PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panelist: **C S Mbileni**
Case No: **PSHS905-13/14**
Date of award: **5 August 2014**

In the ARBITRATION between:

HOSPERSA obo Mokoena, AN **Applicant Party**

and

Department of Health: Mpumalanga **Respondent Party**

Details of hearing and representation:

[1] The arbitration was set down in terms of s24(2); [24(5))] of the Labour Relations Act [the "LRA"] 66 of 1995 as amended. The hearing was held on 14 July 2014 in the Boardroom of the Administration Block at Sabie Hospital, Sabie in Mpumalanga.

[2] Mr. Jabulani J. Mashego from HOSPERSA appeared for the Applicant, Ms A. N. Mokoena and Mr. Jerry G. Mnisi represented the Respondent at the arbitration proceedings. The Applicant's Representative had one witness, the Applicant and the Respondent's Representative called two witnesses, Nursing Service Manager and HR Practitioner and all three agreed to testify under oath.

[3] At the close of the arbitration proceedings, parties elected to be afforded an opportunity to prepare written Heads of Argument and submit same via email to the panellist on Tuesday, 22 July 2014. It was the understanding of all the parties that the arbitration award would be issued within the 14-day time period as provided for in the LRA. The arbitration award, the bundle of documents and electronic version of the award were submitted to the Council.

Issue to be determined:

[4] The issue to be determined is whether or not the Applicant qualifies to be translated in terms of Resolution 3 of 2007, i.e. the Occupational Specific Dispensation (OSD) Agreement.

Background to the issue:

[5] The Applicant is an Employee of the State, appointed as a General Nurse at Sabie Hospital. The Applicant was allocated at Casualty Unit with effect from 1 June to 30 June 2007.

[6] The Applicant went to study for Midwifery from July 2007 through to July 2008 at Rob Ferreira Hospital. After her study, the Applicant was allocated at the Female General Ward instead of the Casualty Unit.

[7] The Applicant's Representative presented Bundle A and the Respondent's Representative had also presented Bundles B and C, which were discovered.

The Applicant's case and argument:

[8] The Applicant, Ms A. N. Mnisi testified that on 1 June 2007, she was allocated at Casualty Unit where she worked until 30 June 2007. The allocation and length of the period of allocation was determined by the Nursing Service Manager.

[9] The Applicant further testified that she performed all the duties, including emergency duties, calling doctors, assessing patients and running the Ward alone when other Professional Nurses were off duty. The Applicant received an increase in salary but not translated like others in the Unit in terms of paragraph c on page 8 of Bundle A.

[10] The Applicant further testified that in terms of the SANC Regulation 212 read with the DPSA Directive, as a Professional Nurse she should have been translated to R160 000 because she was performing emergency duties.

[11] During cross-examination by Mr. Jerry G. Mnisi, the witness Ms Mokoena confirmed that in June 2007, she was allocated at Casualty Unit for one month and that all allocations were determined by the Nursing Service Manager. The witness further confirmed that her salary changed from a certain salary level to a higher salary level.

[12] The witness, Ms Mokoena further confirmed that she was not permanently appointed at Casualty Unit. The witness testified that the nurses referred to are all Nurses that meet the requirements of the OSD Agreement who must translate to the OSD based on the duties they were performing as at 30 June 2007 [**Para 3.3.3 on Remarks, p10 of Bundle A**].

[13] The witness, Ms Mokoena further testified under cross-examination that two Professional Nurses including herself out of three were not translated in terms of the Grandfather Clause.

In closing the Applicant's case, Mr. Mashego contended as follows:

[14] Mr. Mashego argued that the Nursing Service Manager, Ms Lekhuleni stated that nurses were rotated to cover wards and nurses were not appointed permanently to a specific unit. The only exception is when a specific nurse is in possession of a specific qualification and that nurse would be appointed in terms of that specific qualification.

[15] Mr. Mashego further argued that Ms Lekhuleni stated that the Emergency Care Unit is a Specialty Unit which caters for patients who need specialty care [**Bundle C read with para 3.21 of the Arbitration Award, 2009**].

[16] Mr. Mashego further argued that on 30 June 2007, the Applicant was allocated in the Emergency Care Unit [**Bundle B**]. Ms Lekhuleni has failed to confirm that the Applicant was performing duties that are related to the Emergency Care Unit/Casualty Unit but allowed to perform duties that are different from those in the specialty unit.

[17] Mr. Mashego contends that there was no need for the Applicant to be appointed in a post in order to qualify for translation in terms of the Grandfather Clause [**Bundle C read with para 3.21 of**

Arbitration Award, 2009]. This makes a provision for one to be translated based on the duties she was performing on 30 June 2007 and the Applicant met this requirement.

[18] Mr. Mashego further contends that there was no need for the Applicant to have experience as a minimum requirement to qualify for translation in terms of the Grandfather Clause [**Bundle C read with para 3.21 of Arbitration Award, 2009**]. Mr. Mashego argued that the action of the Nursing Service Manager contributed to selective translation.

[19] Mr. Mashego submitted that the Respondent's second witness, Mr. Nyandeni confirmed that the Applicant was not appointed as a full time employee in Emergency Care Unit but remained an employee of Sabie Hospital. The issue of rotation was outside his scope and the allocation list was handled by the Nursing Service Manager.

[20] Mr. Mashego further submitted that Mr. Nyandeni has confirmed that he was not responsible for appointing Nurses but his role was to compile submissions to the HoD. All the translations were based on the decisions of the Hospital Task Team, comprising of HR, Nursing Service Manager and Operational Manager including other stakeholders.

[21] Mr. Mashego further submitted that Mr. Nyandeni has confirmed that the Applicant did not have experience in Emergency Care Unit – this is misleading and it resulted in selective translation. The allocation of the Applicant in June 2007 suggested that Emergency Care Unit is a specialty unit dealing with patients requiring specialised care [**Bundle B**].

[22] Mr. Mashego submitted that Mr. Nyandeni has confirmed that the Applicant's translation into the General Stream was based on the submissions of the Hospital Task Team. The Respondent's witness mentioned the minimum requirement which Resolution 3 of 2007 read with the Arbitration Award, 2009 do not provide for a minimum requirement. The Respondent was misled by the Hospital Task Team which resulted in selective translation in terms of the Grandfather Clause.

[23] Mr. Mashego submitted that the Applicant should be translated in accordance with Resolution 3 of 2007 read with the Arbitration Award, 2009 which provide for her to be translated in terms of the Grandfather Clause retrospective to 1 July 2007.

The Respondent's case and argument:

[24] The Respondent's ***first witness*** Ms Mantombi Lizzy Lekhuleni testified that she is the Matron of Sabie Hospital. Ms Lekhuleni's duties include, inter alia; managing the Nursing Component of the hospital, allocating nurses to balance the wards, allocating nurses for leave by ensuring that wards are properly covered on an annual basis, responsible for quality care in the wards, ensuring that Professional Nurses are assessed, attends to Professional Nurses' Meetings, Staff Nurses' Meetings, Extended Management Meetings, the Nurses' Managers' Forum Meetings and Provincial Meetings. She is also responsible for developing and empowering nurses in their Nursing Career. She attends to Labour organisations' meetings.

[25] Ms Lekhuleni testified that the Applicant, Ms Mokoena was allocated at Emergency Unit which is Casualty Department for one month and then she went for development in July 2007 to July 2008. When the Applicant returned after completing her study, she was allocated in General Female Ward on night duty because she had not qualified as a Midwife.

[26] Ms Lekhuleni further testified that the Applicant was not reallocated to the Emergency Unit in Casualty because she was not specializing in that and other nurses were allocated in Casualty Unit

when she went for development. The Applicant could not be translated because she was not permanently appointed in the Emergency Unit in Casualty Department [**Para c, p5 of Bundle C**].

[27] Ms Lekhuleni further testified that the Applicant was a Staff Nurse yet to be a Registered Nurse which made her salary to change. The Mokoena Staff Nurses were not being discriminated but they were following Resolution 3 of 2007.

[28] Ms Lekhuleni further testified that if one has nurses and they continue to work in that Unit, they would benefit from the Grandfather Clause. The Applicant did not have the specialty qualification to benefit in terms of the Grandfather Clause [**Para 3.3.3, p10 of Bundle A**]. One Nurse benefited in terms of the Grandfather Clause because she had the qualification.

[29] During cross-examination by Mr. Mashego, the witness Ms Lekhuleni testified that Sabie Hospital is a small hospital. Nurses are rotating on monthly basis to close gaps when someone goes on leave. Casualty falls under Specialty and the Applicant as a Single Professional Nurse; she would check the severity of the injury and call the doctor to manage the patient.

[30] Ms Lekhuleni further testified during cross-examination that those who benefited from the Grandfather Clause would have Trauma Qualification and experience. Nurses were allocated even before the OSD was introduced; a nurse had to be in that Unit continuously though not Specialty. In terms of the Remarks under paragraph 3.3.3 on page 10 of Bundle A, a nurse can be in Specialty Unit but not performing duties of the Unit. A nurse would need knowledge, skill, experience and qualification.

[31] Ms Lekhuleni testified that what guides a nurse to be permanently appointed is that in Maternity, the Midwives have Advanced Qualification and in Theatre, Professional Nurses are not rotated and at Sabie Hospital rotation is occurring because the hospital is small.

[32] Ms Lekhuleni denied that the Applicant was not allocated permanently because she did not possess specialty qualification; she did the allocation to cover the institution. Ms Lekhuleni confirmed that the Applicant was not permanently appointed in the Casualty Unit [**Para c, p8 of Bundle A; para c, p5 of Bundle C and para b, p8 of Bundle C**].

[33] The Respondent's ***second witness*** Mr. Liftos Nyandeni gave evidence and stated that he is appointed as the Chief Personnel Officer and his duties include HR Admin, Service Conditions, performance management and development systems and ensuring budgeting.

[34] Mr. Nyandeni testified that he was part of the Hospital Task Team in December 2007 which did allocations and translation for Nurses in terms of the OSD Agreement. The Task Team found that the Applicant was not permanently appointed at Sabie Hospital as at 30 June 2007. The Task Team also found that the Applicant was not performing duties of Specialty Post. The Task Team then translated the Applicant for General Stream, taking into account her experience as a Professional Nurse. The witness was advised by the Operational Manager and Matron that the Applicant was performing general duties.

[35] Mr. Nyandeni further testified that the Applicant could be translated in terms of Grandfather Clause if she was performing duties of Specialty and she could benefit.

[36] During cross-examination by Mr. Mashego, the witness Mr. Nyandeni testified that the Applicant was allocated in Casualty Unit which is categorized as a Specialty Unit. The process of translation happened in December 2007 when the Applicant was translated into General Stream but backdated to 1 July 2007. The Task Team of Sabie Hospital found one employee who was trauma

trained as she was permanently employed and the other nurses were translated into General Stream.

[37] Mr. Nyandeni confirmed that the Applicant was found not to have been permanently appointed, she was not performing specialty duties and therefore she did not qualify for Grandfather Clause and she was then migrated to General Stream. Mr. Nyandeni admitted that the Applicant was allocated in Casualty Unit but not permanently appointed.

[38] Mr. Nyandeni testified that it is possible to perform general duties in Specialty Unit in terms of Clause 3.21, page 11 of Bundle C. In Casualty Unit, there are different categories, e.g. two were not trained and one was trauma trained. Mr. Nyandeni stated in conclusion that the Applicant did not meet the requirements.

[39] In closing the Respondent's case, Mr. Mnisi presented the following arguments:

[39.1] It has been shown through oral and documentary evidence that the Applicant was allocated to do general nursing duties in the Casualty Unit from 1 to 30 June 2007. Bundle B is an extract from the Allocation Book and it was not rebutted.

[39.2] The Respondent introduced pages 5, 8 and 11 of Bundle C to demonstrate the interpretation and application of Resolution 3 of 2007 against the claim raised by the Applicant with specific reference to Clause 3.2.5.3 (i)(b) which stated that:

> **"**A Professional Nurse (Registered Nurse) who occupies a post in a nursing specialty and who 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 the 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.**"**

[39.3] Resolution 3 of 2007 is binding to all parties; therefore no party should add or detract the provision of the resolution in interpretation and application, hence it was the argument of the Respondent in the interpretation and conception of the resolution is distinctive and clear in that regard is a collective agreement espoused by s23 read with s31 of the LRA, 66 of 1995.

[39.4] The Applicant used Bundle A, an extract of the Arbitration Award which invariably supported the Respondent's case which stated that:

> **"**A Professional Nurse (Registered Nurse) who occupies a post in a nursing specialty and who is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been <u>permanently appointed in a post</u> in a specialty unit and has been performing these duties of the 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.**"**

[40] In conclusion, the Respondent prays that the commissioner finds that the Applicant's claim is unfounded and it must be dismissed.

Analysis of submissions and the application of law:

[41] A collective agreement is defined in the LRA and Basic Conditions of Employment Act as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between one or more registered trade unions, on the one hand, and on the other hand, one or more registered employers' organisations, or a combination of employers and employers'

organisations [**Section 213 of the LRA read with Diamond & others v Daimler Chrysler (Pty) Ltd & others (2006) 27 ILJ 2595 (LC) at [27]]**.

[42] HOSPERSA is one of the signatory unions in the Arbitration Award of 2009 with the Employer. HOSPERSA referred a dispute on behalf of its member in terms of s24(2), [24(5)] of the LRA. The dispute relates to the interpretation and application of Resolution 3 of 2007. I am required to determine whether or not the Applicant qualifies to be translated in terms of the OSD Agreement, i.e. Resolution 3 of 2007.

[43] A dispute over the *interpretation* of a collective agreement exists if the parties disagree over the meaning of a particular provision. A dispute over the *application* of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances [**Grogan *Collective Labour Law* at 132**].

[44] An agreement must comply with the statutory requirements of a collective agreement in order to be interpreted and applied in terms of the LRA. The question that arises is whether or not a collective agreement is to be interpreted according to the ordinary principles used in interpreting contracts, or do other considerations apply?

[45] The primary purpose in interpreting collective agreements must therefore be to ascertain what the parties had intended and to this end, the common law canons of contractual interpretation may offer guidance [**UWCASA & others v University of Western Cape [2002] 5 BLLR 487 (LC); NUMSA v Volkswagen of South Africa (Pty) Ltd [2002] 1 BALR 1 (P)**]. Thus:

[45.1] Where the wording of the agreement is clear and unambiguous; the parties may not rely on evidence beyond what is embodied in the document to demonstrate their intentions at the time it was concluded.

[45.2] The words in the agreement must be given their ordinary grammatical meaning and must be interpreted in the context of the agreement as a whole [**Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National bank Ltd 1974 (1) SA 641 (A)**].

[45.3] Where words are unclear and ambiguous, regards may be had to the circumstances surrounding the agreement such as previous negotiations between the parties, correspondence between them and the manner in which they acted on the document [**Coopers and Lybrand & Others v Bryant 1995 (3) SA 671 (A) at 768**].

[46] I am guided by the Labour Appeal Court in **North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others (1997) 18 ILJ 971 (LAC)**, the Labour Appeal Court pointed out that 'a collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from that of an ordinary commercial contract at 979F.'

[47] The Applicant's dispute as I understand it is around the interpretation and application of Clause 3(c) on page 5 of Bundle C; Clause 3.2.5.3 (i)(b) on page 8 of Bundle C read with Clause 3.21.1 on page 11 of Bundle C. It is common cause that the Applicant was allocated in Casualty Unit for the month of June 2007. It is common cause that at the time, the Applicant was not permanently appointed in a specialty post.

[48] P Clause 3.21.1 on page 11 of Bundle C captures the Area of Dispute as **Non Translation of Nurses in Casualty Units:** These Nurses translate under Specialty as trauma and emergency qualification recognized under R212. The Remarks to this area of dispute state that:

"Parties agree that all Nurses that meet the requirements of the OSD must translate to the OSD based on the duties they were performing as at 30 June 2007.

Parties agree that trauma is a specialty Nursing area, but do not support the inclusion of all Nurses employed in trauma units to be translated to the specialty stream..

Parties agree that Clauses 3.1.3.2 and 3.2.5.3 of PHSDSBC Resolution 3 of 2007 apply".

[49] The question is whether or not the Applicant met the minimum requirements of the OSD contemplated in the collective agreement as at 30 June 2007. In my view, the Respondent's witnesses have given incontrovertible evidence to support the Respondent's case as reflected below:

[49.1] The Applicant was not permanently appointed in Casualty Unit but allocated for one month, i.e. 1 to 30 June 2007;

[49.2] The Applicant did not have Specialty qualification such as trauma as at 30 June 2007;

[49.3] The Applicant did not have 20 years of experience to benefit from the Grandfather Clause

[50] A collective agreement binds the parties to the collective agreement [**s23(1)(a) of the LRA**]. Resolution 3 of 2007 for Nurses is a collective agreement and it complies with the provisions as contemplated in s23 of the LRA. The Applicant bears the onus to prove that the Respondent acted unfairly in its interpretation and application of Resolution 3 of 2007. In my view, the Applicant has not established any apparent deviations or failure to interpret or apply the provisions of Resolution 3 of 2007.

[51] In the light of the above facts, analysis and the application of law, the Applicant did not successfully discharge its onus to prove on a balance of probabilities that the Respondent failed to interpret and apply Resolution 3 of 2007 in translating the Applicant. I deem it appropriate to make the following award:

Award:

[52] The Applicant has not discharged its onus to prove that the Respondent failed to interpret and/or apply the applicable provisions of Resolution 3 of 2007 in translating the Applicant.

[53] I Applicant's application is hereby dismissed.

[54] I make no order of costs.

Signed and dated at Johannesburg on this the 5th day of August 2014.

Panellist: _____
Chris Sizili MBILENI.