ARBITRATION AWARD

Case No: **PSHS115-22/23**

Commissioner: **Tebogo Morajane**

Date of award: **24 August 2022**

In the matter between:

NEHAWU obo NTINTELO MKHULULI (Union/Applicant)

and

DEPARTMENT OF HEALTH- NORTHERN CAPE (Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The Applicant referred a dispute relating to the interpretation and application of the collective agreement. The matter was referred in terms of **sections 24(2) and 24(5) of the Labour Relations Act 66 of 1995, as amended** (LRA).

2. The Applicant was present and represented by Mr Mlawuli Munye, a regional organiser from the National Education, Health & Allied Workers Union (NEHAWU). Mr Keetile Boikanyo was the observer from NEHAWU.

3. The Respondent was represented by Mr Paul Koopman, the acting Assistant Director, Labour Relations, Department of Health (DOH). Mr Sipho Nonyane was the observer from the DOH.

4. The proceedings took place on 11 August 2022 at the Kimberley Hospital Complex. The proceedings were recorded.

5. The parties had attempted to reach a settlement on the matter. The Respondent's representative was conceding to the Applicant's claim but preferred an authoritative outcome like a Ruling than a settlement agreement. On that basis I required parties to address me. I have issued an Award than a Ruling, as the process that was before me was an Arbitration.

ISSUE TO BE DECIDED

6. The dispute concerns the interpretation and application of clauses 3.1 to 3.5 of Resolution 1 of 2002 in relation to payment of an acting allowance.

BACKGROUND TO THE DISPUTE

7. The Applicant referred a dispute to the Bargaining Council on 13 May 2022 in terms of section 24(4) of the Labour Relations Act.

8. The matter was set down for Conciliation of 3 June 2022. A certificate of no resolution was issued as parties could not resolve the dispute. The matter was then referred to Arbitration of 29 June 2022.

9. The matter was then set down for Arbitration on 11 August 2022 at the Kimberley Hospital Complex.

SURVEY OF EVIDENCE AND ARGUMENTS

*Mr Ntintelo Mkhululi made the following submission***:**

10 He was appointed as a Director Emergency Medical Services. He was appointed to act in the position of Chief Director Emergency Medical Services. The position he was appointed to was a higher position than his current position.

12. His appointed was in writing and was effected by the Head of the Department. His appointment was an open appointment which was effective from 1 December 2017.

13. He acted in the position of Mr Richard Jones, who was in turn appointed to act in the position of the Chief Executive Officer in the Kimberley Hospital. He was therefore appointed in a position that was not vacant, as Mr Richard was still in the employ of the Department.

14. He always performed his acting duties with diligence and delivered accordingly as evidenced by his assessments. He was not paid an acting allowance when the position he acted in was not vacant.

15. On 17 September 2020, he learned that some of his colleagues, who were in possession of the appointment letters similar to his and who were also acting in the positions that were not vacant, were paid acting allowances. Dr Faki from the Prixley Ka Same District and Mr Taolo from the John Taolo District are examples of such colleagues. Dr Faki and Mr Taolo acted as Directors in the positions that were not vacant, but were both paid acting allowances.

16. He lodged a dispute in September 2020 as the employer was inconsistent in treating him differently from his colleagues. He is still acting in the position of Chief Director. The position of Chief Director is currently vacant as Mr Jones resigned in August 2021. He has been paid an acting allowance for the past six months. However his acting allowance has not been paid from 1 June 2022 to date. His current acting

position is until end of November 2022 as his appointment to act is no longer open, but is for a period of six months.

ARGUMENT FOR THE RESPONDENT

Mr Paul Koopman made the following submission on behalf of the Respondent:

17. It was common cause that the Applicant acted in a higher position for a period longer than 6 weeks. It was also common cause that the Resolution 1 of 2002 required the Respondent to pay acting allowance where acting was not a position that was vacant. It was also common cause that the Resolution 1 of 2002 was binding on the parties to the resolution.

18. Respondent did not dispute the alleged inconsistent application of Resolution 1 of 2002 and would verify the alleged inconsistent application of Resolution 1 of 2002 to employees who were paid an acting allowance differently from employees like the Applicant.

19. Mr Koopman agreed that the Respondent should not act inconsistent towards its employees.

ANALYSIS OF SUBMISSIONS

20. A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision within the collective agreement, and a dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to a particular circumstance(s).

21. In the matter before me, the parties requested me to interpret the provisions of clause 3.1 to 3.5 of Resolution 1 of 2002 on the payment of acting allowances. There is no dispute as to whether Resolution 1 of 2002 is binding. NEHAWU and the Department of Health are parties to this collective agreement. The binding effect of collective agreements is given effect to by section 23 of the LRA.

22. In ***HOSPERSA obo Tshambi v Department of Health, Kwa-Zulu Natal*** **(2016) 37 *ILJ* 1832 (LAC)** the Labour Appeal Court pointed out that a dispute over the interpretation and application of a collective agreement exists where the parties disagree over the meaning and application of a clause in the agreement.

23. In the Labour Appeal Court case of ***Western Cape Department of Health v Van Wyk & Others*** **(2014) 35 *ILJ* 3078 (LAC) para 22** the court held that:

> In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

24. Furthermore, in the absence of any ambiguity, the words in the collective agreement must be given their plain, ordinary and literal meaning (see the unreported case of ***Dalubuhle Uys Mfiki v GPSSBC & Others*** **Case No PR110/16, Delivered 13 February 2018)**.

25. In applying the approach per Tlaletsi DJP in ***Western Cape Department of Health v Van Wyk & Others*** I am required, in interpreting the collective agreement before me, to consider the aim, purpose and *all the terms of the collective agreement* (my emphasis) and not only the provisions of clause 3.1 to 3.5.

26. In the matter before me there was no disagreement and no dispute that clause 3.1 required payment for acting when the following requirements are met, namely:

26.1. When an employee is appointed in writing to a higher position than his/her current position: per clause 3.2

26.2. When the appointment is duly authorised by an authorised person like the Head of the Department or his delegate: per clause 3.1.

26.3. When the position is vacant and funded: per clause 3.1.1.

26.4. When the period for appointment is for a period longer than 6 weeks: per clause 3.1.2.

26.5. The employee must accept the acting position: per clause 3.1.4.

26.6. The employee may not act in a higher vacant post for an uninterrupted period exceeding twelve months: per clause 3.6.

27. Furthermore, the parties did not dispute that in terms of Resolution 1 of 2002, payment of an acting allowance was payable when the acting post was vacant and funded. Therefore, in light of the ***HOSPERSA obo Tshambi v Department of Health, Kwa-Zulu Natal*** judgement, there was no dispute before me about the interpretation of a collective agreement. Instead, the Applicant is seeking an order for the payment of an acting allowance, in a non-vacant position, similar to what was allegedly an unfair payment to his colleagues who had equally acted in the non-vacant positions. In addition, the Applicant was seeking payment for the period of June 2022 to the current period, when he acted in an authorised, vacant and funded position.

28. To fall within the scope of section 24(4), the dispute must concern the interpretation or the application of the agreement, not the fairness of its application. See *PSA obo Liebenberg v Department of Defence* (2013) 34 *ILJ* 1769 (LC), *Department of the Premier, Western Cape v Plaatjies NO* [2013] 7 BLLR 668 (LC) and *PSA obo Strauss v Minister of Public Works NO* [2013] 7 BLLR 710 (LC).

29. The Applicant alleged that the Respondent acted in contravention of a binding collective agreement in its application of the collective agreement. Indeed section 23 of the LRA recognises the binding effect of a collective agreement and requires parties to the collective agreement to honour the clauses of such agreements. However, the dispute before me is the interpretation and application of a collective

agreement in relation to the non-payment of the acting allowance and it is not the Respondent's contravention of the provisions of the collective agreement. I therefore have no jurisdiction to pronounce over the Respondent's alleged contravention of the provisions of the collective agreement.

30. With regard to unfairness resulting from the inconsistent non-payments that the Applicant was seeking an order for payments thereof, I find that I do not have powers to make an order on the unfairness of the inconsistent application of Resolution 1 of 2002. I also do not have powers to compel the Respondent to pay the Applicant acting allowances that were based on the unfair and inconsistent application of the collective agreement. The Applicant referred an interpretation and application of a collective agreement dispute. It is the Applicant's referral that determines what I am mandated to order upon and the powers I have.

31. With regard to the application of clause 3 of Resolution 1 of 2002 to the Applicant's current acting position which is vacant and funded, the Applicant has alleged that the employer has, following the resignation of Mr Richard Jones in August 2021, appointed him to act in a six monthly vacant and funded position of Chief Director, and has paid him acting allowances of R13 693.25 until end of May 2022. The Applicant also alleged that his current acting position is ending in November 2022 and that the employer has not paid him acting allowances from 1 June 2022 to date. As alluded to above, the Applicant referred his dispute on 13 May 2022. The unpaid acting allowance that the Applicant is claiming relates to the period after the referral date of the dispute to Council. I therefore do not have jurisdiction to apply the collective agreement to the events that took place after the date when the dispute was referred as such events had not occurred at the time of referral and as such the referral with regard to the unpaid allowances post 13 May 2022 would have been a premature referral.

AWARD

31. There was no dispute before me about the interpretation of the terms of Resolution 1 of 2002.

32. I have no jurisdiction and powers to pronounce over the alleged unfairness and inconsistent application of Resolution 1 of 2002.

33. I also have no jurisdiction to pronounce over the application of Resolution 1 of 2002 in relation to the unpaid acting allowances post the date of referral of the dispute.

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TEBOGO MORAJANE