



ARBITRATION AWARD

Commissioner: **Ncumisa Bantwini**

Case No: **PSHS682-18/19**

Date of award: **6 March 2019**

In the matter between:

DENOSA obo Martha Nosipho Sipamla

(Union/ Applicant)

and

Department of Health – Eastern Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was heard on 30 January 2019 at the respondent's premises in Sterkspruit. It came before the PHSDSBC in terms of Section 24 (2) 24 (5) of the Labour Relations Act, 66 of 1995, as amended (LRA) for interpretation or application of collective agreement (OSD Resolution 3 of 2007) dispute. Mr. Sivuyile Sikwe, an official from DENOSA appeared for the applicant, Mrs. Martha Nosipho Sipamla while Mr. Luvuyo Busakwe appeared for the respondent, the Department of Health-Eastern Cape.
2. The referring party started to lead evidence and called the applicant as the only witness to testify. The respondent did not lead evidence. Parties were allowed to submit written closing on 13 February 2019. The proceedings were electronically recorded.

ISSUE TO BE DECIDED

3. The issue in dispute in this matter is about the correct interpretation and application of Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution 3 of 2007, in particular, clause 3.2.5.3 thereof.

BACKGROUND TO THE DISPUTE

4. The applicant, Mrs. Martha Nosipho Sipamla is employed by the respondent as a Professional Nurse and is based at Mosong Clinic in Sterkspruit.
5. She referred a dispute to the PHSDSBC through her union regarding refusal of the respondent to correctly translate her to speciality stream as she claims she was performing duties of a professional Nurse at the clinic as at 30 June 2007 which is primary health care facility (PHC).
6. The dispute was conciliated and it remained unresolved. The applicant, through DENOSA, requested arbitration.

Survey of Evidence

7. According to Mr. Sikwe's opening statement, the dispute relates to interpretation and application of OSD Resolution 3 of 2007. The applicant is a permanent employee of the respondent since 2004. When the OSD Resolution was implemented, she was placed in Palmietfontein clinic performing duties of a Professional Nurse. The applicant was translated as PNA 1 in the general instead of specialty stream although clinics are Primary Health Care facilities (PHC).
8. The applicant as at 30 June 2007 was performing duties of a Professional Nurse in primary health care facility which is a specialty area in terms of the OSD Resolution 3 of 2007. When the OSD was implemented in 2009, she was translated to General stream.
9. The applicant seeks to be correctly translated to specialty stream and be paid with retrospective effect from 01 July 2007 as a remedy.
10. **Mrs. Martha Nosipho Sipamla**, the applicant testified as follows:

11. She works for the respondent as a Professional Nurse and is based in Mosong Clinic which is a primary health care unit (PHC) in Senqu District ever since she obtained Community Nursing Science in 2005. She was working in the same clinic performing duties of a Professional Nurse at 30 June 2007. Her Supervisor at the time was Ms. Mbolekwa and she instructed her to perform duties of a Professional Nurse.

12. When OSD was implemented in 2009, she was based at Palmietfontein Clinic carrying out duties of a Professional Nurse and was permanently employed by the respondent. The applicant made reference to clause 3.2.5.3 of the Resolution 3 of 2007 which reads:

13. 3.2.5.3 Translation of Professional Nurse(Registered Nurse) to specialty posts

(i) A Professional Nurse(Registered Nurse) who occupies a post in a nursing specialty and who-

(a) Is in possession of post-basic clinical nursing qualifications listed in Government Notice R212 , as amended, shall translate to the appropriate specialty post: and

(b) Is not in possession of a post –basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been permanently appointed in a post in a specialty unit and has been performing these duties of a specialty post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level

(ii). A Professional Nurse (Registered Nurse) referred to in (i) (b) shall not progress by means of grade progression to the higher salary scale attached to the post in the clinical specialty without first having obtained the required educational qualification in the clinical specialty listed in Government Notice R212” page 7.

14. The applicant testified further that she was supposed to have been translated once-off in terms of Grand Fathers clause as she was working in the primary health care unit as a Professional Nurse as at 30 June 2007. Her notch is currently R272 268 per annum where as she is supposed to be at R340 431 per annum if she was correctly translated in 2007.

15. Under cross-examination, the applicant testified as follows:

16. She is employed as a Professional Nurse in Palmietfontein Clinic /primary health care unit which is a specialized area. As at 30 June 2007 she employed as an Enrolled Nurse but she was performing functions of a Professional Nurse as allocated by her Supervisors.
17. Under re-examination, the applicant confirmed that she was performing duties of a Professional Nurse and she was a permanent employee of the respondent. Messrs. Ndleleni and Mbolekwa instructed her to perform the duties verbally. She completed her General Nursing science in 2004.
18. The applicant seeks translation to speciality stream in terms of Resolution 3 of 2007 with effect from 01 July 2007 as a remedy.
19. In closing, Mr. Sikwe argues as follows:
20. The case relates to interpretation and or application of collective agreement PHSDSBC resolution 3 of 2007 (OSD for nurses).
21. The Arbitrator is required to interpret the clause: 3.2.5.3 on translation of Professional Nurses.
22. As at 30 June 2007, the applicant was a permanent employee of the respondent and was performing duties of a Professional Nurse in primary health care unit. This evidence was not disputed by the respondent.
23. Mr. Sikwe finally prayed that the respondent translate the applicant with immediate effect to the position of PN-B1 Grade 1 (Clinical Nurse Practitioner) remunerated at R340,431 per annum and back pay with effect from 01 July 2007.

The Respondent's case

24. The respondent did not lead evidence.
25. In closing, Mr. Busakwe argued as follows:

26. The applicant's application is 10 years out of time and that an application for condonation should have been filed with the PHSDSBC. This means that the PHSDSBC does not have jurisdiction to deal with the case.
27. It must be noted that this case was conciliated, arbitrated and no issue of jurisdiction was ever raised by parties until it was finalized. It is trite law that any issue of jurisdiction should have been raised as a preliminary issue and be determined before the commencement of arbitration process. The jurisdictional point raised by the respondent's representative cannot be entertained.
28. Mr. Busakwe further submitted that the applicant was correctly translated as an Enrolled Nurse when OSD was implemented. He further stated that although the applicant qualified as a Professional Nurse in 2004 she was translated as a Staff Nurse as there was no position of a Professional Nurse in the clinic as translation is not automatic. In 2009, the applicant was correctly translated as a Staff Nurse in General Stream as she did not possess a Nursing Science qualification.
29. The fact that the applicant was working in a clinic as at 30 June 2007 does not mean that she was supposed to have been translated to specialty stream. The applicant was correctly translated as a Staff Nurse in terms of the OSD Framework.
30. The respondent's representative finally argued that the applicant has failed to discharge her onus of proving that she was incorrectly translated when the OSD Resolution was implemented in 2009.

ANALYSIS OF EVIDENCE AND ARGUMENTS

31. I am required to interpret OSD Resolution 3 of 2007 regarding a claim of incorrect translation of the applicant from general to speciality stream and make a determination thereof.
32. It is common cause that the applicant was translated once-off in terms of Grand- Father's clause to the general stream in 2009 when the OSD Resolution was implemented.

33. Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.

34. The objectives of the OSD for nurses are:¹

1.1 To introduce an occupational specific remuneration and career progression system for Professional Nurses (Registered Nurses). Staff Nurses (Enrolled Nurses) and Nursing Assistants (Enrolled Nursing Assistants) who fall within the registered scope of PHSDSBC that provides for –

1.1.1 career pathing;

1.1.2 pay progression;

1.1.3 grade progression;

1.1.4 recognition of appropriate experience;

1.1.5 increased competencies

1.1.6 and performance

with a view to attracting and retaining nursing professionals in all the identified occupations to the public health sector.

1.2 To introduce differentiated salary scales for identified categories of nursing professionals based on a new remuneration structure.

1.3 To incorporate the existing scarce skills allowance payable to identified categories of speciality nurses into salary.

3.1.3.2. Posts in Specialty Nursing refer to those positions where a post-basic qualification listed in GN R212 is an inherent requirement to perform the duties attached to the post. This also includes similar post-basic qualifications with duration of at least one year in the relevant specialty recognized by the SANC prior to the publishing of GN R212.

35. Clause 3.2.5.3 of the Resolution 3 of 2007 on *Translation of Professional Nurse(Registered Nurse) to specialty posts* provides:

¹ Clause 1 of the OSD for nurses.

- (i) *A Professional Nurse (Registered Nurse) who occupies a post in a nursing specialty and who-*
 - (a) *Is in possession of post-basic clinical nursing qualifications listed in Government Notice R212, as amended, shall translate to the appropriate specialty post: and*
 - (b) *Is not in possession of a post –basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been permanently appointed in a post in a specialty unit and has been performing these duties of a specialty post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level.*
- (ii) *A Professional Nurse (Registered Nurse) referred to in (i) (b) shall not progress by means of grade progression to the higher salary scale attached to the post in the clinical specialty without first having obtained the required educational qualification in the clinical specialty listed in Government Notice R212” page 7.*

36. The words used by the parties in clause 3.2.5.3 of the OSD for nurses are very clear and unambiguous. For a professional nurse to be translated to an appropriate specialty post he/she had to have a post-basic clinical nursing qualification listed in Government Notice R212. If the professional nurse does not have the said post-basic clinical nursing qualification listed in Government Notice R212, he/she had to be a nurse who has been permanently appointed in a post in a specialty unit and who had been performing the duties of the specialty post satisfactorily on 30 June 2007. The latter would be translated as a once-off provision to the first salary scale. It is common cause that the applicant was translated in terms of the latter provision.

37. As stated above, for a professional nurse to be translated to an appropriate specialty post he/she had to have a post-basic clinical nursing qualification listed in Government Notice R212. The applicant was not in possession of a post-basic clinical nursing qualification listed in Government Notice R212 as at 30 June 2007. Accordingly, she could not be translated in terms of clause 3.2.5.3(i)(a) of the OSD for nurses.

38. It is common cause that the applicant was not in possession of a Government Notice R212 post-basic qualification as at 30 June 2007. It is also common cause that the applicant was registered with SANC as an Enrolled Nurse and was permanently appointed as such as at 30 June 2007. It is therefore common cause that the applicant was not appointed in a post in a specialty unit and has been performing these duties of

the specialty post satisfactorily on 30 June 2007 as required by clause 3.2.5.3(i)(b) of the OSD for nurses.

39. It must be noted that the applicant claims that she was appointed by her supervisors to perform duties of a Professional Nurse. No documentary evidence was submitted nor witnesses called to support this claim. Accordingly, the onus and evidential burden was on her to prove on a balance of probabilities the foundation of her claim.

40. On the evidence that has been placed before me, I am satisfied that the respondent correctly applied and interpreted clause 3.2.5.3 of the OSD for nurses.

41. The applicant therefore, did not qualify for translation in terms of the provisions of clause 3.2.5.3(i)(b) of the OSD for nurses. Her claim of incorrect translation therefore fails.

AWARD

42. I make the following award:

43. The respondent correctly interpreted and applied clause 3.2.5.3 of the OSD for nurses.

44. The applicant's claim of incorrect translation is hereby dismissed.

45. I make no order of costs.



Signature

Ncumisa Bantwini