



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case no: CA7/13

In the matter between

DEPARTMENT OF CORRECTIONAL SERVICES

(WESTERN CAPE)

Appellant

and

DEMOCRATIC NURSING ORGANISATION OF

SOUTH AFRICA (DENOSA) obo DE ERASMUS

First Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Second Respondent

PH KIRSTEN N.O.

Third Respondent

Heard: 20 May 2014

Delivered: 18 December 2014

Summary: Interpretation and application of a collective agreement: Occupational Specific Dispensation (OSD) for Nurses – translation of employee into the correct position in terms of the OSD – employee a professional nurse managing a nursing speciality unit translated into a lower salary scale- employer contending employee not having necessary qualification to be translated into a higher salary scale- arbitrator upholding employer's contention. Labour Court setting aside arbitrator's award. Appeal – duties performed at the date of the OSD taken into account for the translation of

employee - employee performing managerial function entitled to be translated to the salary scale of manager- Labour Court's judgment upheld – appeal dismissed with costs.

Coram: Tlaletsi DJP, Ndlovu JA et Coppin AJA

JUDGMENT

TLALETSI DJP

Introduction

- [1] This is an appeal by the Department of Correctional Services against a judgment and order of the Labour Court (per Rabkin-Naicker J) in a review application brought in that Court by the first respondent (a trade union - hereinafter referred to as the respondent) against an arbitration award issued by the third respondent (the commissioner) under the auspices of the second respondent, the Public Health and Social Development Sectoral Bargaining Council (the Bargaining Council).
- [2] The arbitration concerned a dispute between the appellant and the respondent, acting on behalf of its member (the employee) employed by the appellant, about the interpretation and application of a collective agreement.

Factual Background

- [3] The factual narrative that led to the dispute is largely common cause. On 10 September 2007, a Collective Agreement as per Resolution No 3 of 2007 was concluded between the State and various other trade unions, including the respondent, representing nurses employed by the State. The Collective Agreement Resolution No. 3 of 2007 is known as the "Agreement on Implementation of an Occupational Specific Dispensation for Nurses" (OSD for Nurses).
- [4] The objective of the OSD for Nurses is recorded in Clause 1 as:

'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.'

[5] Clause 3.2.5.3 deals with the "translation" of a Professional Nurse to a Speciality post and provides that:

'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 speciality 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 speciality unit and has been performing these duties of the speciality 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 a post in the clinical speciality without first having obtained the required educational qualification in the clinical speciality listed in Government Notice R212.

- iii. A Professional Nurse (Registered Nurse) who is managing a nursing speciality unit, and who is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been performing these duties of managing the speciality unit satisfactorily on 30 June 2007, shall be translated as a once-off provision to the appropriate salary scale attached to the corresponding management level.'
[Emphasis provided]

[6] Clause 3.2 of the OSD for Nurses provides that the Minister for Public Service and Administration was required to issue a Directive to give effect to the Collective Agreement for its implementation. The Director General in the Department of Public Service and Administration issued this Directive on 28 September 2007. The Directive incorporated, *inter alia*, the terms of clause 3.2.5.3 of the OSD for Nurses *verbatim*. The directive is known as DPSA Implementation Directive.

[7] It is common cause that on 7 August 2009, a settlement agreement was entered into pursuant to a dispute between the appellant and the trade unions, representing the nurses employed by the State, under case no: PHSHS492-08/09 of the Bargaining Council. Clause 3c of the aforesaid agreement recorded the terms of Clause 3.2.5.3 of the OSD for Nurses *verbatim* and in clause 3a, it recorded that "*The basis of translation to the OSD for Nurses shall be the duties that a Nurse was performing as at 30 June 2007.*" The settlement agreement did however not amend the OSD for Nurses agreement.

[8] According to the employee, prior to the implementation of the OSD for Nurses, on 1 July 2007 she was employed in the position of Head of Department:

Healthcare Services at the Obiqua Correctional Centre in the Allandale Management Area at Paarl, Western Cape. Her duties were of a managerial nature and included administration, supervision and primary healthcare tasks. Her duties prior to the implementation of the OSD for Nurses remained the same after the implementation and she performed her duties satisfactorily. According to her, Obiqua Correctional Centre is a primary health centre and is a speciality unit.

- [9] As at 30 June 2007, the employee was not in possession of a post-basic clinical nursing qualification accredited with the SA Nursing Council in terms of Government Notice R212. She obtained such a qualification in 2009, meaning that she did not hold it at the relevant time for the purposes of the OSD for Nurses. However, despite having been employed as manager of a speciality unit by the appellant on 30 June 2007 and performing such duties satisfactorily, she was not, with the implementation of the OSD for Nurses, translated to what she regarded as the appropriate salary scale attached to the corresponding management level. The corresponding management level of the post of the manager of a speciality unit on 30 June 2007 was the post of Operations Manager: Nursing which carried the minimum salary scale in terms of the OSD for Nurses of R235 000.00 per annum. She was instead translated to a minimum salary scale of R160 000.00 per annum in the first phase of implementation of the OSD for Nurses and later advanced to a salary scale of R183 000.00 in the second phase of implementation.
- [10] The appellant however contended as follows: that the employee had been working as a Clinical Nurse Practitioner at the Obiqua Correctional Centre from 1995 being employed to perform production work. Obiqua is but one of several centres which fall under the management area of Allandale and before July 2007 none of these centres had a financed post of a Section Head, except the Allandale Management area. The employee, as in many other centres, represented her division at meetings and performed the duties of Section Head although that was not her post. She was also not paid as a Section Head. The appellant contended further that it was simply common practice in the Department that where two or more officials on the same rank and salary level

are functioning in the same section, and there is no post for a Section Head, one of the officials is tasked to supervise or act as a Section Head. He/she would however not be paid a salary and benefits if any, of Section Head.

The Arbitration Award

[11] The commissioner made the following remarks in his analysis of the evidence as well as the parties' respective cases:

11.1 The duties performed by the employee were the same as prior the implementation of the OSD agreement for Nurses on 1 July 2007 and they included managerial duties. That was not the only qualification for an employee to be translated to the OSD for Nurses. She did not meet the second qualification in that she did not have a qualification in primary healthcare which she only obtained at the end of 2009.

11.2 The employee was translated to the appropriate salary scale attached to the corresponding "managing level" because she did not have the necessary post basic clinical nursing qualification at the relevant time. She was translated from a clinical nurse practitioner to division head. She was not entitled to be translated to an operational manager post.

11.3 That the appellant did not act inconsistently with reference to Sister Jens who, according to the employee, did not have the necessary qualification at the relevant time but was translated to an operational manager in terms of the OSD for Nurses. *"Even if there was inconsistency it cannot assist the [employee] in this matter."*

The Review

[12] The respondent's application was dismissed with no order as to costs by the commissioner. Aggrieved by this decision the respondent sought to review the award of the commissioner on the grounds that the award was defective because the commissioner failed to apply the provisions of sub-paragraph (iii) of Clause 3.2.5.3 of the OSD for Nurses and caused the employee to be

translated as a once-off provision to the appropriate scale attached to the corresponding management level; the commissioner committed a gross irregularity and exceeded his powers by ignoring the plain language and provisions of the OSD for Nurses agreement and made an award which is plainly in contrary to its provisions.

- [13] The Labour Court remarked *inter alia*, that there appeared to be a “*disjunctive between the remedy sought at arbitration and submissions before the Labour Court*” on the application of the OSD Agreement for nurses in that, at the arbitration proceedings, the employee and her representative submitted that she was expecting to be translated to the lowest salary scale of operational manager and that she also expected that the name of her post would change to that of operational manager. However, she averred in the founding papers that in any event, in terms of the OSD for Nurses, what she was entitled to was translation to the appropriate salary scale, and not translation to the post itself.
- [14] The Labour Court further recorded the appellant’s case at the arbitration and in the Labour Court was that in terms of the Directive on implementation of OSD for Nurses existing posts had first to be converted to OSD posts on the establishment before nurses could be translated into those posts; that an employee could not be translated to a post if that post did not exist after due alignment of the “*persal*” system with the organizational post structures contained in the relevant OSD establishment, and that in this case no such post was established for Obiqua Prison Hospital.
- [15] Having considered the submissions by the parties as well as Clause 3.2.5.3 (iii) as well as the Implementation Directive, the Labour Court held that:

‘12. Given the clear wording of the clause above, the finding by the arbitrator that the correct salary scale to which [the employee] was translated was that of clinical nurse practitioner because she did not have the requisite qualification to be translated to the operational post, does indeed amount to a reviewable irregularity. The arbitrator did not apply his mind properly to the relevant ‘once-off’ translation provision in respect of salary scale which applied to [the employee].

13. In the result, the ultimate decision reached by the arbitrator was not one that a reasonable decision maker could make given that he committed the latent gross irregularity referred to above. His flawed reasoning led to an ultimate award that dismissed [the employee's] application *in toto*. This denied [the employee] the once-off salary increase to which she was entitled in terms of the collective agreement, read with the directive on implementation.'

[16] The Labour Court found it appropriate to set aside the award and substitute its own finding. The Labour Court held that "*a proper reading of the Agreement, together with the Implementation Directive, and given her qualifications as of 30 June 2007 [the employee] was entitled to the once-off salary increase, but not to be designated as an operational manager in terms of the applicable process of restructuring the establishment in line with new OSD's.*"

The Labour Court consequently found that the award was reviewable and set it aside. The appellant was translated on a once-off basis to the salary scale of R235 000.00 per annum, retrospective to 1 July 2007 and no costs order was made.

The Appeal

[17] The grounds upon which the judgment and order of the Labour Court are challenged are that the Labour Court erred and/or misdirected itself, and misinterpreted the applicable collective agreement in that: its decision amounts to allowing individuals to be translated in vacuum, contrary to the OSD for Nurses agreement; despite the available evidence that the employee did not occupy a management post at the relevant time for purposes of applying the OSD for Nurses agreement, the Labour Court nevertheless applied the OSD for Nurses agreement as if she worked in a management post; the Labour Court's interpretation creates an expansion of establishments; and it applied and incorrectly interpreted clause 3.2.5.3 (iii) which was applicable to speciality units and not applicable in this case.

[18] The OSD for Nurses is a collective agreement that is aimed at addressing some of the imbalances and anomalies which arose from our racially divided healthcare system and which was, *inter alia*, characterised by inequality.

Nurses, among others, were inconsistently graded and paid. Working conditions and facilities were unfairly skewed against the disadvantaged members of the population. Importantly, unequal access to education and training meant that many nurses lacked formal qualifications, although some acquired valuable skills and competence informally. The OSD for Nurses agreement, therefore, *inter alia*, sought to implement a new, fair, coherent and consistent remuneration and career progression system for all nursing professionals in a unified public health sector.

- [19] The OSD for Nurses agreement is a Collective Agreement as defined in section 213 of the Labour Relations Act (the Act).¹ A collective agreement is afforded special status by section 23 of the Act² and it varied the contracts of employment between the appellant and its employees. In *CUSA v Tao Ying Metal Industries and Others*,³ the Constitutional Court emphasized the importance and the rights that Collective Agreements give effect to as follows:

[55] The issues raised in this case are matters of public interest. This case also concerns the enforcement of a bargaining council agreement which sets out minimum wages and other conditions of employment and requires us to apply the provisions of the LRA. The right of every trade union and every

¹ Act 66 of 1995, According to section 213, a collective agreement “means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand -

(a) one or more employers;
 (b) one or more registered employers’ organisations; or
 (c) one or more employers and one or more registered employers’ organisations;”

² Section 23 provides that “23. Legal effect of collective agreement

(1) A *collective agreement* binds -

(a) the parties to the *collective agreement*;
 (b) each party to the *collective agreement* and the members of every other party to the *collective agreement*, in so far as the provisions are applicable between them;
 (c) the members of a registered *trade union* and the employers who are members of a registered *employers’ organisation* that are party to the *collective agreement* if the *collective agreement* regulates -

(i) terms and conditions of employment; or
 (ii) the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers;
 (d) *employees* who are not members of the registered *trade union* or *trade unions* party to the agreement if -

(i) the *employees* are identified in the agreement;
 (ii) the agreement expressly binds the *employees*; and
 (iii) that *trade union* or those *trade unions* have as their members the majority of *employees* employed by the employer in the *workplace*.”

³ [2009] 1 BLLR 1 (CC) at paras [55] and [56].

employers' organisation and employer to engage in collective bargaining is entrenched in section 23(5) of the Constitution. The concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process.

[56] Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and to enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law.'

20] It is significant to note that in terms of clause 3(a) of the Preamble to the OSD for Nurses agreement, one of the underlying principles that form the basis of the agreement is that the basis of translation to the OSD for a nurse shall be the duties that a nurse was performing as at 30 June 2007. *In casu*, it is common cause that the employee was performing managerial duties and was overall in-charge of the Obiqua Prison Hospital.

[21] The contentions that the employee performed the duties of manager at Obiqua Prison Hospital informally because of the practice that existed at the appellant and that since there was no funded post for the manager's position she was not entitled to translation, are, in my view, without merit and unfair. The purpose of the OSD for Nurses agreement was, among others, to do away with this form of exploitation and to recognise actual service. The basis of translation was precisely not the "funded post" that the nurse occupied but the duties that were satisfactorily performed as at 30 June 2007. The aim was to recognise actual skill and not the actual position in existence. This conclusion is further fortified by the appellant's Implementation Directive issued by the Director General on 28 September 2007 (referred to above) on how the existing posts of Chief

Professional Nurses, in designated posts of unit Managers as at 30 June 2007, should be converted. For the Chief Professional Nurse post as at 30 June 2007 it would be Operational Manager Nursing (Primary Health Care) as from 1 July 2007. The non-existence of a post could therefore not be a good enough reason to exonerate the appellant from complying with the OSD for Nurses Agreement.⁴

[22] As regards the requirement that a Professional Nurse should be managing a nursing speciality unit, the Implementation Directive defines a nursing speciality unit as *“including a primary health care clinic”*. This aspect disposes of the contention that Obiqua Prison Hospital is not a speciality unit, because it would, in any case, fall under the primary health care clinic category. The job titles for Professional Nurses in primary health care are:

- a. Clinical Nurse Practitioner Grade 1 (Primary Health Care) salary level PN-B1
- b. Clinical Nurse Practitioner Grade 2 (Primary Health Care) salary level PN-B2
- c. Operational Manager Nursing (Primary Health Care) salary level PN-B3 and
- d. Assistant Manager Nursing (Primary Health Care) salary level PN –B4

Since the employee was managing a nursing speciality unit primary health care clinic, and although not in possession of a post-basic clinical nursing qualification listed in Government Notices R48 or R212, but had been performing these duties of managing the unit satisfactorily on 30 June 2007, she was entitled to be translated as a once-off provision to the salary level PN-B3, being the appropriate salary scale for nurses who were previously earning at salary level 8 and 9. Therefore, her translation to the lower salary scale of

⁴ *Minister of Correctional Services v PHSDSBC and Others* Labour Court case C120/2010 dated 27 September 2011, unreported. *Minister of Correctional Services v PHSDSBC and others* Labour Court case C121/2010 dated 27 September 2011, unreported both per Steenkamp J

R183 000.00 per annum attached to the post of Clinical Nurse Practitioner was erroneous.

- [23] In my view, placing the employee on scale PN-B3 did not amount to a promotion, or expanding the establishment. It was to place her on the appropriate corresponding scale in line with the applicable OSD for Nurses agreement as well as the Implementation Directive by the Director General of the appellant. Clause 3.2.5.3 (iii) was, therefore, the appropriate and applicable provision for a once-off translation for a nurse in the position of the employee. The Labour Court, therefore, did not misdirect itself or err in its interpretation and application of the collective agreement. Its findings that the commissioner did not apply his mind properly to the relevant once-off translation provision in respect of the salary scale applicable to the employee and that his ultimate decision was not one that a reasonable decision-maker could not make are, in my view, correct.
- [24] In conclusion, the appeal has no merit and falls to be dismissed. Both parties have submitted that costs should follow the result. I am of the view that it would be in accordance with the requirements of the law and fairness that costs should follow the result because, *inter alia*, of the “*Internal Memo*” dated 27 August 2008. This memo was prepared by Mrs E.M. Lottering, the Health Manager: Allandale Management Area, and addressed to various officials concerned. In the memo she indicated that the employee had been incorrectly translated and that the situation had to be rectified. Therefore, the respondent’s officials responsible for the matter were aware of this erroneous situation and yet they failed to correct it, choosing instead to oppose the employee’s referral until the dispute ultimately reached this Court.
- [25] In the result, the following order is made:
- The appeal is dismissed with costs.
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Ndlovu JA and Coppin AJA concur in the judgment of Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT: Ms Nayman

Instructed by The State Attorney

FOR THE RESPONDENT: Ms S. Harvey

Instructed by Chennells Albertyn Attorneys

Labour Appeal Court