



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN CAPE TOWN
JUDGMENT**

CASE NO: C 1011/2010

In the matter between:

**DEMOCRATIC NURSING
ORGANISATION OF SOUTH AFRICA
(DENOSA) obo MS F P FADANA**

Applicant

And

**PUBLIC HEALTH AND SOCIAL
DEVELOPMENT SECTORAL
BARGAINING COUNCIL**

First Respondent

C S MBILENI, N.O.

Second Respondent

DEPARTMENT OF HEALTH

Third Respondent

Heard: 21 August 2012

Delivered: 20 May 2014

Summary: (Review - occupational specific dispensation-promotion dispute-employee – failure to make necessary factual findings – findings made on ‘submissions’ – award set aside).

JUDGMENT

LAGRANGE, J

Introduction

- [1] In this matter, the arbitrator had to determine a dispute concerning the interpretation and application of the Occupational Specific Dispensation collective agreement of 2007 for Nurses ('the OSD agreement'), which was embodied in PHSDSBC Resolution 3 of 2007. The issue in dispute concerned whether or not the union's member, Ms F Fadana, a Chief Professional Nurse, was correctly translated to the OSD grade of Clinical Nurse Practitioner Grade 1 with effect from 1 July 2007 in terms of the OSD agreement.
- [2] The applicant (which refers to the union and Ms Fadana jointly) contended that, according to the duties Ms Fadana was performing at the time the OSD agreement took effect, she ought to have been translated to the position of Operational Manager, because she was working in that capacity at the Empilisweni Clinic at the relevant time.
- [3] On the other hand, the Department of Health argued that the function Ms Fadana was performing at the time OSD was implemented was that of a Sister in Charge of the clinic, but that was a position which was rotated amongst various Chief Professional Nurses. When OSD was implemented, the post of Operational Manager was created at all clinics, but that position was not linked to the matching and placement process that took place in the course of giving effect to the OSD agreement. Because the previous equivalent position had been rotated prior to the implementation of OSD, it was necessary to advertise the post internally.

- [4] It appears to be undisputed that posts of Operation Manager at all clinics in the Breede Valley sub-district were only advertised in May 2009, some 14 months after the implementation of the OSD. It also seems to be common cause that Ms Fadana applied for the post in competition with twelve other candidates but was unsuccessful. It was only after she had been unsuccessful in the application for the post that she first claimed that she ought to have been automatically translated to that position by virtue of the provisions of the OSD agreement. One particular provision which is at the centre of the dispute between the parties states:

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

- (i) A professional Nurse (Registered Nurse) who occupies a post in a nursing speciality and who*
- is in possession of a post-basic clinical nursing qualification listed in Government Notice R 2112, as amended, shall translate to the appropriate specialty post; ...”*

- [5] A critical difference in the approach of the parties is that the applicants argue effectively that using the translation Table (Keys) contained in Annexure B to the OSD agreement, Ms Fadana ought to have been automatically translated to the Operational Manager grade in question, whereas the employer's argument appeared to be based on Annexure A to the OSD Agreement which stipulates the career streams, salary scales, appointment requirements and grade progression/post promotion requirements of the OSD. For certain job titles, a requirement for grade progression/promotion is stated as “Promotion to higher vacant advertised post.” In this instance, that requirement is one that applies to the post of Operations Manager.
- [6] The OSD agreement also makes reference to an Implementation Directive of the Department of Public Service and Administration which was to be followed in giving effect to the system. That directive contains a similar

provision to clause 3.2.5.3 of the OSD agreement which specifically indicates that translation to the appropriate salary scale attached to the corresponding management level salary of a Professional Nurse includes someone who is managing a primary health care clinic (as a 'nursing specialty unit'). The directive also includes steps to align the organisation of the post establishment of the Department by converting the current (pre-OSD) post establishment to a post establishment in line with the post structure created by the OSD. In Specialty Nursing that entailed the conversion of Chief Professional Nurse posts into Operational Manager posts with effect from 1 July 2007.

- [7] What emerges from the above is that, there appear to be two distinct elements to the implementation of OSD in the Department of Health. One is concerned with the immediate consequences for an individual occupying a particular salary level under the old dispensation to a new salary grade under the relevant OSD stream based on their occupation. The other is concerned with the requirements for appointment and promotion within the new OSD under the new structure. The first element deals with the alignment of existing staff with the new salary structure and the second with the placement of staff in specific posts. Critical issues to resolve the parties' dispute in this instance is whether Ms Fadana should have simply received a certain minimum salary level applicable to the new post equivalent of the post she previously occupied, and whether she ought to have automatically also been appointed to the converted post created on the staff establishment in alignment with the OSD for nurses. Even more fundamental is the question of whether Ms Fadana occupied post of Chief Professional Nurse on 30 June 2007.
- [8] In his award, the arbitrator considered the "submissions and arguments" of both parties and came to the conclusion that the applicants failed to prove that the employer had incorrectly interpreted the OSD agreement when it translated Ms Fadana to the post of Clinical Nurse Practitioner Grade 1 rather than that of Operational Manager.
- [9] The basis of his decision seems to have been two-fold. Firstly, he places obvious emphasis on the fact that Ms Fadana did not immediately lay

claim to the translated salary grade of Operational Manager, when the OSD took effect in July 2007, but only did so much later, after failing to secure the actual post at the Clinic which was advertised. Secondly, the arbitrator appeared to accept, at least implicitly, that the Department had followed a policy of rotating Chief Professional Nurses in what was then referred to as the post of Sister-in-Charge at a clinic. Accordingly, and again implicitly, if Ms Fadana fortuitously held that position at 30 June 2007, she could not benefit from that timely coincidence between the implementation of the OSD and her temporary occupancy of a post that had been shared with others. For this reason, the arbitrator then considered the fairness of the appointment process to the advertised post, which he clearly saw was the appropriate way the Department should have addressed a post that was previously held on a temporary basis by a number of persons.

[10] Obviously, in reaching this conclusion, the arbitrator necessarily accepted that Ms Fadana incumbency of the Sister-in-Charge position was merely temporary. However, this was by no means common cause. This is the crux of the applicants' basis for reviewing the award. The way the arbitration proceeded was that, the parties made submissions and then presented argument in support of their respective claims. Whether this had been by agreement or not, it is common cause that the arbitrator failed to establish a set of agreed facts on which he could base his decision. For this reason both parties agree in effect that he made factual findings without having heard evidence and therefore without any basis for doing so. Accordingly, the parties agree the award should be set aside for this reason. I agree that the arbitrator committed misconduct in relation to his duties in failing to make a factual determination about the status of Ms Fadana's incumbency in the post in question. He also failed to hear evidence on her education qualifications and why her duties corresponded to that of an Operational Manager, rather than Clinical Nurse Practitioner Grade 1. Moreover, the very nature of the position 'Sister-in-Charge' as a post description appears to be contentious.

[11] I might mention that there does appear to be a trend in arbitrations on matters of this nature in the public service, for matters to be decided on

the basis of written submissions by parties supplemented by oral argument. In principle, if there is no material factual dispute, and the matter is just a question of legal interpretation, such an approach ought to be encouraged. However, it cannot be used as a way of avoiding the onerous task of adducing oral and written evidence where there is a dispute of fact.

- [12] The results of trying to arrive at factual findings when there is no agreement on matters of fact reveal themselves in cases such as this. If parties wish to simply submit argument they must agree on what the common cause facts are and if necessary lead evidence on those in dispute. That is what should have happened in this case, where the arbitrator avoided making critical findings, such as whether or not Ms Fadana was occupying the post which was to become that of an Operational Manager or whether she was merely temporarily acting in it. It might well be the case that the parties in this matter could agree on a stated case but that was not done.
- [13] One factual dispute concerns the correct status of Ms Fadana's position when she was Sister-in-Charge at Empilisweni clinic. Was it a post that was being circulated amongst other senior nurses on temporary basis, or was she effectively occupying the post as the only *de facto* incumbent, except if she was temporarily absent? Other disputes concern the correct interpretation and implementation of the OSD agreement. Thus, if Ms Fadana was the incumbent performing the role of Sister-in-Charge at Empilisweni Clinic, at the time OSD was implemented but was one of a number of Senior Professional Nurses who had been doing so, ought she have been regarded as 'occupying the post' that was converted into an Operational Manager's post? Or, as the Department appears to contend, was her status in that post temporary and fortuitous, in the sense that it could just have well have been one of the other Senior Professional Nurses who 'occupied' it on 1 July 2007 and consequently it would have been arbitrary to have confirmed her appointment to the establishment post by way of translation. Alternatively, are the requirements for anyone to be appointed to the Operational Manager's post as per Annexure A to the OSD resolution the same, even at the time of translation, which

includes the requirement that the post must be advertised? A related issue is what the designation 'Sister-in-Charge' actually meant in relation to pre-OSD post structures.

In limine issues raised by the Department

- [14] However, the Department raised two preliminary points on review, which it says is dispositive of the review application in its favour. Firstly, it claims that even though the dispute resolution procedure of the bargaining council does not limit the time period within which an employee may lodge a grievance, she did so 14 months after the OSD was implemented and on this basis her application must be dismissed. The difficulty I have with this *point is that the respondent never took exception to the applicant's late filing of her grievance*. Similarly, in so far as an objection based on a late referral might have raised a jurisdictional issue *vis-a-vis* the arbitration, there is nothing that has been placed before the court to support this.
- [15] The second *in limine* issue is that there was a collective agreement which has the consequence that the applicant was estopped from declaring a dispute and waived her right to be translated. This objection is based on a claim by the third respondent that a lawful and binding agreement was reached between the parties including Ms Fadana herself at a meeting of a so-called Institutional Management Labour Committee ('IMLC'). That body was established in terms of a collective agreement and creates a labour management consultative and negotiation forum at the level of the Provincial Department of Health, in respect of matters falling within the jurisdiction of institutional management (per clause 6.1 of the agreement). Although the decision making process of the IMLC is slightly obscure, the employer and union parties have equal votes (clause 7.6.6) and the normal rules of meeting procedure apply (clause 7.7.8).
- [16] The basis for the agreement relied on by the Department is an item in the minutes of the IMLC meeting of 21 November 2008, which reads:

"3.8 Hoof van Empilisweni kliniek

Sr Fadana is in beheer, maar dit sou net 'n tydelike reeling tussen haar en sr Sigula gewees he, aflosperiodes van 6 maande vir

elkeen om waar te neem; maar vir 2 jaar is sr Fadana steds in beheer van die klinkiek. Personeel wil weet – is did nou ‘n permanente posisie? E Majiet verduidelik dat daar eersdagss Operational Managers poste geadverteer sal word, vir onder andere Empilisweni kliniek ook.

Personeel ook ongelukkig omdat al die sr’s in beheer van die kliniek will wees – hul wil besluit wanneer die Assistentente oortyd/verlof mag teken.

E Majiet maak dit baie duidelik dat indien sr Fadana nie beskikbaar / aan diens is nie, is slegs sr Sigula 2de in bevel.”

- [17] I do not think this is evidence of an agreement of any sort. It indicates that there was unhappiness about the non-circulation of nurses in the acting position occupied at that time by Ms Fadana and management’s clarification of its intention to advertise the post. As we know Ms Fadana did in fact apply for the post when it was advertised in May the following year. In her replying affidavit she asserted that she never consented to anything as she was not aware of her rights and certainly never relinquished any. In so far as estoppel is alleged, I do not think that based on management stating its position at that meeting and Ms Fadana’s subsequent application for the post, it can be said that she had agreed that the only basis on which she could lay claim to the Operational Manager’s post was if she had succeeded in her job application. Moreover, if Ms Fadana was unaware of any entitlement she might have had under the OSD agreement at the time of this discussion, she can hardly have been expected to raise something she was not aware of. A failure to speak giving rise to estoppel can only occur if the party which is silent is aware of the need to raise the issue to alert the other party to that issue.¹ On the limited information before the court, it cannot be said that Ms Fadana had remained silent knowing that it might give the impression she accepted that the only path to appointment as an Operational Manager was through applying for the post if and when it was advertised.

¹ See e.g, **Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A)** at 642F-643C

- [18] Likewise, it cannot be said that her failure to speak and subsequent application for the post constituted a waiver of her right to seek to enforce the OSD agreement, since there is no evidence she had full knowledge of her potential claim based on the OSD agreement, until after she was unsuccessful. It is trite law that a person cannot be said to have waived a right that she had waived her right to pursue that avenue.
- [19] Consequently, I am not persuaded that the requirements of estoppel or waiver have been established by the Department.

Condonation

- [20] The applicant's review application was launched some four months' late which is a considerable period. The explanation offered relates to the inability of the union's two organisers to cope with the demands placed on them and on the internal processes which must be followed before a review can be instituted. The organiser handling the dispute referred it to the union's legal officer on 14 June 2010, which was still two week's before the six week period for filing the review had been exhausted. She even telephoned him about the matter when she discovered the legal officer was on leave. After that she believed it would be dealt with properly and assured Ms Fadana likewise. It was only in October 2010 when dealing with the union's attorneys of record on other matters, that she became aware they were not handling this application. On contacting the legal officer as to what had transpired she was told he had not received the documents and they had to be resent to him. The application was resent in mid December 2011.
- [21] While I do not think that the organiser was dilatory, it is apparent that the legal officer who had been contacted on the matter and should have been expecting the papers was not as diligent as he ought to have been. The explanation is a poor one, and as I have mentioned elsewhere, unions and employers cannot use their labyrinthine or cumbersome procedures as an excuse for delay. They must adapt them to the requirements of the LRA not vice-versa.

[22] Nonetheless, there was no wilful delay as far as I can tell and the organiser initiating the matter acted timeously when she realised all was not well. Likewise Ms Fadana reportedly showed her ongoing concern. On the matter of prejudice, it seems the delay was not of great concern to the Department which delayed its own answering affidavit by some months without even seeking condonation therefor. Lastly, I accept that the issue is of some importance to both parties. In the circumstances, the applicant's late filing of the review application is condoned.

[23] The marginally late filing of the applicants' answering affidavit is also condoned.

Conclusion and relief

[24] In consequence, I am satisfied the award should be reviewed and set aside. Although it was suggested by the Department in argument that the court could determine the factual issues on the basis of the affidavits in the review, I do not agree.

[25] The correct implementation of OSD translation in this instance will to a significant degree be determined by the findings of fact, some of which are identified above. The parties also did not really get to grips with the issues of principle that are implicit in the arbitrator's findings but which are vitally important to the proper implementation of the OSD dispensation. In particular, the question of whether translation could only occur if all normal pre-requisites for occupying a post on the OSD were met or whether, at the date of implementing the OSD on 1 July 2007, some requirements such as successfully applying for the OSD position did not have to be met.

[26] Regrettably, contrary to what I had initially hoped, there simply is not enough in the material before the court to determine this, and I must remit the matter back.

Costs

There is no reason in fairness and equity why the applicant should not be entitled to its costs in the review application, but not for those incurred in relation to its condonation application.

Order

[27] The arbitration award issued by the second respondent on 13 May 2010 under case number PSHS 566-09/10 is reviewed and set aside.

[28] The matter is remitted to the first respondent for a new hearing before another arbitrator other than the second respondent in which the parties must either agree on a statement of case, including common cause facts, or evidence must be led.

[29] The third respondent must pay the applicant's costs excluding those incurred in relation to the applicant's condonation application.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: S Harvey instructed by Chennels Albertyn

FIRST RESPONDENT: J Van der Schyff instructed by the State Attorney