined posts are currently filled, Head Office will advertise the posts of Finance Manager. The incumbents who are appointed to the combined posts of Finance and Systems Manager must be absorbed in the posts of Systems Manager after consultation provided they were appointed on salary level 9 or 10 as the case may be.”**
- 3.12 Paragraph 4 of the circular indicated that the following requirements for appointment were to be reflected on advertisements to fill the separated Finance Manager posts:

- “(a) An appropriate Bachelor’s degree or National Diploma in BCom Accounting, National Diploma in Cost and Management Accounting or Bachelor of Business Administration plus 3 years managerial experience in financial management.**
- (b) Shortlisted applicants will be subjected to a competency test in Financial Management aspect.”**

3.13 Paragraph 6 of the circular indicated the appointment requirements that must be used by institutions when advertising posts of Systems Manager:

- “(a) An appropriate Bachelor’s Degree or National Diploma in Public Management / Administration plus three years management experience in systems management.**

**OR**

- (b) 5 years managerial experience in Systems management in respect of in service employees who are appointed as Finance and Systems Manager in possession of Grade 12 qualification. A one year appropriate additional qualification will be an added advantage.**
- (c) The alternative requirements mentioned in paragraph [b] above must be used as a once off which means that it will not be applicable in the future any more once these posts are filled.”**

3.14 No consultation had taken place between the Department and the Applicant and / or the four members prior to the issuing of Human Resources Circular 97 of 2011.

3.15 No consultation has taken place between the Department and the Applicant and / or the four members since the issuing of Human Resources Circular 97 of 2011, notwithstanding that the Department’s legal representatives assured the Labour Court that such consultation would take place, subject to the qualification that in Appadu’s case, the CEO of the hospital where he is posted invited him to meet with her to discuss the contents of the circular; such meeting did not in fact take place.

3.16 The Department commenced advertising the Finance Manager posts, notwithstanding that no consultation had taken place. In the case of Ramharakh, the Department has filled the Finance Manager post at his hospital, done away with his post of Finance and Systems Manager, and absorbed him into the post of Systems Manager.

4.

4.1 In terms of section 186(2)(a) of the Labour Relations Act 66 of 1995, an unfair labour practice includes unfair conduct relating to the demotion of an employee.

4.2 In ***Ndlela v SA Stevedores Ltd 1992 13 ILJ 663 (IC)***, it was held that an employee is demoted if his terms and conditions of employment change such that there is a material reduction in of the

employee's remuneration responsibilities or status. In ***Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others 2008 29 ILJ 2708 (LAC)*** at 2739G-J, the Labour Appeal Court held that the mere fact that an employee's rank or remuneration are not going to change by virtue of some act on the employer's part (in casu, a transfer) does not mean that said act does not constitute a demotion, and that a transfer of the employee to a posting which had less status, prestige and responsibility amounted to a demotion.

- 4.3 It is submitted that the Department's conduct in relation to Labuschagne, Ramharakh, Cochobos and Appadu has resulted (in the case of Ramharakh) or will result (if the Department is permitted to go ahead and proceed with the appointment of new Finance Managers) in a material reduction of their remuneration, responsibilities and status in the following respects:
- 4.3.1 The level of responsibility accorded to the members either has or will be substantially reduced even if they were to apply for and be appointed to the post of Finance Manager, occupation of the said post would still carry considerably less responsibility than holding the post of Finance and Systems Manager, which carries the added responsibility of heading up the Systems component. Similarly, if the members are simply absorbed in the post of Systems Manager (as has already occurred with Ramharakh), then their responsibilities have been or will be diminished through the loss of oversight of the Finance component. The complexity of their work will inevitably be reduced, because the post of Finance and Systems Manager embraces a wider range of tasks as well as skill set than each of the separate posts of Finance Manager and Systems Manager.
- 4.3.2 A further element of the reduction in the members' responsibility is that if the Department is permitted to split the posts, they will have fewer individuals reporting to them, irrespective of whether they are ultimately appointed as Finance Managers or absorbed into the post of Systems Manager.
- 4.3.3 Closely associated with the reduction in the members' responsibility (and the complexity of their functions) pursuant to the Department splitting the post of Finance and Systems Manager into separate posts is the diminishing of the members' status.
- 4.3.4 Furthermore, Regulation V C of the Public Service Regulations, 2001 (promulgated in terms of the Public Service Act (Proc 103 of 1994) and published under GN R1 in GG 21951 of 5 January 2001) provides as follows concerning the grading and remuneration of employees in the public service, such as the four members:

### **C Grading and remuneration**

- C.1 An executing authority shall determine the grade of a post to correspond with its job weight and set the commencing salary of an employee on the minimum notch of the salary range attached to the relevant grade, unless the salary proves inadequate under the criteria in regulation V C.3.**



- C.2 If a job has a weight that applies to more than one salary range, the executing authority shall determine which of the relevant salary ranges to use.**
- C.3 An executing authority may set the salary for a post or an employee above the minimum notch of the salary range indicated by the job weight-**
- (a) if she or he has evaluated the job, but cannot recruit or retain an employee with the necessary competencies at the salary indicated by the job weight; and**
  - (b) she or he shall record the reason why the salary indicated by the job weight was insufficient.**
- C.4 If the job weight demonstrates that a filled post is overgraded or undergraded, an executing authority shall either effect changes to the work organisation or regrade the post according to the job weight and the relevant collective agreements, as provided in regulation V C.5 to C.7**
- C.5 An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-**
- (a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and**
  - (b) the department's budget and the medium-term expenditure framework provide sufficient funds.**
- C.6 If an executing authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-**
- (a) already performs the duties of the post;**
  - (b) has received a satisfactory rating in her or his most recent performance assessment; and**
  - (c) starts employment at the minimum notch of the higher salary range.**
- C.7 The absorption of the incumbent employee in the higher-graded post as provided under regulation V C.6 shall take effect on the first day of the month following the month during which the executing authority approves that absorption.**
- C.8 If an executing authority determines that the salary range of an occupied post exceeds the range indicated by the job weight, she or he shall-**
- (a) if possible-**
    - (i) redesign the job to equate with the job grade; or**
    - (ii) transfer the incumbent to another job on the same salary range; and**
  - (b) abide by relevant legislation and collective agreements.**

**C.9 As far as possible, an executing authority shall set the salary of a part-time, seasonal or temporary employee proportional to the salary of an equally graded full-time employee.**

- 4.3.5 Although the members' immediate compensation packages will remain unchanged, their removal from the post of Finance and Systems Manager, whether to the posts of Finance Manager or Systems Manager, will by virtue of the reduction in their level of responsibility as well as the complexity of their function, reduce their "job weight" as contemplated in Regulation V C of the Public Service Regulations. This reduces their prospects of having their salary level upgraded in terms of Regulations V C.4 through C.7. It is submitted that the members have strong prospects of success should they apply for an upgrading of the posts of Finance and Systems Manager, because the Department has graded the distinct Finance Manager post as a level 9 post, the same grading as their Finance and Systems Manager posts, notwithstanding the lesser responsibility and status associated with the post of Finance Manager.
- 4.3.6 Furthermore, it is submitted that the Department has clearly indicated to the four members that it intends to reduce their status in that it has not merely decided to split their posts, but has decided that they are to be absorbed into the post of Systems Manager unless they successfully apply for the post of Finance Manager. It is submitted that this is tantamount to the Department indicating to four members that (a) it regards the new Finance Manager post as carrying greater responsibility and status than the new Systems Manager post; and (b) that its prima facie view is that it does not regard them as suitable for the Finance Manager post but is prepared to absorb them in the seemingly lesser Systems Manager post.
- 4.4 Accordingly, it is submitted that the Department's conduct in relation to Labuschagne, Ramharakh, Cochobos and Appadu has resulted in Ramharakh's demotion, and will result, if the Department is permitted to continue the process, in the imminent demotion of Labuschagne, Cochobos and Appadu.
- 4.5 The Department's has failed to consult with the four members and indeed the Applicant union prior to implementing the splitting of the Finance and Systems Manager posts and advertising the Finance Manager posts. Indeed it has completed the process as regards Ramharakh's post.
- 4.6 In light of the four members satisfactory performance assessments there is no obvious reason for the Department to deprive them of their posts as Finance and Systems Managers and force them into the lesser posts of Finance Manager (at best and only following a successful application for such post) or Systems Manager.

4.7 On 13 June 2006, the Department of Public Service and Administration (“the DPSA”) issued a Guide on Transformation and Restructuring: Human Resources, a copy of which is annexed hereto, marked “B”. Of significance are the following provisions:

**‘When embarking on a transformation and restructuring exercise, you should ensure that**

- **All employees and their representatives are timeously informed of the exercise...**
- **The representatives of the employees and / or the employees themselves are consulted.’**

4.8 In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others 2008 29 ILJ 2708 (LAC)*, His Lordship Mr Justice Zondo stated the following:

4.8.1 At **2724H-I**: “In my view s 186(2)(a) of the LRA places an obligation on an employer not to engage in any unfair act ‘relating to [the demotion]’ of an employee. The demotion of an employee without his consent would, generally speaking, constitute an unfair labour practice in our law.

4.8.2 At **2731F-G**: “In our law the general rule is that, where a body or state functionary is obliged to observe the audi alteram partem rule in a particular case, it is required to observe that rule before it can take the decision in issue (see *Administrator of the Transvaal & others v Traub & others* 1989 (4) SA 731 (A) at 750C; (1989) 10 ILJ 823 (A)). In *Traub’s* case the learned Chief Justice explained the rationale for the requirement that the audi rule should, generally speaking, be observed before an adverse decision is taken against a subject. He said at 750C: ‘that is, while [the body or official or functionary who is to make such a decision] still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken’.”

4.8.3 At **2740A**: “In terms of the common law a demotion without the employee’s consent is unlawful. In terms of the Labour Relations Act the demotion of an employee without his consent would be unfair.”

4.8.4 At **2740C**, having found that a transfer of the employee in casu (“the appellant”) amounted to a demotion: “Furthermore, the decision to transfer the appellant ... was made without the appellant being consulted first or being given an opportunity to be heard. That is fatal to the transfer and renders it invalid, void and of no legal effect.”

4.9 In the premises, it is submitted that the demotion of Ramharakh and the imminent demotions of Labuschagne, Cochobos and Appadu are unfair and amount to unfair labour practices.

- 5.1 The Applicant learnt of the Department's final decision to separate the post of Finance and Systems Manager into two separate posts as announced in Human Resources Management Circular 97 of 2011 on 29 September 2011.
- 5.2 The Applicant consulted with its attorney on 30 September 2011 and held consultations with counsel on 4 and 6 October 2011, whereupon draft papers were prepared for an application in the Labour Court for an interim interdict against the Department prohibiting it from implementing the unfair labour practice.
- 5.3 A final attempt was made by the Applicant to resolve the matter without litigation. On 11 October 2011, the Applicant was advised by members of the Department's labour relations component that they had not been given any instructions to deal with the matter.
- 5.4 Thereafter, the Applicant referred this dispute on 12 October 2011 and finalised its application papers for an interim interdict in the Labour Court the same day.
- 5.5 A copy of the said Labour Court application papers is annexed hereto, marked "C". In the papers, the Applicant alleged that the matter was urgent, that the four members had a clear right meriting protection, that they reasonably apprehended irreparable harm and that they had no other satisfactory remedy in the circumstances save an interim interdict.
- 5.6 The application for an interim interdict was heard by the Labour Court under case number D919/11 on 20 October 2011. Judgment was delivered on 28 October 2011 by Her Ladyship, Madame Justice Boqwana AJ. A copy of the court's judgment has been annexed hereto, marked "D".
- 5.7 Scrutiny of the court's judgment indicates that:
  - 5.7.1 The Department's legal representatives argued that the application was premature and pre-emptive of a process of consultation that still had to take place (as appears from paragraphs 7 and 17 of the judgment)
  - 5.7.2 The Department's legal representatives made the submission that in an unfair labour practice dispute the Applicant's members would be entitled to restoration to their positions prior to the implementation of the decision should they be successful in the bargaining council, or to claim as specific performance in terms of their contracts of employment, restoration to their positions (as appears from paragraph 18 of the judgment).
  - 5.7.3 The court stated at paragraph 19 of the judgment: "I am of the view that the employer would be obliged to follow any award properly determined by the bargaining councils. It seems to me, that if the employer goes ahead to implement without consultation it would be doing so at its own peril. Further, it would have to deal with the consequences of having to undo its decision to implement in the face of its own undertaking on paragraph 2.2(c) of the circular..."

5.7.4 The court was therefore of the view that the Applicants had not shown that the matter was urgent, had not shown that they had a reasonable apprehension of imminent harm and had not shown that the balance of convenience favoured interim relief.

6.

- 6.1 Notwithstanding the submissions made by its legal representatives, the Department has failed to consult with the four members prior to advertising their posts and commencing the selection process. In the case of Ramharakh, the Department has gone so far as to appoint a Finance Manager and absorb Ramharakh into the post of Systems Manager, without consulting with Ramharakh or the Applicant.
- 6.2 The Department has certainly not secured the consent of the Applicant or the four members to their demotions.
- 6.3 It is submitted that in light of the submissions made by its legal representatives before the Labour Court, that the Department has not merely committed an unfair labour practice and breached the members' contracts of employment, but furthermore has acted in bad faith in failing to conduct consultation with the Applicant and / or the four members.

7.

In addition to the objective harm suffered by or that will be suffered by the four members, consisting in the objective fact of demotion, the consequent breach of their contracts of employment as well as the unfair labour practice arising therefrom, the members have sustained subjective harm in that their dignity as well as reputations have been infringed. As to the subjective harm suffered by the four members if the Department is permitted to finalise the process of splitting the Finance and Systems Manager posts:

7.1 Labuschagne makes the following statement:

**“I have been in the Department of Health for 41 years and have worked my way up the ranks. I have been Finance and Systems Manager since 2006. Prior to 2006, I was deputy to the Finance and Systems Manager for 12 years and have always assisted in budget and expenditure matters. I would find it humiliating and hurtful not to mention demoralising.”**

7.2 Ramharakh makes the following statement (Ramharakh has already been removed from the post of Finance and Systems Manager and absorbed into the post of Systems Manager):

**“The Department has categorically indicated by splitting the posts that the incumbents of the ‘Finance and Systems Managers’ posts are incompetent. Instead of managing 104 staff I will now only have 74 staff under my control. The fact that there were no consultative processes from the Department clearly indicates that the splitting of the posts was a unilateral decision.”**

7.3 Appadu makes the following statement:

**“I was and still am mortified that the Department was so casual about changing my vocation as if they hadn’t a care in the world. I have aspired my entire working career to one day head the administration of a hospital and I eventually did just that. Not once did the powers that be ever consider discussing this issue with us so that we could find a way to solve whatever problems the Department had regarding the portfolio of Finance and Systems. The Department has changed the course of my career, it seems as if on a whim and definitely without foundation.**

**It is very obvious from Human Resources Management Circular 97 of 2011 that the decision to split the post was a foregone conclusion and the Department, like a typical bully, was telling us that there is nothing anybody can do.**

**For my own understanding, it is important I know why the Department “felt” I did not do my work properly. Not once was I ever told that I was not doing my job properly.**

**I have taken pride in my job and this is not what I expected from my employer.**

**The manner in which the splitting of the post has been done clearly indicates that the Department has had a “loss of confidence” in the competence of all of the Finance and Systems Managers.**

**In addition to the above, the mere fact that they directed that we are to be absorbed into the posts of Systems Manager clearly illustrated how little they thought of the post.”**

7.4 Cotchobos makes the following statement:

**“I have read and echo the sentiments of my colleague, Mr Appadu.**

**As Finance and Systems Manager, in the course of battling to improve the administration of the hospitals where I am stationed, I have built a reputation for getting results as well as a trust relationship with those individuals reporting to me, with the Hospital Manager, with the Hospital Board and with members of the community. Now, by losing that portfolio, it looks like I’ve done something wrong or haven’t delivered. This will damage my reputation as well as imply that the trust I have built up with others was unfounded.”**

8.

8.1 It is submitted that the only proper remedy for the four members is that they be restored to and / or confirmed in their posts as Finance and Systems Managers. They are entitled to specific performance in terms of their contracts of employment.

8.2 It is further submitted that in arguing the question of the interim interdict before the Labour Court and in persuading the court not to grant such an interim interdict in order to preserve the status quo, the

Department explicitly conceded that it would be prepared to restore the members to the posts of Finance and Systems Manager if it was found to have committed an unfair labour practice by the bargaining council.

8.3 It is further submitted that in its judgment, the Labour Court accepted that the appropriate remedy would be to restore the status quo.

8.4 Where the process of splitting the posts has been completed and individuals other than the members have been appointed to the posts of Finance or Systems Manager (as is presently the case with Mr Ramharakh, and may be the case with the other members by the time an award in respect of this dispute is issued), it is submitted that restoration of the status quo can take place without the need to join those individuals appointed to the post of Finance Manager or Systems Manager.

8.4.1 In this regard, it is submitted that the Applicant's members' desire to be restored to the post of Finance and Systems Manager means that their restoration will not affect the posts of individuals appointed as Finance Manager or Systems Manager as the case may be. Such individuals would maintain their responsibilities, remuneration and status but would simply have a further layer of management, namely the post of Finance and Systems Manager, inserted between them and their present superiors.

8.4.2 While the Department may be of the view that such a remedy introduces an unnecessary layer of management, it is the Department's own representatives who argued that it was possible to unscramble the egg in the event that they committed an unfair labour practice. Furthermore, the Labour Court warned the Department that if it implemented the splitting of the posts without consultation, it did so at its peril.

8.5 Where the process of splitting the posts has not been completed, it is submitted that the Applicant and the affected members are entitled to an interdict prohibiting the Department from proceeding further with the process until it has undertaken proper consultation with the Applicant and the members and obtained their consent to the process of splitting the posts.

8.5.1 The requirements for an interdict are trite (see **Setlogelo v Setlogelo 1914 AD 221**):

8.5.1.1 A clear right

8.5.1.2 An injury committed or reasonably apprehended

8.5.1.3 No other satisfactory remedy

8.5.2 It is submitted that the affected members have a clear right meriting protection, that they reasonably apprehend suffering from the Department's actions if the Department is permitted to continue with the splitting of their posts, and that there is no other satisfactory remedy other than an interdict.

8.5.3 While it is correct that the Honourable Panelist could award the members compensation in terms of the Labour Relations Act, such compensation is limited to a maximum of 12 months

remuneration and would be no substitute for preserving the status quo and preventing the wrong from occurring. Furthermore, it is submitted that there is no other satisfactory remedy for the affected members other than an interdict, because they are entitled to specific performance of their contracts of employment. (see ***Candid Electronics v Merchant Buying Syndicate (Pty) Ltd 1992 2 SA 459 (C)***)

9.

However, in the event that the Honourable Panelist is of the view that it is undesirable to either restore the status quo or preserve the status quo in respect of any one of the members, then the Applicant claims compensation on behalf of that member amounting to the maximum possible compensation of 12 months remuneration. The basis for such claim is as follows:

- 9.1 The objective wrong caused to the member by the breach of his or her contract of employment and the unfair labour practice represented by the demotion.
- 9.2 The infringement to the member's dignity and reputation occasioned by the demotion and the manner in which said demotion has been effected.
- 9.3 The Department's bad faith not to mention recklessness in implementing the demotions contrary to the submissions its legal representatives made to the Labour Court and contrary to the advice given by the Labour Court and reasoning underlying the court's decision.

10.

It is further submitted that in light of the submissions given by the Department's legal representatives to the Labour Court concerning the Department's apparent intention to consult and in light of the advice given by the Labour Court to the Department concerning the need to consult, that the Department's opposition to the relief claimed by the Applicant on behalf of its members is frivolous and vexatious, and accordingly that the Department be directed to pay the Applicant's costs.

**WHEREFORE** the Applicant prays on behalf of its members for an award in the following terms:

1. Where the process of splitting the posts has been completed, that the Department restore the member (s) affected thereby to the post of Finance and Systems Manager;
2. Where the process of splitting the posts has not been completed, that the Department be interdicted and prohibited from continuing with the process of splitting the post of Finance and Systems Manager until it has consulted with and obtained the consent of the affected member(s) thereto.
3. In the alternative to prayers 1 and 2, that the Department be ordered to pay compensation to the affected member(s) in the amount of 12 months remuneration, such payment to be effected within 14 days of date of award, with interest on such amount to run at the prescribed rate from 14 days after date of award.



#### 4. Costs

### 5. RESPONDENT'S (EMPLOYER) SUBMISSION

**The respondent failed to make submissions as agreed alternatively to apply for an extension to make submissions.**

### 5. ISSUE TO BE DECIDED

I am required to determine whether the Respondent (employer) had perpetrated an act of unfair labour practice against the applicants concerning demotion as regards the four employees/ applicants by separating the post of Finance and Systems Manager into the two separate posts of Finance Manager and Systems Manager. Should I find in favour of the applicants then I must determine the appropriate remedy.

### 6. BACKGROUND TO THE ISSUE

The applicants are :

JENNIFER MARGARET LABUSCHAGNE ("Labuschagne")

RAJENDRA SOOKDAVU RAMHARAKH ("Ramharakh")

PAUL GEORGE SHAUN COTCHOBOS ("Cotchobos")

RAJANDRAN PERUMALSAMI APPADU ("Appadu")

6.1 Where the process of splitting the posts has been completed, that the Department restore the member (s) affected thereby to the post of Finance and Systems Manager;

6.2 Where the process of splitting the posts has not been completed, that the Department be interdicted and prohibited from continuing with the process of splitting the post of Finance and Systems Manager until it has consulted with and obtained the consent of the affected member(s) thereto.

6.3 In the alternative to prayers 1 and 2, that the Department be ordered to pay compensation to the affected member(s) in the amount of 12 months remuneration, such payment to be effected within 14 days of date of award, with interest on such amount to run at the prescribed rate from 14 days after date of award.

#### 6.4 Costs

### 7. SURVEY OF EVIDENCE

The applicants in this matter initially approached the Labour Court on an urgent basis to interdict the respondent from proceeding with its restructuring of its Finance Department. The respondent opposed the application and the Labour Court did not find that there sufficient grounds to grant the order. The

thrust of the contention of the applicant was that they were not consulted in the process and the Court found and directed that the matter be ventilated at arbitration.

The applicants are aggrieved that the respondent had not complied with its submission to the Court and requires a determination of the matter.

#### ANALYSIS OF EVIDENCE AND ARGUMENTS

8. In the absence of any counter evidence from the Respondent I have to accept the evidence of the applicants. In accepting such evidence as probable, I find that the applicants had discharged the onus that the respondent had perpetrated an act of unfair labour practice against the applicants and granted the relief as prayed.
9. Further should the respondent disagree with the above finding it has the right to apply for the order to be rescinded.

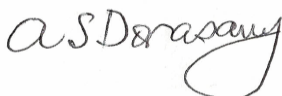
Further I have considered the issue of costs and do not believe that the respondent should be saddled with a cost order against it as it may explain the reasons for not making any submissions.

I accordingly make the following award:

10. Where the process of splitting the posts has been completed, the Department/respondent must restore the applicant (s) affected thereby to the post of Finance and Systems Manager;
11. Where the process of splitting the posts has not been completed, that the Department/respondent is interdicted and prohibited from continuing with the process of splitting the post of Finance and Systems Manager until it has consulted with and obtained the consent of the affected applicant(s) thereto.
12. There is no order as to costs

DONE AND SIGNED IN DURBAN ON THIS 11 DAY OF OCTOBER 2012.

*Signature*



Arbitrator: Anand Dorasamy

( AWARD ULP LABUS DEMOTION )