IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA5/2018

In the matter between:

THE MEC FOR THE DEPARTMENT OF HEALTH,

WESTERN CAPE **Appellant**

and

PROFESSOR A R COETZEE & 49 OTHERS **First to Fiftieth Respondents**

UNIVERSITY OF CAPE TOWN **Fifty First Respondent**

UNIVERSITY OF STELLENBOSCH **Fifty Second Respondent**

NATIONAL MINISTER OF HEALTH **Fifty Third Respondent**

NATIONAL MINISTER OF THE DEPARTMENT OF

PUBLIC SERVICE AND ADMINISTRATION **Fifty Fourth Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Fifty Fifth Respondent**

D I K WILSON N.O. **Fifty Sixth Respondent**

Heard: **07 March 2019**

Delivered: **03 May 2019**

Summary: Interpretation of collective agreement – Western Cape Provincial government entering into an agreement with UCT and Stellenbosch University in terms of which university staff rendered clinical services at state hospitals - a collective agreement providing for the payment of a scarce skills allowance to health professionals was concluded in accordance with the constitution of the bargaining council - the respondents employees claim the scarce skills

allowance which they allege is owing to them in terms of a collective agreement - the appellant contends that the employees fall outside the registered scope of the bargaining council, are not public service employees and are consequently not entitled to the benefits of the collective agreement.

Held that these special contractual provisions leave no doubt that the principal and chief specialist positions are posts "which have been created for the normal and regular requirements" of the relevant hospital departments and as such are part of the fixed establishment as defined in section 1 of the PSA. They are central to the functioning of a teaching hospital and confer clinical responsibilities on the incumbents. The employees accordingly "hold posts on the fixed establishment" and are part of the public service. They are thus employees of both the university and the public service falling within the registered scope of the bargaining council by virtue of their holding those posts with the result that the collective agreement applies to them in terms of clause 2 and they are entitled to the allowance payable under clause 3. Labour Court's judgment upheld – Appeal dismissed with costs.

Coram: Coppin JA, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the decision of the Labour Court (Moshoana AJ) dismissing its application to review and set aside an award handed down by the fifty sixth respondent ("the commissioner"). The first to fiftieth respondents ("the respondents")[1] claim a scarce skills allowance which they allege is owing to them in terms of a collective agreement concluded in the Public Health and Welfare Sectoral Bargaining Council, ("the bargaining

[1] The other respondents have played no active role in the litigation and thus can be taken to abide by the decision of the court.

council"), in 2004.[2] The appellant contends that the respondents fall outside the registered scope of the bargaining council, and are for that reason not entitled to the benefits of the collective agreement.

The collective agreement

[2] The collective agreement dealing exclusively with a scarce skills allowance ("the allowance") was concluded in accordance with the constitution of the bargaining council on 28 January 2004.[3] The bargaining council is a sectoral bargaining council established under the auspices of the Public Service Co-ordinating Bargaining Council ("the PSCBC") in terms of section 37 of the Labour Relations Act[4] ('the LRA"). The collective agreement was signed by the Minister of Health on behalf of the state as employer and by three trade unions (DENOSA, NEHAWU and PSA) on behalf of their members.

[3] The respondents were not members of the signatory trade unions but members of the South African Medical Association ("SAMA"). However, in terms of an agreement between DENOSA and SAMA, the two unions arranged to act together and have been admitted jointly as a single party to the bargaining council. Clause 9 read with clause 7.3 of the constitution of the bargaining council permits two unions to be admitted as a single party to the bargaining council provided their aggregate membership meets the designated threshold of membership. Through this unusual mechanism in the constitution of the bargaining council, the respondents are members of a registered trade union that is party to the collective agreement concluded in the bargaining council, despite the fact that SAMA was not a signatory to the collective agreement.[5]

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[2] The Public Health and Welfare Sectoral Bargaining Council has been renamed the Public Health and Social Development Sectoral Bargaining Council.
[3] Collective Agreement No.1 of 2004.
[4] Act 66 of 1995.
[5] The then acting General Secretary of the bargaining council, Mr. Tekokoze Dlomo, during his testimony in the Labour Court proceedings before Cheadle AJ (discussed below) explained that an agreement had been concluded between DENOSA and SAMA referred to as the "working together agreement". That agreement does not form part of the appeal record. However, it is clear that the object of the agreement was for the two unions to act together for the purposes of collective bargaining and admission to the bargaining council as a single party as contemplated in the provisions of the bargaining council constitution. Mr. Dlomo confirmed that the unions had put their membership together to meet the threshold for admission and voting at the bargaining council.

[4] The heading of the collective agreement reads:

> 'AGREEMENT: INSTITUTION OF A NON-PENSIONABLE SCARCE SKILLS ALLOWANCE: DESIGNATED HEALTH PROFESSIONALS WORKING IN PUBLIC HEALTH SECTOR HOSPITALS/INSTITUTIONS AS MANAGED BY THE HEALTH EMPLOYER.'

[5] Clause 1 of the collective agreement specifies the five objectives of the agreement. These were: i) to attract and retain health professionals with scarce skills on a full time basis to the public health sector as managed by the health employer; ii) to institute a non-pensionable scarce skills allowance for designated health professional categories working in clinical service delivery (including those in the management of the function of their specialities) of public health sector hospitals/institutions and are not part of the senior management service; iii) to identify the initial occupational groups as the first recipients of the scarce skills allowance; iv) to determine the percentage of the allowance and the method of payment; and v) to agree that the scarce skills allowance be a fixed percentage linked to the annual salary notch.

[6] Clause 2 of the collective agreement defines its scope. It applies to "the employer and employees…in the Public Health Sector as managed by the Health Employer, but excluding those health professionals in other sectors and…(who) fall within the registered scope of the PH&WSBC". Clause 3 of the collective agreement provides that the allowance shall be payable to the occupational groups that are designated as "Scarce Skills". Clause 3(b) of the collective agreement includes a table of the three "designated categories" of registered health professionals entitled to the allowance. The category relevant to this appeal includes: i) medical and dental specialists; ii) dentists; iii) medical doctors; iv) pharmacists; and v) pharmacologists.

[7] The allowance payable in respect of the relevant designated category was in the amount of 15% of the annual salary notch payable to personnel (designated employees appointed on a full time basis) in the occupational

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Professor Denise White, the vice-chairperson of SAMA between 2003 and 2008, corroborated Mr. Dlomo's testimony and confirmed the existence of the arrangement in terms of the bargaining council's constitution.

group. The allowance was backdated to 1 July 2003 (the implementation date) and remained in force until 30 June 2009 when it was replaced by a new remuneration model (the occupation-specific dispensation – "OSD") which the respondents are paid as part of their remuneration.

[8] The issue in this appeal is whether the respondents were entitled to be paid the allowance for the period of its duration.

The teaching hospital agreements

[9] The respondents are or were medical doctors employed as principal or chief specialists at teaching hospitals in the Western Cape, particularly Groote Schuur Hospital and Tygerberg Hospital. The respondents currently hold (or, in the case of those respondents who have retired, previously held) posts as professors in the faculties of medicine at either the University of Stellenbosch ("Stellenbosch") or the University of Cape Town ("UCT").

[10] The employment arrangement of the respondents is governed in part by a peculiar set of agreements, entered into about 50 years ago, which regulate the relationship between the state and the universities with regard to teaching hospitals.

[11] Groote Schuur Hospital and Tygerberg Hospital[6] are used by the medical faculties of, respectively, UCT and Stellenbosch as teaching hospitals for the training of students at their faculties of medicine. Students studying medicine participate in the treatment of patients at the teaching hospitals and accompany the professors and lecturers on patient ward rounds and other medical interventions, enabling them to acquire practical medical knowledge.

[12] In 1967, an agreement ("the UCT agreement") was concluded between UCT and the erstwhile Provincial Administration of the Cape of Good Hope ("the Province"). A few years later, a similar agreement was concluded between Stellenbosch and the Province ("the Stellenbosch agreement"). There are no

[6] Other hospitals have been used for teaching over the years. They include: Red Cross Children's Hospital; Somerset Hospital; the Mowbray Maternity Hospital etc. For convenience we limit reference to the teaching hospitals to Groote Schuur and Tygerberg with which the respondents are associated and where most of the training of medical students takes place.

material distinctions between the terms of the Stellenbosch and UCT agreements ("the teaching hospital agreements").

[13] Groote Schuur and Tygerberg Hospitals are situated on state land. The teaching hospital agreements provide for the universities to contribute to the capital costs of erecting and maintaining the lecture rooms, libraries, students' common areas, hostels and other buildings reserved for purposes of the university, on such state land. The universities are also responsible for the cost of maintaining these buildings and the cost of equipment and consumables required for research purposes. The Province, in turn, is responsible for the capital and maintenance costs of hospital wards, operating theatres, treatment facilities and other amenities used in the treatment of the patients.

[14] Clause 6 of the UCT agreement provides for the constitution of "joint staff". It reads:

> 'Salaried medical and other professional staff (referred to as Joint Staff) shall be employed to serve jointly the University and the Provincial Administration. Having regard, however, to the responsibilities of the University in regard to medical teaching and training and to the Administration in regard to the provision of hospital services, the University through its professors and lecturers in charge shall have control over the academic duties of the joint staff and the Provincial Administration through the Director and the Medical Superintendent of a teaching hospital over their non-academic duties.'[7]

[15] Clause 2 of the UCT agreement defines the term "joint staff" to mean the medical and other professional staff jointly responsible to the university and the Province, in terms of the agreement. Clause 8 defines the duties of the joint staff under the agreement. Joint staff shall: i) with the assistance of medical interns employed by the Province, provide and administer services in all branches of medicine to patients at the teaching hospitals; ii) provide all formal and clinical teaching in all branches of medicine to students of the university; iii) provide pathological and other specialised services for the teaching of students at the university; iv) undertake such research in the

[7] The Stellenbosch agreement contains a similar provision

practice of medicine as can be combined with other services; v) serve in a consultative capacity, whenever required, to the university in respect of matters relating to the medical school of the university and to the Administration in respect of any matters relating to the provincial hospitals; and vi) perform such other duties as may be agreed upon between the university and the Province from time to time. All members of the joint staff therefore render services both to the university and to the Province.

[16] Clause 9(a)(i) of the UCT agreement provides that, unless otherwise agreed to by the university and the Province, the persons on the joint staff who hold the post of Dean, Deputy Dean or Professor in the faculty of medicine are appointed under conditions of service of the university. The other members of the joint staff are employed under conditions of service of the Province. The joint staff thus consists of those persons appointed by the university on its terms and conditions ("university employees") and those appointed by the Province exclusively on its terms and conditions ("provincial employees").

[17] Clause 10 of the UCT agreement provides that "the authority under whose conditions of service a member of joint staff is appointed shall be responsible for the payment of his salary." Clauses 31 and 32 stipulate that the authority on whose conditions of service a particular joint staff member will be appointed has the responsibility to advertise, recruit and interview for the post although the appointment still requires the approval of the other authority. Thus if someone is appointed by the university, that appointment must be approved also by the Province, and vice versa. Clause 32(c) of the UCT agreement provides that in respect of an appointment of a person under university conditions of service, no appointment may be made if the Province does not agree. In which event, the post remains vacant and has to be re-advertised.

[18] Clause 60 of the UCT agreement provides that the retirement age of the UCT employees is determined by the conditions of service of UCT, and the retirement age of the provincial employees by the Province's terms and conditions, although the services of any member may be extended by agreement between the university and the Province. Clause 55 states that

members of the joint staff are subject to the disciplinary code of the authority under whose conditions of service they were appointed. Clause 56 stipulates that members of the joint staff are responsible to the medical superintendent and the Province for "performance of duties relating to the administration and clinical work of the teaching hospitals" and are responsible to the professors and lecturers in charge at the faculty of medicine and the Senate of the university "for duties relating to the methods and direction of teaching of students".[8]

[19] The Province makes certain contributions towards the salary costs of university appointed employees serving on the joint staff, and the university contributes to the salary costs of provincially appointed joint staff.[9]

[20] Each of the respondents concluded a contract of employment with the university employing them, which contracts expressly incorporate the provisions of the UCT agreement or Stellenbosch agreement (as applicable). The university employees are remunerated by the university; do not have PERSAL numbers;[10] and are members of the Associated Institutions Pension Fund and not the Government Employees' Pension Fund ("the GEPF") to which the provincial employees belong. The disciplinary code and retirement age of the university are applicable to them.

[21] It is accordingly not disputed that the respondents were appointed by the universities. However, clause 3 of the UCT agreement makes it clear that while the respondents are responsible to the Senate of the university for the execution of their university duties, they are accountable to the Province for the execution of their clinical duties and provincial administrative duties, including, for instance, managing a departmental budget.

[22] The individual respondents who testified both stated that when they applied for their posts, the vacancy announcement specifically stated that they would

[8] The Stellenbosch agreement contains terms identical to those in the UCT agreement regulating the position of Stellenbosch employees and provincial employees serving on the joint staff at Tygerberg Hospital.
[9] Clauses 69 and 70 of the UCT agreement.
[10] PERSAL is the payroll system utilised by the state to pay salaries to public servants.

be subject to joint appointment as a professor and as a chief specialist. The interview panel consisted of both university and government representatives.

The history of the litigation between the parties

[23] The MEC for the Department of Health, the Western Cape Provincial Government, maintains that the respondents are not entitled to be paid the allowance because it is payable only to public service employees. It contends that since the registered scope of the bargaining council is "the public service" a collective agreement concluded in the bargaining council cannot be applicable to persons, like the respondents, who are not in the public service and thus not within its registered scope.[11] The stance of the appellant has led to litigation which has endured for almost 13 years.

[24] In response to the appellant's failure to pay the allowance, the first respondent and other professors at Stellenbosch referred a dispute to the bargaining council, which dismissed the referral on the grounds that the bargaining council did not have jurisdiction to conciliate the dispute, because the claimants were employed by the university and not by the Department of Health. However, instead of reviewing the decision, the respondents instituted a claim for payment of the allowance in the Labour Court. The appellant defended the claim and, *inter alia*, raised a plea of prescription. Cheadle AJ, purportedly acting as an arbitrator in terms of section 157 of the LRA, determined that the respondents were entitled to the allowance. Subsequently, Rabkin-Naicker J held that the claim had not prescribed.

[25] The appellant appealed to this Court which upheld the appeal on the basis that the Labour Court had no jurisdiction in the matter. The respondents had instituted a new claim in the Labour Court requesting the court to sit as an arbitrator in terms of section 158(2)(b) of the LRA when they should have persisted with the initial referral to the bargaining council and a review of the jurisdictional finding. The Act does not allow such conduct. Section 158(2)(b) permits the Labour Court to act as an arbitrator only when after the referral to

[11] As stated earlier, clause 2 of the collective agreement expressly indicates that the collective agreement applies only to employees in the Public Health sector who fall within the registered scope of the bargaining council.

the Labour Court it becomes apparent that the dispute ought to have been referred to arbitration. That was not the case here. The respondents abandoned the referral to the bargaining council. This Court refrained from expressing any view as to whether the collective agreement applied to the respondents, pointing out that this was an issue to be decided by the forum which had the requisite jurisdiction.

[26] The respondents thereafter brought a successful review application in terms of section 158(1)(g) of the LRA, which resulted in Rabkin-Naicker J setting aside the initial ruling of the bargaining council and the remittal of the matter to the bargaining council to be determined by arbitration.

[27] In its earlier judgment, this Court opined that the dispute between the parties was one concerning the interpretation and application of a collective agreement. Rabkin-Naicker J, however, held that the dispute was in essence a demarcation dispute. Accordingly, in late 2016, the respondents referred two disputes (an interpretation and application dispute in terms of section 24 of the LRA, as well as a demarcation dispute in terms of section 62 of the LRA) to the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

[28] Section 24 of the LRA provides for disputes about the interpretation and application of a collective agreement to be resolved in accordance with a dispute procedure stipulated in the collective agreement; alternatively, where there is no stipulated procedure, as in this case, by referral to the CCMA. Section 62 of the LRA permits employers and employees to apply to the CCMA for a determination *inter alia* as to whether any provision in a collective agreement is or was binding on any employee, employer, class of employees or class of employers.

[29] In paragraph 7 of the demarcation dispute referral, the respondents sought a demarcation that they fell under the bargaining council "for purposes of the collective agreement" and that they were entitled to the allowance.

[30] The disputes were consolidated by agreement between the parties and referred to arbitration in the CCMA. No evidence was led at the hearing but,

by agreement, a number of documents, including the transcript of the evidence led before Cheadle AJ in the Labour Court, were placed before the commissioner.

[31] The commissioner handed down his award on 29 March 2017. He found that the respondents were entitled to payment of the allowance in terms of the collective agreement. He ordered the appellant to pay specified capital amounts together with interest.[12]

[32] The essential reasoning of the commissioner in regard to the demarcation issue was as follows:

> 'On the basis of these definitions it appears to me that the Applicants are in fact part of the public service. It was common cause that they are employed in provincial hospitals, and at least part of their duties (the clinical duties at least) are performed for and on behalf of the Department of Health. They occupy posts which are firmly established and have been for many years; but even if these posts are regarded as additional to the establishment, they are covered by part (b) of section 8(1) of the PSA. Their titles of Chief Specialist and Principal Specialist are ones which apply equally to the Provincial appointees. Even if they are regarded as part-time employees of the Province, they are covered by section 8(2) of the PSA…….I do not regard it as significant that the Applicants are employed on the conditions of service of the Universities while the Provincial Appointees are employed on the conditions of service of the Province. This is merely a convenient practical arrangement to deal with the complexities posed by a joint staffing venture. What is more significant, to my mind, is that the Respondent has a right to veto an appointment by a university, and exercises control over the non-teaching aspects of the Applicants' work. This clearly indicates to me that the role of the employer was intended to be one that was shared virtually on an equal basis between the employers, regardless of who exercised disciplinary control, handled the mechanics of payment and paid the PAYE to the Revenue Service. '

[12] Subsequent to the initial award, the commissioner issued a variation award in relation to the capital amounts and a determination regarding the interest payable. The quantum of the claims is not in dispute before us.

[33] He held that the respondents "form part of the public service and therefore fall within the scope of the PSCBC" as they were persons holding posts on the "fixed establishment"[13] and hence within the registered scope of the bargaining council.

[34] The commissioner then turned to the interpretation and application of the collective agreement and held that it applied to the respondents as they fell within designated health professional categories working in clinical service delivery as identified in the collective agreement and were working in public health sector hospitals as managed by the health employer. He felt fortified in his conclusion by the fact that on 11 February 2004 (two weeks after the signing of the agreement), the Acting Director-General of the department in a letter[14] stated that professors who were principal and chief specialists were included. There is also evidence that such employees in other provinces were paid the allowance.

[35] In dismissing the appellant's application for review, the Labour Court held that the respondents were employed by the Province and that the hospitals where they worked were in the public sector. It failed to deal clearly with the question of whether the respondents were public servants falling within the scope of the bargaining council and the collective agreement. However, it held that even if the commissioner committed an error that the respondents were public servants, the error was immaterial because mere errors of law are not enough to vitiate an award. The Labour Court also took the view that a demarcation award is an award *sui generis* and thus subject to a lower standard of scrutiny on review.

The appellant's submissions in this appeal

[36] As stated, the appellant maintains that the respondents fall outside the registered scope of the bargaining council because they are not public servants, and are accordingly not entitled to the benefits of a collective agreement concluded in that bargaining council which explicitly restricted its

[13] Section 8(1) of the PSA defines the public service to consist of persons holding posts on the fixed establishment. The provision is discussed below.
[14] Annexure SOC5.

application to employees in the public health sector falling within the registered scope of the bargaining council.[15] While the teaching hospital agreements create a joint venture between the universities and the Province, under which members of the joint staff render services both to the Province and to the universities, the appellant views the respondents exclusively as university employees, unlike the other members of the joint staff who are provincial employees in the public service. The bargaining council, being a public service bargaining council, cannot conclude collective agreements which are applicable to persons not in the public service.

[37] The appellant refers to various provisions of the Public Service Act[16] ("the PSA") in support of its assertion that the respondents are not public servants. Most significant, in its view, the appointment of persons to posts in the public service is made by the relevant executing authority being, in respect of a provincial department, the MEC of the Executive Council responsible for such department.[17] The regulations made under the PSA stipulate procedures by which persons are appointed to posts in the public service. A failure to follow these procedures renders any purported appointment invalid.[18] Contracts of employment in the public service must be in writing, and must be concluded with the executive authority responsible for appointing the public servant in question.[19]

[38] Moreover, the remuneration of public service employees is paid by the state as employer and public servants are registered on PERSAL, the state's payroll system. Public service employees have the choice of belonging to the Government Employees' Medical Scheme ("GEMS"), and cannot be compelled to belong to some other medical scheme. Disciplinary action against an employee appointed to the public service takes place in the manner set out in sections 21 to 24 of the PSA. The retirement of public

[15] Clause 2 of the collective agreement.
[16] Act 103 0f 1994
[17] Section 9(1) read of the PSA.
[18] *Khanyile v Minister of Education & Culture, KZN and Another* (2004) 4 All SA 442 (N) at 446 – 449; and *University of the Western Cape and Others v MEC for Health & Social Services and Others* (1998) 19 ILJ 1083 (C) at 1096A – D.
[19] Public Service Regulations, B.1.(g) of Part VII, GNR 1 of 5 January 2001 (Government Gazette No 21951).

service employees is governed by section 16 of the PSA and such employees are members of the GEPF.

[39] The appellant submits that since none of these provisions apply to the respondents, they are not in the public service but are only professors in the medical faculties of Stellenbosch and UCT. The appointments of the respondents were not affected by the department's executive authority, and the PSA procedures were not followed in relation to their appointment or the creation of their posts. Nor were they employed under contracts of employment concluded under the PSA. The respondents are remunerated by the universities, do not have PERSAL numbers and do not belong to the GEPF.

[40] Although the respondents perform certain duties in public hospitals by reason of the university agreements, the appellant argues that the special contractual arrangement does not override the provisions of the PSA, and does not mean that they are in the public service. The respondents are appointed on university terms and conditions. Only the employer (the appellant) and the provincial employees at the teaching hospitals are bound by the public service terms and conditions; and thus the variation effected by the collective agreement introducing the allowance applies only to the provincial employees in the public service.[20]

[41] The appellant contests in particular the finding of the commissioner that the respondents occupy posts which "are firmly established and have been for many years" and that these posts fall within the category of post contemplated in section 8(1) of the PSA. According to the appellant, only the provincial employees serving on the joint staff at the teaching hospitals hold posts on "the fixed establishment" - defined in section 1 of the PSA to mean posts created for the normal and regular requirements of a department.

[20] See generally section 23(3) of the LRA which provides that where applicable a collective agreement varies any contract of employment.

[42] The appellant also takes issue with the finding by the commissioner that the appointment of the respondents on the conditions of service of the universities was "merely a convenient practical arrangement to deal with the complexities posed by a joint staffing arrangement." The finding, it argues, is both wrong and unreasonable in that it ignores the contractual relationship between the parties (in particular clause 9 of the UCT agreement), effectively creates a new employment contract and fundamentally amends the teaching hospital agreements resulting in the respondents no longer being employed exclusively on university terms and conditions.[21]

[43] The effect of the award, it was argued, is that the professors at the teaching hospitals will form part of the public service. This will mean that an entire new dispensation is required to replace the university terms and conditions, which have hitherto governed their employment, with those applicable to public servants. Practical steps will then have to be taken to: i) create posts on the "fixed establishment" for these professors; ii) have them become members of the GEPF; and iii) subject them to all of the provisions of the PSA and all other protocols which govern various aspects of the employment of public servants in the Province.

[44] For those reasons, the appellant submitted that the commissioner committed a material error of law in finding that the respondents are entitled to the benefits flowing from the collective agreement and that such material error of law *per se* renders the award reviewable or alternatively the award is one which no reasonable commissioner would make, and should be set aside on that ground.

<u>The respondents' submissions in this appeal</u>

[45] The respondents argue that they are entitled to the allowance because they all hold the posts of principal and chief specialists at the relevant public hospitals. They, therefore, fall within the express scope of the collective agreement as they are "designated health professionals working in public sector hospitals". They submit that the wording of the collective agreement is

[21] As required in terms of clauses 9 and 10 of the UCT agreement.

clear and unambiguously indicates that the allowance is to be paid by the provincial departments of health to all principal and chief specialists without exception.

[46] The respondents aver furthermore that the allowance was specifically negotiated for persons in their position and the collective agreement binds the state in relation to them by virtue of the fact that their union was party to it. The collective agreement was negotiated by DENOSA and SAMA acting jointly for and on behalf of the respondents. The collective agreement had in mind the respondents and their similarly situated colleagues in the other provinces who all received the allowance in accordance with the circular of the national Acting Director-General of the Department of Health, dated 11 February 2004, distributed to all heads of provincial departments of health, instructing payment to be made to principal and chief specialists.

[47] It was not disputed in the pre-trial minute that the respondents were appointed to various principal and chief specialist positions through a joint process conducted by the university and the Province. The question of their positions as principal and chief specialists on the fixed establishment was not placed in issue in the pleadings before Cheadle AJ. This is confirmed in paragraph 48 of the judgment of Cheadle AJ where he said:

> 'It is uncontested that the Applicants occupy posts on the joint staffing establishment of the hospitals. Professors Coetzee and James for example are classified as Chief Specialists, a post in the Public Service Staffing System, and as such the head of their respective departments with responsibility for managing and supervising staff, both provincially and university appointed in their department. The fact that they also occupy the post of Professor on the University establishment does not alter the fact that they occupy a post on the establishment of the hospitals and therefore the Province.'

[48] The respondents also referred to Annexure SOC 13 as proof of the designation of the respondents as specialists on the fixed establishment. This document initially did not form part of the appeal record because the issue as to whether they occupied posts on the fixed establishment was not disputed.

[49] The respondents complain that had the issue been placed in dispute on the pleadings further evidence would have been adduced in respect of it and that it is now unfair of the appellant to ambush them on appeal. Evidence was led before Cheadle AJ only on the pleaded issues and the parties agreed that the record before the Labour Court would be placed before the CCMA for its determination of the issues on that basis. Hence, the related and consequent issue of the respondents falling outside the registered scope of the bargaining council was never adequately pleaded. For reasons that will become evident later, it is not necessary to canvass this contention in any detail.

[50] The respondents, in any event, submit that they hold posts on the fixed establishment or have been appointed permanently additional to the fixed establishment and thus in terms of section 8 of the PSA form part of the public service.

Evaluation

[51] Section 213 of the LRA defines a collective agreement to mean 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 (as far as it is relevant) one or more employers on the other hand.

[52] There is no dispute that the agreement granting the scarce skills allowance to the occupational groups designated in clause 3 of it is a collective agreement as defined in section 213 of the LRA. The written agreement concerned remuneration and was concluded between the state as employer and three registered trade unions acting on behalf of their members.

[53] Section 31 of the LRA deals with the binding nature of a collective agreement concluded in a bargaining council. The relevant part of it reads:

> 'Subject to the provisions of section 32 and the constitution of the bargaining council,[22] a collective agreement concluded in a bargaining council binds –

[22] Section 32 of the LRA provides for the extension of collective agreements concluded in bargaining councils to non-parties by the Minister of Labour, which did not happen in this case.

(a) the parties to the bargaining council who are also 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 thereof apply to the relationship between such a party and the members of such other party…'

[54] The collective agreement granting the scarce skills allowance binds the state and the trade union parties to the collective agreement, which in this case include DENOSA and SAMA acting jointly in terms of the provisions of the constitution of the bargaining council.[23] Section 31(b) of the LRA operates to bind the state to fulfil its obligations under the collective agreement to "the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such party (the state) and the members (the respondents) of such other party (the unions)."

[55] A collective agreement only assumes a binding quality in terms of section 31(b) of the LRA "in so far as the provisions thereof apply to the relationship" between the state, as a party to the collective agreement, and the respondents, as members of their trade union. The question then is whether the provisions of the collective agreement granting the scarce skills allowance apply to the relationship between the appellant and the respondents.

[56] The title of the agreement defines its purpose as the "institution of a non-pensionable scarce skills allowance" for "designated health professionals working *in* public health sector hospitals". Moreover, clause 1.2 of the collective agreement specifies as one of its objectives the aim "to institute a non-pensionable scarce skills allowance for designated health professional categories working in clinical service delivery of public health sector hospitals…" There is no denying that Groote Schuur and Tygerberg hospitals (where the respondents work) are public sector hospitals. Likewise, clause 3 of the collective agreement identifies "medical specialists" as being part of the

[23] The binding nature of a collective agreement concluded in a bargaining council (consistent with the policy of industrial self-regulation) is subject to the provisions of the constitution of the bargaining council. The constitution enjoys precedence over the statutory provisions.

occupational group designated to be paid the allowance. All the respondents are medical specialists working in clinical service delivery.

[57] Clause 2 of the collective agreement which deals with its scope is the critical provision. It provides that the collective agreement applies to the employer (the state) and employees in the public health sector as managed by the health employer, who fall within the registered scope of the bargaining council.

[58] Notably, clause 2 of the collective agreement does not apply the collective agreement to "the employer and *its* employees". It applies it rather to the "employer and employees". The general appellation "employees" signals an intention not to require (for the purpose of the agreement's application) an exclusive employment relationship between the health employer (the state) and the employees (the designated health professionals). It was perhaps sufficient for the purposes of this particular collective agreement that the respondents were "employees" *in* the public health sector *as managed by the health employer*. Thus, both clause 2 and the heading of the collective agreement do not posit the state as only the employer of the employees (the designated health professionals) but rather as the manager of the public health sector. This choice of wording intimates an intention to cover all designated health professionals (including employees of the university) working *in* public sector hospitals *as managed by the health employer*.

[59] The peculiar language hence supports the proposition of the respondents that the scope of the collective agreement was designed and formulated to take account of the unique employment relationships established by the teaching hospital agreements. However, there is no need to make a decisive finding in that regard. The respondents are in any event "employees" as defined in section 213 of the LRA which is delineated more widely than the ordinary contractual conception of an employee to include any person "who works for another person or the State and who receives or is entitled to receive any remuneration" and "any other person who in any manner assists in carrying on or the conducting the business of the employer". The definition does not require there to be a mutual exchange (*quid pro quo*) in that it does not

stipulate that the employer must pay the remuneration. It is thus possible to be an employee as defined if the employee works for one person and is paid by another. By the same token, the broad compass of the definition of "employee" to include persons assisting in the carrying on of an employer's business also indicates that there is no requirement that the employer pay such person in order for the latter to be an employee. In the premises, the respondents fall within the definition of "employee" in section 213 of the LRA and thus are employees as contemplated in clause 2 of the collective agreement.[24]

[60] The remaining question is whether the respondents are employees who fall within the registered scope of the bargaining council. As discussed, clause 2.2 of the collective agreement explicitly limits the application of the collective agreement to employees who fall within the registered scope of the bargaining council. Moreover, in terms of section 28 of the LRA, the powers and functions of a bargaining council may be exercised or performed only in relation to its registered scope. The introductory part of section 28 makes it clear that the powers and functions of a bargaining council (including the power to conclude and enforce collective agreements[25]) may be exercised or performed only "in relation to its registered scope." A bargaining council may not exercise powers or perform functions in respect of persons and matters outside its registered scope.

[61] The constitution of the bargaining council defines its registered scope as meaning "the state as employer and its employees who fall within the registered scope of the PSCBC". Section 37 of the LRA stipulates that the PSCBC and the public service sectoral bargaining councils exercise their duties and functions only in respect of the public service. Section 35 states that the bargaining councils in question are established for "the public service as a whole" and "any sector within the public service". The registered scope of the PSCBC is defined by its constitution as the public service in respect of *inter alia* terms and conditions of service that apply to two or more sectors and

[24] Cheadle AJ pursued this line of reasoning in reaching his conclusion that the collective agreement applied to the respondents.
[25] Section 28(1)(a) of the LRA

matters assigned to the state as employer in respect of the public service. The registered scope of the bargaining council is thus undeniably the public service, and its collective agreements are not applicable to persons who are not in the public service.

[62] The term "public service" is defined in section 213 of the LRA to mean the national departments, provincial administrations, provincial departments and government components contemplated in section 7(2) of the PSA which provides that "for the purpose of the administration of the public service there shall be national departments and provincial administrations mentioned in the first column of schedule 1, provincial departments mentioned in the first column of schedule 2 and the organisational components mentioned in the first column of schedule 3". UCT and Stellenbosch are not listed in any of these schedules. [26] The universities are thus not part of the public service.

[63] This brings us to the decisive question of whether the respondents (being employees as broadly defined in the LRA) form part of the public service as members of the joint staff. Section 8(1) of the PSA defines the composition of the public service to include various persons. The relevant provision is section 8(1)(c) of the PSA which includes in the public service persons who "hold posts on the fixed establishment" other than posts referred to in section 8(1)(a) of the PSA;[27] and persons "employed temporarily or under a special contract in a department…additional to the fixed establishment".[28] The fixed establishment is defined in section 1 of the PSA as meaning "the posts which have been created for the normal and regular requirements of a department."

[64] As discussed, it was not disputed that the respondents held posts on the fixed establishment in the proceedings before Cheadle AJ. However, in its founding affidavit in the application for review of the commissioner's decision, the appellant averred that the respondents do not hold posts on the fixed establishment. It maintained that the creation of posts on the fixed establishment can only occur if various established procedures, as laid down

[26] The definition lists certain exclusions, which are not relevant for present purposes.
[27] Section 8(1)(c)(i) of the PSA. The posts in section 8(1)(a) of the PSA are specific posts, for example, in the South African Police Services.
[28] Section 8(1)(c)(ii) of the PSA.

in Regulation F (Part III) of the Regulations are followed. Regulation F provides that before creating a post for any newly defined job, or filling a vacancy, an executive authority shall confirm that the post is required to meet the department's objectives, where necessary evaluate the job and ensure that sufficient budgeted funds are available. This, the appellant says, was not done and thus each of respondents holds a post only on the university structures.

[65] The respondents correctly contest this interpretation. Regulation F was enacted in 2001, long after the conclusion of the teaching hospital agreements. It also is not directly concerned with the composition of the fixed establishment, but rather the functional and budgetary requirements for the creation of new posts and the filling of vacancies. Non-compliance with it will not have the effect of removing an existing post from the fixed establishment.

[66] The respondents, besides being professors, are all principal and chief specialists in various fields of medicine rendering clinical services for the Province at public hospitals for the benefit of the public. The positions "principal and chief specialists" by virtue of their nomenclature alone are not typical university positions; they are part of the normal and regular requirements of a hospital and its departments. The filling of the posts is subject to confirmation by the Province and the management of the clinical work of those holding the posts is controlled by the Province. One of the aims of the teaching hospital agreements is to bring the professors into the public service in appropriate posts to give them authority to provide clinical services to the public and to subject them to direct governmental control and accountability in relation to the provision of those services. If such were not posts on the fixed establishment of the public hospitals, then one must ask why the system of joint appointment was established by the teaching hospital agreements in the first place.

[67] Clause 6 of the UCT agreement clearly envisages that posts held by the joint staff are part of the fixed establishment. It provides that the joint staff "shall be employed to serve jointly the University and the Provincial Administration". Additionally, the principal and chief specialists are directly responsible to the

Medical Superintendent, a public servant employed by the Province, for the performance of their clinical and administrative duties at the hospitals. Clause 56 of the UCT agreement provides that the joint staff "shall be directly responsible to the medical superintendent" and through him to the Administration for the performance of duties relating to the administration and clinical work of the teaching hospitals."

[68] These special contractual provisions leave no doubt that the principal and chief specialist positions are posts "which have been created for the normal and regular requirements" of the relevant hospital departments and as such are part of the fixed establishment as defined in section 1 of the PSA. They are central to the functioning of a teaching hospital and confer clinical responsibilities on the incumbents. The respondents accordingly "hold posts on the fixed establishment" and are part of the public service. They are thus employees of both the university and the public service[29] falling within the registered scope of the bargaining council by virtue of their holding those posts with the result that the collective agreement applies to them in terms of clause 2 and they are entitled to the allowance payable under clause 3.

[69] It does not follow from this finding, as the appellant believes, that the respondents will be required to become contractual employees of the appellant in all the respects identified. The terms and conditions of public service employment apply to employees appointed to the public service in terms of section 9 of the PSA. However, section 12A of the PSA permits the executing authority (the appellant) to appoint one or more persons, "on grounds of policy considerations", under a special contract to perform tasks as may be appropriate in respect of the exercise or performance of its powers and duties.[30] Such a *sui generis* arrangement can be (and presumably has been) comprehensively and adequately catered for in the manner provided for in the teaching hospital agreements.

[29] Section 1 of the PSA defines an "employee" to mean a person contemplated in section 8(1)(c) of the PSA.
[30] Section 8(1)(c)(ii) contemplates persons employed under special contracts in posts additional to the fixed establishment as forming part of the public service.

[70] In any event, the resolution of the issue before us is limited to a finding that a collective agreement granting a specific allowance is binding on the appellant in relation to the respondents by virtue of their membership of a trade union party to the bargaining council which was party to the collective agreement. The appellant is obliged by section 31(b) of the LRA, as a party to a collective agreement, to extend to the respondents the fruits of a particular collective bargaining exercise. Strictly speaking, no obligation or other legal requirement arises from the collective agreement compelling the appellant to reconstitute, substitute or vary the contractual employment relationship between the respondents and the universities.[31] The stand-alone allowance is due to the respondents in terms of a statutory obligation arising under the system of collective bargaining established by the LRA. The respondents' entitlement derives from section 31(b) of the LRA and not from their employment with the university. Although, the modalities for the fulfilment of the obligation are not described in the collective agreement, it was nonetheless practically possible to give effect to the obligation in the manner the agreement was executed for the benefit of similarly situated medical professors in the other provinces. In this regard, it is worth repeating that the allowance was paid to every medical specialist employed in public health sector hospitals throughout the Republic with the exception of the respondents and their colleagues at the teaching hospitals in the Western Cape.

[71] In the premises, the commissioner made no material error of law and did not render an unreasonable award. His determinations that the respondents were employed or engaged in the public service and were entitled to the allowance in terms of the collective agreement were both correct and reasonable. Although aspects of its reasoning may be open to debate, the Labour Court equally did not err in dismissing the application for review.

[31] Section 31 of the LRA which deals specifically with bargaining council collective agreements does not include a provision similar to section 23(3) of the LRA. Section 23 of the LRA governs the legal effect of collective agreements concluded outside of bargaining councils. Section 23(3) provides that where applicable a collective agreement varies a contract of employment. It is debatable whether this general provision is applicable to collective agreements concluded in bargaining councils. The effect of a bargaining council collective agreement on the individual employment contracts of members of trade union parties to a collective agreement conceivably may be a matter determined exclusively by the terms of the collective agreement and the constitution of the bargaining council.

[72] The appeal is dismissed with costs, such costs to include the costs of employing two counsel.

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JR Murphy

Acting Judge of Appeal

I agree

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P Coppin

Judge of Appeal

I agree

_____

K Savage

Acting Judge of Appeal

APPEARANCES:

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	Instructed by The state attorney
FOR THE RESPONDENTS:	Adv R Steltzner SC
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