REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 1/2013

In the matter between:

WESTERN CAPE DEPARTMENT OF HEALTH **Appellant**

and

MEC VAN WYK AND OTHERS **First Respondents**

PHSDSBC **Second Respondent**

ARTHI SINGH N.O. **Third Respondent**

DEMOCRATIC NURSING ORGANISATION OF

SOUTH AFRICA (DENOSA) **Fourth Respondent**

Heard: **20 March 2014**

Delivered: **05 June 2014**

CORAM: **Tlaletsi DJP, Davis JA *et* Coppin AJA**

Summary: Interpretation and application of collective agreement. Employer translating employees in terms of OSD for Nurses in terms of Resolution 3 of 2007-– employees employed in the Gastroenterological Unit -employer translated employees to the general stream- employees contending to be translated to speciality nurses. Principles relating to the interpretation of collective agreement restated- employer having no prerogative to interpret and apply a collective agreement without a specific authority in the collective agreement to do so- the arbitrator entitled to determine whether the employer's interpretation is fair and

Labour Appeal Court

not contrary to the spirit and purpose of the collective agreement- arbitrator interpreting OSD in light of the spirit and the purpose of the collective agreement -Arbitrator finding that employer failing to comply with the provisions of the collective agreement; employer ordered to translate employees to speciality nurses- Labour Court upholding arbitrator's decision and dismissing the review application with costs. Arbitrator's decision reasonable- Appeal dismissed with costs.

JUDGMENT

TLALETSI DJP

Introduction

[1] The appellant (the Western Cape Department of Health) is appealing against the judgment and order of the Labour Court, in a review application brought in that court by the appellant against an arbitration award issued by the third respondent ("the arbitrator") under the auspices of the second respondent (the Public Health and Social Development Sectoral Bargaining Council) hereafter referred to as "the Bargaining Council".

[2] The arbitration concerned a dispute between the appellant and the fourth respondent (The Democratic Nursing Organisation of South Africa (DENOSA), a trade union duly registered in terms of the Labour Relations Act[1]and acting on behalf of its members (first respondents), who are the employees of the appellant. The dispute was about the interpretation and application of a collective agreement.For the purpose of this appeal the union and its members shall be referred to as "the respondents".

Factual Background

[3] The factual matrix that led to this dispute is common cause. On or about 10 September 2007, the Department of Health in its capacity as the employer

---

[1]Labour Relations Act 66 of 1995.

Labour Appeal Court

concluded a collective agreement with the respective trade unions representing the nurses employed by the Department. The collective agreement was incorporated into Resolution 3 of 2007 and was commonly referred to as Occupational Specific Dispensation for Nurses ("the OSD").

[4] Clause 3.2.5.3 of the OSD for nurses which deals specifically with the translation of professional nurses (Registered nurses) provided 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. <u>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</u>.
>
> 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 satisfactory 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]

Labour Appeal Court

[5] The individual employees are employed in the Gastroenterological Unit at Groote Schuur hospital which is a level three tertiary academic hospital. They complained that their employer in applying the OSD translated them to the general stream instead of to the speciality stream which would have made them to benefit in terms of the OSD. They complained further that their colleagues (gastroenterological nurses) at Tygerberg and Worcester hospitals, who had been trained by them, were translated to the speciality stream and as a result have derived benefits provided by the OSD. The appellant contended that gastroenterology does not fall within a speciality stream and that it being a speciality unit, the employees could not be regarded as performing speciality functions and could therefore not benefit in terms of the OSD.This led to the referral of the dispute to the Bargaining Council which was arbitrated by the third respondent.

Arbitration proceedings

[6] At the arbitration proceedings, the respondents tendered the evidence of Dr Dion Levin, a specialist gastroenterologist at Groote Schuur Hospital. He described the field of gastroenterology as a sub-speciality. He testified that for a doctor to operate in the field of gastroenterology he/she was required to study for a period of four years in order to become a specialist. He/she is required to undergo further training in order to become a sub-specialist. He mentioned that the nurses working with the specialist doctors are required to be trained specialist nurses since the procedures that are conducted in the unit require highly skilled personnel. He confirmed that the individual employees are highly skilled and they trained nurses from other units across the world. He testified further that nurses in his unit are different from nurses working in the theatre since they are required to actively participate in the procedures and are therefore required to be more skilled.

[7] Maria van Wyk who is one of the employees also testified. She mentioned that they are all professional nurses. She is a Chief Professional Nurse and an Operational Manager. She has 25 years' experience in the field of

Labour Appeal Court

gastroenterology. She is skilled because of her extensive practical training and the experience that she acquired. She however does not have a formal qualification in the field. She mentioned that their unit falls under the medical and surgical science speciality. They also trained nurses in their units. She confirmed that her colleagues at Tygerberg and Worcester hospitals, who were trained by them and were performing exactly the same functions as them were translated as speciality nurses. They also had to be translated as speciality nurses. She confirmed further that there is currently no post-basic qualification for gastroenterology nurses.

[8] The appellant tendered the evidence of Tendani Mabuda, who is the Director of Nursing Sciences at the appellant. He testified that he was directly involved in the interpretation and application of the OSD for nurses. He was also part of the committee that determines which fields would be regarded as speciality. He mentioned that it is a requirement that a speciality stream be aligned to a post-basic qualification and since there is no post-basic training for gastroenterology, it is not regarded as a speciality unit. Nurses and doctors, he testified, are governed by professional bodies and what may be a speciality for doctors is not necessarily a speciality for nurses. He testified that the translation of the individual employees in this case was done correctly and that the translation for their colleagues at Tygerberg was incorrectly done. Although their incorrect translation was done in 2007, he became aware thereof in 2009 and a decision has been taken to have the translation reversed.

[9] The arbitrator, in considering the evidence presented as well as the relevant clause 3.2.5.3, remarked that:

9.1 the agreement does not define and list speciality post. The appellant in deciding which units should be regarded as speciality units must act fairly.

9.2 from the nature of the work performed in the gastroenterology unit and Dr Levin's description of the field as a sub-speciality, there is no reason why the unit cannot be "classed under the broad specialist category of medical and surgical science which is provided in Government Notice R212."

Labour Appeal Court

9.3. the fact that there is no post-basic qualification does not in any way diminish the highly specialised nature of the work performed by the nurses.

9.4 it emerged during evidence that the Theatre and the ICU are also not listed in Government Notice R212 and yet they are regarded as speciality.

9.5 the appellant's interpretation of the term "speciality function" and its insistence that the gastroenterology unit is not a speciality unit is too narrow and does not fit the purpose of the collective agreement which is to advance the careers of the nurses with a view to attracting and retaining nursing professionals.

9.6 the appellant has on two previous occasions viewed similar units as speciality units and the nurses holding the same position as the individual employees have been translated. The appellant has to date not reversed the said translation dispute it claims that the translations were incorrectly done at great expense.

[10] The arbitrator finally found that the appellant had failed to comply with the provisions of the collective agreement, failed to apply its mind or exercised its discretion capriciously and found a need to intervene and give effect to the collective agreement. The arbitrator thereafter made the award that the appellant was *"ordered to translate all the individual employees to the speciality stream, retrospectively from 1 July 2007*" and made no order to costs.

<u>The Court *a quo*</u>

[11] The appellant sought to review the award of the arbitrator on the grounds that the arbitrator exceeded her powers by finding that the gastroenterology unit is a speciality unit for purposes of applying the OSD which was the prerogative of the employer. Secondly, that the arbitrator ignored relevant evidence contained in circular 139/2007 which clearly defined which units are speciality units as well as the evidence of Mabuda.

Labour Appeal Court

[12] With regard to the first ground of review the Labour Court found that the arbitrator did not exceed her powers. The court *a quo* held that the arbitrator properly and rationally interpreted the relevant OSD provisions in light of the evidence before her and further that she had to assess whether the employer exercised its prerogative fairly and came to the conclusion that it had not. As regards the second ground, the court *a quo* held that the arbitrator clearly considered Mabuda's evidence and was not persuaded to come to a different conclusion. Regarding circular 139/2007 the court below held that:

> "The circular that the applicant refers to, did serve before the arbitrator. She does not refer to it in her award, yet it does not appear from the transcript that it was "excluded", as Ms Nyman argues. Nor does it "clearly define" speciality units, as she argues. Circular 139/2007 is an internal one that was not sent to the trade union parties to the collective agreement. It does not deal with gastroenterology units at all and it does not amend the collective agreement."

The application for review was consequently dismissed with costs. The appellant applied and was granted leave to appeal to this Court by the Labour Court with costs being costs in the appeal.

<u>The Appeal</u>

[13] The grounds of appeal upon which the appellant is challenging the decision of the court *a quo* are listed in the notice of appeal and are simply that the court *a quo* erred:

13.1 in finding that the GR139/2007 did not define "speciality post" when the correct finding should have been that the Head of Department, in accordance with his delegated powers, had the final say on what constitutes "speciality units" and "speciality posts";

13.2 in confirming the arbitrator's reliance on Dr Levin's evidence which was in fact irrelevant;

Labour Appeal Court

13.3 in not rejecting the arbitrator's reasoning with reference to Mabuda's evidence, whose evidence could not be challenged;

13.4 in not finding that the arbitrator's reasoning in its entirety was defective and unreasonable in relation to the evidence led and should have set aside and corrected the award to one dismissing the dispute.

[14] It is in my view important to state what the objectives of the OSD are. These are found in clause 1 which states that:

> '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.'

Labour Appeal Court

[15] The purpose of the OSD is, therefore, *inter alia*, to introduce a new remuneration and career progression system for nurses, with the view to attracting and retaining nursing professionals in the public health sector. In terms of clause 3.2.5.3 referred to above, for a professional nurse to be translated to an appropriate speciality post he/she had to have a post-basic clinical nursing qualification listed in GR212. If the professional nurse does not have the said

post-basic clinical nursing qualification listed in GR212, he/she had to be a nurse who has been permanently appointed in a post in a speciality unit and who had been performing the duties of the speciality post satisfactorily on 30 June 2007. The latter would be translated as a once-off provision to the first salary scale.

[16] The individual employees are not in possession of a post-basic clinical nursing qualification. They could only be translated as the second category, namely, that relating to nurses who are permanently in a post in a "*speciality unit*" and had been performing their duties in that "*speciality unit*" satisfactorily. It is common cause that the respondent employees are permanently employed. It is also not disputed that they have been performing their duties satisfactorily, to the extent that they have been used to train other nurses employed in their field. What seems to be standing in their way to be translated into OSD category is the fact that the unit in which they are employed is not regarded as a "*speciality unit* "by the appellant.

[17] It is common cause that the OSD collective agreement does not define what a "*speciality unit*" is. The appellant contends that in the absence of such a definition in the OSD, the Department had the prerogative to determine which of its units should be regarded speciality units. The main and perhaps the only basis for the appeal by the appellant is that the arbitrator failed to recognise the fact that the appellant's classification of the gastroenterology unit as a non-speciality unit cannot be interfered with, unless it is found that the appellant acted in an arbitrary manner, with bias, malice or ulterior motive.

[18] There is nothing in the OSD that suggests that in the absence of the definition of a "*speciality unit*" it shall be the prerogative of the appellant to give meaning to that term. The OSD agreement is a product of collective bargaining and not something the appellant may, unilaterally, vary or interpret. There is therefore no reason why the appellant's interpretation of the OSD collective agreement should be preferred over that of the trade union. As pointed out by the respondents' counsel, were managerial prerogative be permitted to be the determining factor in deciding how to interpret and apply a collective agreement, this would

Labour Appeal Court

undermine our industrial relations framework and the primacy of collective bargaining.

[19] It was submitted on behalf of the appellant that s41 (1) of the Public Service Act[2]("PSA") empowers the national Minister of Health to make regulations regarding inter *alia*, any matter required or permitted by the PSA and any matter referred to in s3(1)[3] of the PSA and to make regulations relating to inter *alia*, innovation and any matter to improve the effectiveness and efficiency of the public service and its service delivery to the public. It was pointed out that the Minister, in turn, is permitted to delegate to the Director-General (the "DG") any power conferred on the Minister by the PSA, except the power to make regulations. The DG, therefore, goes the argument, by a circular dated 28 September 2007 which was addressed to, *inter alia*, the Provincial Departments

---

[2]Public Service Act 103 of 1994. Section 41(1) provides that Subject to the Labour Relations Act and any collective agreement, the Minister may make regulations regarding-
(a) any matter required or permitted by this Act to be prescribed;
(b) any matter referred to in section 3 (1), including, but not limited to-
(i) the allocation, transfer and abolition of functions in terms of section 3 (4) and the staff performing such functions;
(ii) employment additional to the establishment and restrictions on the employment of persons, other than permanently or for fixed periods or specific tasks, in the public service as a whole;
(iii) the appointment of unpaid voluntary workers who are not employees and their functions;
(iv) the co-ordination of work in a department or between two or more departments;
(v) a code of conduct for employees;
(vi) the disclosure of financial interests by all employees or particular categories of employees and the monitoring of such interests; and
(vii) the position of employees not absorbed into a post upon its re-grading;
(c) the reporting on and assessment of compliance with this Act and the review for appropriateness and effectiveness of any regulations, determinations and directives made under this Act;
(d) the designation or establishment of one or more authorities vested with the power to authorise a deviation from any regulation under justifiable circumstances, including the power to authorise such deviation with retrospective effect for purposes of ensuring equality; and
(e) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

[3]Section 3(1) The Minister is responsible for establishing norms and standards relating to-
(a) the functions of the public service;
(b) the organisational structures and establishments of departments and other organisational and governance arrangements in the public service;
(c) the conditions of service and other employment practices for employees;
(d) labour relations in the public service;
(e) health and wellness of employees;
(f) information management in the public service;
(g) electronic government;
(h) integrity, ethics, conduct and anti-corruption in the public service; and
(i) transformation, reform, innovation and any other matter to improve the effectiveness and efficiency of the public service and its service delivery to the public.

Labour Appeal Court

of Health, was exercising his managerial prerogative through powers delegated to him by the national Minister of Health upon the implementation of the OSD collective agreement. On the basis of the said circular, an OSD Moderation Meeting was convened in the Western Cape Province on 29 November 2007 in order to "*establish a uniform interpretation and application of speciality nursing services throughout the Department for the purposes of the alignment exercise*". The decisions of this meeting were recorded in Circular 139 of 2007 which recommended how the OSD should be applied to the different units in the province.

[20] It is common cause that the process adopted by the DG is a process undertaken outside the bargaining process and was not sanctioned by the OSD collective agreement. Parties that concluded the collective agreement with the employer party at national level were not part of this process. It would be incorrect and unfair, in my view, to hold that the PSA gives the appellant, through its DG, a prerogative to impose its understanding of the bargained collective agreement on the other parties thereto, without a specific authority for such prerogative in the collective agreement. Fundamentally, the appellant's reliance on the PSA does not take account of s5(4) of the PSA which provides that:

> 'Any act by any functionary in terms of this Act may not be contrary to the provisions of-
>
> (a) any collective agreement contemplated in item 15 (i) of Schedule 7 to the Labour Relations Act; or
>
> (b) any collective agreement concluded by a bargaining council established in terms of the said Act for the public service as a whole or for a particular sector in the public service.'

and s5(6) which provides that:

> '(a) Any provision of a collective agreement contemplated in subsection (4), concluded on or after the commencement of the Public Service Amendment Act, 2007, shall, in respect of conditions of service of employees appointed in terms

Labour Appeal Court

> of this Act, be deemed to be a determination made by the Minister in terms of section 3 (5).
>
> (b) the Minister may, for the proper implementation of the collective agreement, elucidate or supplement such determination by means of a directive, provided that the directive is not in conflict with or does not derogate from the terms of the agreement.'

[21] The arbitrator had the authority to determine, in the event of disagreement as to the correct interpretation of the OSD collective agreement by the parties, the interpretation and how the agreement should be applied.[4] The managerial powers of the DG cannot, in my view, trump the statutory powers of the arbitrator when interpreting and applying the collective agreement.

[22] In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract[5]. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes.[6] In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

[23] Reverting to the facts of this case, the issue before us is whether the court *a quo* was correct in upholding the arbitrator's interpretation and application of clause 3.2.5.3(i) of the OSD collective agreement. It is clear in my view that the arbitrator was alive to what was required of her. She considered the aim and purpose of the OSD collective agreement. The arbitrator considered the evidence placed before her by the parties namely, among others: that the

---

[4] Section 24 of the Act.

[5] See *Northern Cape Forests v SA Agricultural & Allied Workers & others (1997) 18 ILJ (LAC)*

[6] *SA Municipal Workers Union v SA Local Bargaining Council and Others (*2012) 33 ILJ 353 (LAC) at para [15].

Labour Appeal Court

individual employees performed work which was more specialized than that performed by those in the general nursing stream; the gastroenterological nursing falls under the medical and surgical science speciality; the employees' specialist training occurred on the job; and they trained nurses in similar units who were themselves translated to the speciality stream.

[24] The arbitrator considered the evidence of Mabuda and that of Dr Levin on the type of work and the environment in which the employees worked. She was entitled to do so in order for her to properly give meaning to the concepts "*speciality function*" and "*speciality units*". She was entitled to determine whether the appellant's interpretation of these concepts through the evidence of Mabuda and the circulars issued by the Department was correct. She found that its interpretation was incorrect and contrary to the spirit and the purpose of the collective agreement. The evidence of Dr Levin was crucial to the issue that the arbitrator had to determine. He is a specialist medical practitioner in the unit under consideration and worked with the individual employees. It would be illogical to expect the arbitrator to reject Dr Levin's evidence solely because he is not a nurse, and accept Mabuda's evidence that the gastroenterology unit is not a speciality unit because it is a nurse that is saying so. One would have thought that the specialist in the field of gastroenterology, Dr Levin, was better placed to give such an opinion. It is apparent that in this matter that the arbitrator did apply the fairness standard in his interpretation and application of the OSD collective agreement.

[25] In my view, the court *a quo* did not err in its finding that the arbitrator did not exceed her powers and that the award is not reviewable. In my view, the decision of the arbitrator is not a decision that a reasonable decision-maker could not reach. It is a correct decision that is justified by the material placed before the arbitrator. For the above reasons, the appeal falls to be dismissed.

[26] What remains to be decided is the issue of costs. Both parties submitted that costs should follow the result. In my view, the requirements of the law and fairness dictate that costs should be awarded to the successful party.

Labour Appeal Court

[27] In the result, the following order is made:

The appeal is dismissed with costs.

____

Tlaletsi DJP

Deputy Judge President of the Labour Appeal Court

Davis JA and Coppin AJA concur in the judgment of Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT: Adv R Nyman

Instructed by State Attorney, Cape Town

FOR THE RESPONDENTS: Adv S Harvey

Instructed by Channels Albertyn Attorneys, Rondebosch.

Labour Appeal Court