



**IN THE CONCILIATION, MEDIATION AND ARBITRATION
COMMISSION (CMAC)**

Held at Manzini

CMAC REF: SWMZ 92/14

In the matter between:

CLEMENTINE P MASHWAMA AND 3 OTHERS Applicants

And

SOUTHERN AFRICA NAZARENE UNIVERSITY Respondent

CORAM

Arbitrator : Mr. Robert S. Mhlanga

For Applicants : Mr. S Madzinane

For Respondent : Mr. S Mdladla

**ARBITRATION AWARD
(29/11/16)**

Venue : CMAC Offices, Lankhosi Building, Manzini

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The arbitration proceedings were held at CMAC Offices, kaLankhosi Building in Manzini on numerous dates from 28th April 2014, until the 11th day of April 2016, thereafter the matter was deferred to 4th May 2016 for filing of written closing submissions. However, the parties failed to file their closing submissions on the aforesaid date. The written closing submissions were filed on the second week of August 2016, the Applicants' closing submissions were filed on the 10th August 2016, while the Respondent's submissions were filed earlier than this date, between the 8th and 9th August 2016.

1.2 The Applicants were represented in this matter by Mr. Siphon Madzinane from Madzinane Attorneys, a law firm based in Manzini.

1.3 On the other hand, the Respondent was represented by Mr. Sidumo Mdladla from SV Mdladla & Associates, a law firm based in Mbabane.

2. ISSUES TO BE DECIDED

The issues in dispute in this case as reflected in the Certificate of Unresolved Dispute are the following:

- (a) Unlawful deductions
- (b) Acting allowance
- (c) Responsibility allowance

3. BACKGROUND OF THE DISPUTE

3.1 The Applicants reported a dispute of unfair labour practice to the Commission (CMAC) pertaining to Unlawful deductions, Acting allowance and Responsibility allowance.

3.2 The dispute was conciliated upon on the 12th March 2014, but it was not resolved. Consequently, a Certificate of Unresolved Dispute was issued by the Commission.

3.3 Subsequently, by consent of the parties the dispute was referred to arbitration for determination hereof. On the 9th April 2014, I was duly appointed by the Commission to arbitrate the matter.

4. SUMMARY OF EVIDENCE

4.1 Both parties led oral evidence and filed documents in support of their respective cases. Two (2) witnesses namely, Clementine Mashwama and Theresa Ntshakala testified in support of the Applicants' case. On the other hand, the Respondent called one witness namely, Stanley Ngcwane.

Applicants' Case

Clementine Mashwama's Evidence

4.2 I will refer to this witness as the first Applicant or Mrs Mashwama as the case may be.

4.3 May I mention that after the Applicants' case has been closed, this witness was later on recalled(after an application to reopen the Applicants' case has been made and granted) to give evidence on the question of whether or not an Officer was paid an acting allowance when acting as the Level Coordinator. She handed in as part of her evidence documents being two(2) memoranda dated 2nd July 1997 and 17th November, 1997 and her pay slips for the months of August

2005, September 2005, October 2005, November 2005, December 2005 and August 2006.

4.4 The first Applicant's evidence was given under oath. In a nutshell her testimony was that she is presently employed by the Respondent as the Senior Lecturer, having been employed on the 1st April 2013. She was previously employed by the Nazarene Nursing College where she was holding the position of Level Coordinator- Level 1. She described the duties she performed as a Level Coordinator-Level 1 at Nazarene Nursing College (it is needless for me to recount those duties here as same are not relevant).

4.5 It was Mrs Mashwama's evidence that in her new job (Senior Lecturer) she continued to perform the duties she was performing as a Level Coordinator at her previous employment which were similar to the duties of the Head of Department. She stated that she was performing added responsibilities in that over and above her duties as a Senior Lecturer, she also performed duties which ought to have been performed by the Head of Department. At the time of her engagement there was no Head of Department, hence she was compelled in the circumstances to perform the added responsibilities (level coordination) which should have been performed by the Head of department, but she was not paid for performing these extra duties. She said that the other Senior Lecturers from the other departments at the University (SANU) were not performing the added responsibilities.

4.6 She further asserted that she and her colleagues (the other three Applicants in these proceedings) communicated their concerns to the Respondent through the Dean Lois Germane Dlamini namely; that a Head of department should be appointed and that they should be

financially compensated or paid an acting allowance for performing the added responsibilities. She stated that the Dean had a meeting with them regarding their concerns wherein the Dean, who was allegedly mandated by the University management, verbally requested them to continue discharging these added responsibilities whilst the management was still looking into their concerns. The Dean told them that she had forwarded their concerns or grievances to the University management (Exco). She said that the Dean told them that the management sent her (Dean) to tell them that they should continue performing the added responsibilities.

4.7 The first Applicant stated that they asked the Dean to reduce into writing that the management was requesting them to continue discharging the added responsibilities, but she (Dean) neglected or failed to do so. In support of her assertion the first Applicant made reference to a document at page 71 of the Applicants' bundle filed of record, dated 16th July 2013, being the minutes of a meeting between the Applicants and the Dean, this document is titled: "**Meeting between Faculty Dean with the Former Nazarene Nursing College Level Coordinators**".

4.8 Mrs Mashwama read the contents of this document, and the relevant portion thereof reads as follows: "*The former Nazarene College of Nursing Level Coordinators submitted to the Dean that they request the University to appoint the Head of Department for the General Nursing Program to align the department with other programs run by the university (Bachelor of Science in Medical Laboratory Sciences and Pharmacy Assistant Certificate).*"

4.9 It is further stated in this document that: *"The former Nazarene College of Nursing level coordinators are requesting to be recognized financially for the managerial work they have done since employment (April 2013) with the university"*.

4.10 The first Applicant (Mrs Mashwama) further referred to another document at page 77 of the Applicants' bundle of documents filed of record titled: **"Programme Coordination of General Nursing and Midwifery"**. This was the response to the Applicants' concerns from the Dean (Sr LG Dlamini) which reads as follows:

"This letter is in response to the abovementioned issues. The Executive Management Committee on its siting (sic) on the 19th August 2013 deliberated on the concerns raised by the Dean, FOHS with regards to remuneration of FHOS lecturers for coordinating of the General Nursing and Midwifery programme.

The Executive Management Committee resolved to consider this matter and take it with the seriousness it deserves and deliberations are still on process. You will be informed of the outcome as soon as possible."

4.11 Mrs Mashwama during her testimony further referred to a letter written by the Applicants to the Dean, dated 4th November 2013. The letter is titled: **"REQUEST FOR CONFIRMATION FOR HEAD OF DEPARTMENTS POSITION."**

4.12 The letter in question reads thus: *"Following that we, Winnie Magagula, Clementine P. Mashwama, Dr. Theresa Nshakala and Catherine Sihlongonyane have been working as Head of Departments for the period that is over six months, we request confirmation for the above positions in line with labour laws of the country. In addition, we request to be reimbursed for the period whereby we were acting on the above."*

- 4.13 The first Applicant stated that subsequently the Dean through a memorandum (Memo) advised them that their request had been referred to the University (SANU) senior management (Exco).
- 4.14 Eventually they were called by SANU Management, but the meeting they had with Management was futile because instead of deliberating on their concerns, the Management asked them to define the meaning of "Head of Department" and they told management that they could not do that, and they also advised management that the matter would now be referred to their attorneys.
- 4.15 On the 2nd December 2013, they wrote a follow up letter on their request for confirmation as Head of Department, and they advised the Respondent that if they did not get a response to their request within seven days, then they would seek further advice. They did not get a response for this letter.
- 4.16 Following the Respondent's failure to respond to their request they wrote another letter dated 11th December 2013, wherein they advised the Respondent that they intended to seek legal advice on the matter in question.
- 4.17 Mrs Mashwama stated that she stopped performing the added responsibilities in or about April 2014, after the Respondent had appointed the Head of Department. She carried out the added responsibilities from April 2013 to April 2014 without being remunerated for this. She said that since she was performing the duties of the Head of Department, she was supposed to be paid or remunerated for this in terms of the University (SANU) policies. She asserted that in terms of Subsection 5.9 of the SANU policies she was

entitled to an Acting allowance calculated at 10% of her basic salary. It was Mrs Mashwama's evidence that she was also entitled to be paid the Responsibility allowance in terms of Subsection 5.10 of SANU Policies calculated at 15% of her basic salary.

4.18 On the other hand Mrs Mashwama contended that she was underpaid by the Respondent in that upon her engagement she was given a salary scale indicating that as a Senior Lecturer she was supposed to be paid an annual salary of E264, 744.00, which amounts to E22, 062.00 per month. She stated that the monthly salary of E18, 749.00 being paid to her by the Respondent is contrary to its own salary scale. She said that since the date of her employment an unlawful deduction of E3, 313.00 per month has occasioned which translates to E36, 443.00 over the period of eleven (11) months.

4.19 Mrs Mashwama prayed for an order directing the Respondent to pay her (inclusive of the other three Applicants) the claims set out in the Applicants' statement of claim filed of record namely; (a) Unlawful deductions (b) Acting allowance (c) Responsibility allowance.

Cross-examination

4.20 During cross-examination, Mrs Mashwama was subjected to a lengthy cross-examination by the Respondent's attorney Mr. Mdladla. However, for the sake of brevity I will only summarize the questions and responses which I deem relevant herein.

4.21 During cross-examination, most of the questions that were asked by the Respondent's attorney revolved around the question of whether this witness (Mrs Mashwama) was appointed or requested by the

Respondent to act as the Head of Department pending the appointment of the substantive Head of Department.

4.22 Mrs Mashwama reiterated under cross-examination that she was employed as a Senior Lecturer, and she signed the contract of employment on the 5th April 2013. She said that upon engagement she was not given a job description. The employer is said to have told her that it was still working on it.

4.23 When asked as to when she started performing the duties of the Head of Department, Mrs Mashwama's response was that she started from the date of engagement after realizing that there was no Head of Department in the General Nursing Programme.

4.24 She and her colleagues continued to perform the duties of level coordination, which they were performing in their previous employment pending the appointment of the Head of Department by the Respondent.

4.25 Mrs Mashwama was repeatedly asked whether she was appointed or requested to act as the Head of Department. Her response was that she was verbally requested (at a later stage) by the Faculty Dean to continue performing the added responsibilities (as she had been doing since the date of her employment).

4.26 When asked whether she has a document to support her assertion that she was requested to be the Acting Head of Department, in response she reiterated that she was verbally requested by the Dean to continue discharging the added responsibilities. She said that when they asked the Dean to put in writing the said request, she (Dean) failed to do so. She conceded that there is no document or

correspondence from the Respondent to the effect that she was requested to act as the Head of Department. However, she referred to an email of the 15th August 2013, from her (Mrs. Mashwama) to the Dean.

4.27 She read the email, which in part reads as follows: "*We write to follow up a memo we wrote to your office on coordination of General Nursing and Midwifery Levels on the 1 August 2013 with the following concerns:*

- **That the coordination responsibility request be communicated in writing.**
- **That the Head of Departments are placed as soon as possible.**
- **That the coordinators are remunerated according to SANU policies pertaining Responsibility Allowance Section 5.10.1 taking into consideration that these activities have been ongoing since April 2013."**

4.28 It was put to AW1 (Mrs Mashwama) that she was neither requested nor appointed by the Respondent as the Acting Head of Department. In response, AW1 disputed this; she reiterated that she was verbally requested by the Respondent through the Dean, but unfortunately this was never put in writing (despite their request that same should be written down).

4.29 AW1 further stated that the memo written to the Faculty Dean (wherein inter alia, they asked that the verbal request for them to continue with the added responsibilities or level coordination be put in writing) was copied to the Vice Chancellor (VC) and the Vice Chancellor never denied the fact that they (Applicants) were verbally requested, thus she assumed that the Vice Chancellor also acceded to this.

- 4.30 During cross-examination, AW1 stated that her claim of Acting Allowance is based on the alleged 'verbal request' made by the Dean as reflected in the Memo written to the Dean and copied to the Vice Chancellor. She said that initially there was no Head of Department in the General Nursing Department thus they requested the Respondent (SANU) to appoint the Head of Department.
- 4.31 With regard to the claim of Underpayment/Unlawful deductions, when AW1 was asked why she contended that she was underpaid by the Respondent, her response was that she was underpaid because her salary is lower than the salary initially reflected in the advertisement for this position(Senior Lecturer).
- 4.32 She said that when she signed the contract of employment she realized that her salary was different or lower than the salary which appeared in the job advertisement or pay scale initially given to her by the Respondent. She was given the pay scale before she signed the contract of employment. She allegedly complained about this, and the Respondent assured her that it would look into it, but to no avail.
- 4.33 However, when asked about the validity and legality of the contract of employment she signed, she conceded that the contract of employment between her and the Respondent is valid and binding. She also conceded that the salary currently paid to her by the Respondent is in accordance with the contract of employment entered into between the parties. Furthermore she conceded that there was no underpayment or unlawful deduction which was being effected from her salary by the Respondent. However, with regard to the claims of Acting allowance and Responsibility allowance she maintained that she was entitled to be paid same by the Respondent.

She alleged that she was entitled to Responsibility allowance by virtue of having acted as the Head of Department for over six (6) months.

4.34 On the other hand, AW1 stated that upon her engagement she was not given a job description, and to date she does not have same.

4.35 It was put to AW1 that the pay scale she was referring to was not applicable, and that same was revised before she signed the contract of employment. It was brought to her attention that the revision of the pay scale was necessitated by the fact that the Respondent (SANU) depends on Swaziland Government for financial support or funding (subvention).

4.36 In response, AW1 conceded that she was aware that since Respondent would be funded by Government, a pay scale was subject to Government's approval. She stated that the Respondent through the Vice Chancellor negotiated with them to accept a salary cut or a salary lower than the one initially promised by the University.

4.37 It was further put to AW1 that her remuneration or salary is in line with the current pay scale which was vetted and approved by Government, and that this scale is applicable to all the Respondent's employees.

4.38 In response, AW1 said that she was not aware of that and that she was hearing this for the first time. However, she said that she could not deny it.

4.39 On the other hand, AW1 stated that initially she was involved in the transition of the Respondent from Nazarene Nursing College to University (SANU). She also conceded that the Government was

involved in the process because it provides subvention for the University, hence some of the decisions to be made by the Respondent were subject to Government's approval.

4.40 During re-examination AW1 said that she was neither consulted on the new or current pay scale nor shown same by the Respondent.

Theresa Ntshakala's Evidence

4.41 The second witness who also gave her evidence under oath in support of the Applicants' case was Theresa Ntshakala, to whom I shall refer as the second witness (AW2) or Ms Ntshakala as the case may be.

4.42 In essence AW2's evidence was similar to AW1's testimony in so far as the claims and events giving rise to the issues in dispute are concerned.

4.43 In her evidence she stated that she is employed by the Respondent as a Senior Lecturer, having been employed in April 2013. Her monthly salary is about E18,749.00. She also stated that upon her employment she was not given the job description.

4.44 Her contention is that from April 2013 until June 2014, over and above her normal duties as a Senior Lecturer, she was called upon to perform added responsibilities, which were supposed to be done by the Head of Department. This was necessitated by the fact that there was no Head of Department for the General Nursing Programme. She stated that despite performing these extra duties or added responsibilities, the Respondent did not pay her for such. She expected to be paid an Acting allowance for performing these duties, which ought to have been performed by the Head of Department.

- 4.45 AW2 said that when she was still at Nazarene Nursing College she was appointed as a Level Coordinator Level 2, and when she joined the Respondent (SANU) she continued (due to the absence of Head of Department) with level coordination which entails duties similar to those of the Head of Department.
- 4.46 She said that upon her employment on the 13th April 2013, the Respondent gave her its Policies and Procedures which constitutes the terms and conditions of employment herein. She was also given the Salary Scale depicting that a Senior Lecturer is supposed to earn an annual salary of E264, 744.00 which translates to about E22, 000.00 per month.
- 4.47 She stated that she was never paid the salary of E22, 000.00 ever since she started working for the Respondent (SANU). AW2 said that she is not aware of any other Salary scale besides the one given to her by employer upon her engagement. AW2 further stated that she no longer performs the added responsibilities following the appointment of the substantive Head of Department in July 2014.
- 4.48 She and her colleagues asked the Respondent to pay them the Acting allowance for performing these added responsibilities, as well as the Responsibility allowance for having performed the extra duties for a period of six(6) months. They also asked the Respondent to appoint the Head of Department.
- 4.49 The Respondent failed to address their concerns in that it neither paid them the Acting allowance and Responsibility allowance nor appointed the Head of Department. However, according to her the Dean verbally requested them to continue performing these extra duties while in the

meantime the University (SANU) was looking into their matter. Unfortunately, when they asked the Dean to put in writing the University's undertaking that they should continue performing these added responsibilities (while their concerns were being considered) she failed to do so. AW2 referred to the document at page 71 of the Applicants' bundle namely, the minutes of a meeting between the Applicants and the Faculty Dean. This is the same document referred to by AW1 in her evidence.

4.50 AW2 stated that the Vice Chancellor was aware of their grievances or concerns, because some of their correspondences were copied to the Vice Chancellor. She said that the Respondent failed to address their grievances or concerns. She also confirmed that the University management once called them to a meeting wherein instead of addressing their concerns, the management asked them to define what the term "Head of Department" means. They declined to do that, and that was their last encounter with the Respondent on these issues, and subsequently they referred the matter to their attorneys for action.

4.51 AW2 prayed for the payment of the Acting allowance calculated at 10% of her basic salary, Responsibility allowance calculated at 15% of her basic salary in terms of the University policies, as well as Unlawful deductions occasioned by the fact that she was underpaid. AW2 alleged that according to the Salary Scale given to her by the Respondent, she is supposed to be paid a salary of E22,000.00 per month, not the current salary of E18,749.00 per month.

Cross-examination

- 4.52 Under cross-examination, AW2 confirmed that her case or set of circumstances are similar to those of AW1 (Ms Clementine Mashwama).
- 4.53 She also confirmed that the contract of employment entered into between the parties sets out her terms and conditions of employment. Furthermore, she confirmed that she received the University (SANU) Policies and Procedures manual before she signed the contract of employment. AW2 confirmed further that the contract of employment is valid, and that it is the only contract she signed or entered into with SANU.
- 4.54 It was put to AW2 that she was not underpaid because the salary being paid to her by the Respondent is the one agreed upon between the parties in terms of the signed contract of employment. In response, AW2 conceded that she did sign the contract of employment. However, she stated that she signed same under pressure because she was not given enough time to read it before signing same. She said that she was forced to sign it because of the circumstances she was in at the point in time, otherwise she would not have been paid her salary if she did not sign the contract of employment. She said that the contract of employment was signed on the 15th April 2013, but it was backdated to the 5th April 2013.
- 4.55 She said that from the onset the issue of the Salary scale differential or payment of the salary which is contrary to the salary scale initially given to her by the Respondent was raised and the Respondent's management promised her that it would look into it, but to no avail.

4.56 During cross-examination, AW2 was asked if she was aware that the Salary scale currently utilized by the Respondent was approved by the Government because the University is being funded by Government of Swaziland. In response, AW2 conceded that she was aware of the existing salary scale, the employer told them about this during the welcoming meeting when they contested the salary scales. However she said that she did not know whether or not the current salary scale was agreed upon between the Respondent and Government. She said that the Respondent was supposed to give her the new salary scale which is allegedly applicable.

4.57 AW2 conceded that at the time she signed the contract of employment she was aware that the salary being offered to her by the Respondent was different or lower than the salary reflecting in the initial salary scale in her possession. She said that she signed the contract under pressure because the pay date was close and she signed same in order to get her salary in that month (otherwise she would not have been paid if she did not sign the contract of employment).

4.58 AW2 was asked as to how could she had been appointed to be acting Head of Department because the General Nursing and Midwifery Programme had not yet been departmentalized and thus there was no Head of Department. In her response she conceded that this was true, however she insisted that she was entitled to be paid an acting allowance because she performed the added responsibilities(level coordination), and that these duties are similar to those performed by the Heads of Department in the other departments of the University. She said that she regarded herself as an Acting Head of Department

by virtue of performing these added responsibilities (which were supposed to be done by the Head of Department).

4.59 AW2 was referred to their (Applicants) letter of demand dated 18th December 2013, filed of record herein, and she was asked to confirm whether the contents thereof are true and correct. AW2 confirmed the contents as true and correct. With reference to the assertion in the letter to the effect that they (Applicants) were instructed to be Acting Head of Department, AW2 was then asked whether or not they were instructed and if so, by whom. In response AW2 denied that they were instructed, she said that they were verbally requested by the Dean to continue discharging the added responsibilities while the Respondent was still looking into the raised issues or concerns. In support of her contention AW2 referred to the following documents filed of record from the Applicants' bundle namely, a Memo from them (Applicants) to the Dean dated 1st August 2013, and a follow up email to their Memo to the Dean sent on the 15th August 2013, and the Dean's response thereto dated 23rd August 2013.

4.60 It was put to AW2 that she was never requested to be an Acting Head of Department and as such she was not entitled to any Acting allowance. AW2 denied this, she maintained that she and her colleagues were verbally requested by the Dean to continue doing the added responsibilities (as they had been doing since the date of their engagement) and that she was entitled to be paid an Acting allowance.

4.61 It was further put to AW2 that it was inconceivable that they could all be appointed as Heads of Department. In response she reiterated that at Nazarene Nursing College they were level Coordinators, and when

they joined the Respondent they (in the absence of the Head of Department) continued with the level Coordination (which is similar to the activities or duties performed by the substantive Head of Department). She said that they were supposed to be remunerated by the Respondent for performing these added responsibilities.

RESPONDENT'S CASE

Stanley Ngcwane's Evidence

4.62 The Respondent led one witness to buttress its case namely, Stanley Ngcwane. Mr. Ngcwane gave his testimony under oath and stated that he is currently employed by the Respondent as the Registrar, having been employed on the 1st July 2013.

4.63 He said that previously, before his employment by the Respondent, he served as the member of the Board of Governors, wherein he served as a Vice Chairman, and later on he was appointed as the Chairman of the Board of Governors for Southern Africa Nazarene University (SANU). He relinquished his position as a Member of the Board of Governors following his engagement by the Respondent (SANU).

4.64 In his evidence Mr. Ngcwane gave a brief background of how the Southern Africa Nazarene University (SANU) was formed or established. In a nutshell, he stated that the National Body, being an authoritative structure of the Church of the Nazarene, alongside other statutory organs of the Church of Nazarene came up with an idea to merge the three colleges so that they become a University. The three colleges were: Nazarene Teachers College, Nazarene Nursing College and Nazarene College of Theology.

- 4.65 He said that work started in 2007, wherein these three aforesaid Colleges were merged and a consortium was established. He stated that the three Colleges agreed to cooperate in all their activities while maintaining their autonomy in terms of administration. The Respondent (SANU) was fully launched as a University in 2010, after having met all the statutory requirements for the University to be recognized as a legal entity by Government.
- 4.66 The transition from being Colleges to University was truncated or staggered (it did not happen at once). The recruitment of staff or employees of the former Colleges began in 2013. With regard to the former Nazarene Teachers College, it was only the support staff that was transferred to SANU in April 2013, while the academic staff was hired in April 2014, because there were some issues like severance pay which had to be sorted out with Government.
- 4.67 The witness further stated that during the period of transition, it was the administration only that was changed, while the academic functions of the former colleges continued or remained intact to enable the students' programmes of study to continue without any disturbance.
- 4.68 Regarding the Applicants' contention that they should be paid an acting allowance because they were performing added responsibilities (level coordination) or that they were requested by the Respondent (through the Dean) to perform the added responsibilities, Mr. Ngcwane only confirmed that the Applicants were requested to continue with level coordination, as they (Applicants) had been doing same when they were still at the Nazarene Nursing College, while the restructuring was still ongoing in order to allow a harmonious

transition. However, he denied that they were entitled to any acting allowance, because there was no department yet in the General Nursing and Midwifery programmes at that time nor was there a Head of Department. Therefore, they could not have been instructed or requested to be Acting Head of Department as there was no Department. He said that their positions of being Level Coordinators were non-remunerative.

4.69 Furthermore, Mr. Ngcwane stated that the duties of the Level Coordinators are different from those of the Head of Department in that the Level Coordinators focus on the coordination of the academic activities which are particular to a level, not to an entire organic unit. On the other hand, the Head of Department is responsible for the entire programmes of study. For instance, in a Bachelor of Science in Midwifery (a four year programme) the Head of Department is responsible for the entire programme, that is, from first year students to fourth years, whereas a Level Coordinator for first year students is responsible for the academic activities of first year students only.

4.70 The witness stated that there are no Level Coordinators at the University (SANU), level Coordinators existed at the College. The witness further stated that after the completion of the restructuring process, in 2014 the General Nursing and Midwifery programmes were crystallized or formed into two departments namely, the Department of General Nursing and the Department of Midwifery. The Heads of these two departments have already been appointed. Sister Winnie Magagula was appointed as the Head of Department for the Department of Midwifery, and Catherine Sihlongonyane was appointed to act as the Head of Department for the Department of General Nursing, because the incumbent or substantive Head of this

department is on study leave. On the other hand, Doctor Theresa Ntshakala was appointed as the Head of Department for the new Department of Nursing in Anaesthesia.

4.71 With regard to the Applicants' claim for unlawful deductions or underpayment which was allegedly occasioned by being paid on a lower pay scale, Mr. Ngcwane's testimony was that the Applicants are not underpaid because the pay scale on which they are currently remunerated is the correct scale which was endorsed or sanctioned by the Board of Governors. He stated that the initial pay scale given to the Applicants was a working document used during the negotiations with the Lecturers. He further stated that the University is dependent on Government for subvention (20% is provided by Government) to cater for staff's salaries. The Respondent was advised by the Government to use the University of Swaziland's pay scale as a benchmark for its own pay scale which was done. Consequently, the initial pay scale was reviewed and redrafted to be in line with the Government's subvention, hence the current pay scale came into existence.

Cross-examination

4.72 Under cross-examination, Mr. Ngcwane confirmed that the Applicants during the transition were verbally requested by the Vice Chancellor, Winnie Nhlengethwa to continue performing the added responsibilities (level coordination) which they had been doing since the time they were employed by the Nazarene Nursing College. He said that this was part of the cooperation from the academic Staff, as there was a need to manage the transition. He further confirmed the fact that the Applicants agreed to the Vice Chancellor's aforesaid request.

- 4.73 The witness confirmed that all the four Applicants are employed as Senior Lecturers. He further confirmed that over and above the performance of their duties as Senior Lecturers, the Applicants also performed the added responsibilities, that is, level coordination.
- 4.74 When asked whether or not the Applicants (while still at Nazarene Nursing College) were remunerated for being Level Coordinators, Mr. Ngcwane's response was in the negative. He said that they were not remunerated as per the instruction or information he got from the Vice Chancellor, who is the former Principal of the institution (Nazarene Nursing College). However, the witness did not have any documentary proof to substantiate his contention.
- 4.75 It was put to this witness that at Nazarene Nursing College, the Level Coordinators were remunerated for level coordination. They allegedly received an allowance for performing the added responsibilities (level coordination). The witness was not in a position to say whether this was true or not because he did not have proof.
- 4.76 During cross-examination it was shown to the witness that the Applicants as early as July 2013 (as appears in the correspondences exchanged between the parties at pages 71 and 74 of the Applicants' bundle) they requested to be remunerated for level coordination (added responsibility), and the witness acknowledged same. He reiterated that at SANU there are no Level Coordinators.
- 4.77 The witness (Mr. Ngcwane) stated during cross-examination that the Applicants were dealing directly with the Dean, not Management as the correspondences were addressed to the Dean. However, he said that the Management (Exco) eventually had an audience with the

Applicants wherein the Applicants were told that the Management could not deal with the issue of payment for acting as Head of Department because their positions as Level Coordinators were non-remunerative. He said that the matter had already been dealt with at the Faculty level before it came to Management. He stated that the Meeting Management and the Applicants was futile because the Applicants advised Management that they had since referred the matter to their Legal Advisor. Mr. Ngcwane stated that the issue brought to Management was the one pertaining to the payment of an acting allowance, not the issue of level coordination.

4.78 During cross-examination Mr. Ngcwane was asked whether the Respondent would remunerate the Applicants for level coordination if it were to be found that at the Nazarene Nursing College they were remunerated for being Level Coordinators. His answer was in the affirmative. He said that SANU would have continued to pay them for level coordination.

4.79 Mr. Ngcwane, under cross-examination denied that the alleged added responsibilities performed by the Applicants were essentially similar to the duties of the Head of Department. However, he conceded that to a certain extent some of the functions or duties of Level Coordinators were similar to those of the Head of Department.

4.80 Mr. Ngcwane also conceded that the Respondent benefitted from the services (level coordination) rendered by the Applicants during the transition.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS/ ARGUMENTS

5.1 In the present case, both parties filed closing submissions in support of their respective cases. I have noted all the submissions advanced by the parties herein, but in my analysis I will only refer (when it is necessary) to the submissions which I deem relevant. Over and above the oral evidence led by the parties, I will also take into account the parties' documentary evidence (documents filed of record herein).

5.2 In the present case the four Applicants are claiming against the Respondent payment of the following: **(a)** Unlawful deductions in the sum of E145,772.00 (E36,443.00x4) **(b)** Acting allowance(10% of basic salary) in the sum of E52,948.80 (E13,237.20x4) **(c)** Responsibility allowance(15% of basic salary) amounting to E66,180.00 (E16,545.00 x 4).

5.3 In this case, I am called upon to decide whether or not the Applicants are entitled to be paid the aforementioned claims.

5.4 In the instant case the Applicants, according to the general principle which says, **"He who alleges must prove"**, bear the onus to prove on the balance of probabilities that they are entitled to be paid the abovementioned claims herein. They must prove that the Respondent is liable to pay them the aforesaid monies.

5.5 In essence the Applicants' case is encapsulated in their letter of demand dated 18th December 2013, "Annexure A" of their report of dispute and in the Applicants' statement of claim. In the letter of demand it is alleged that: **"Our clients have instructed us that on or about the 1st April 2013, they were instructed to be Acting Head of Department in respect of the levels at which they were**

Head of Department for with their previous employer. From the 1st April 2013 to date our clients have, over and above being Senior Lecturers at the University, been also Head of Departments. Despite them holding that position from 1st April to date, the University has not paid them their allowance for being Head of Departments.”

5.6 In the letter of demand, it was further contended on behalf of the Applicants that: **“On the issue of being Head of Departments, our clients have instructed that when they realized that the University was not paying them their acting allowances, they duly wrote the University several letters seeking payment of their acting allowance for being Head of Departments. Unfortunately all correspondences sent by our clients to the University did not attract a courtesy of a response.”**

5.7 It is the Applicants’ contention that: **“In terms of the policy of the University relating to remuneration and benefits, a person who is acting is supposed to be paid an acting allowance being 10% of basic salary.”** It is further asserted that since they (Applicants) had been Acting Head of Department for six (6) months, they are entitled to be paid a sum of E2, 206.20 each per month which translates to E13, 237.20 per person.

5.8 With regard to the claim of Underpayments or Unlawful deductions, as per the said letter of demand, it is argued on behalf of the Applicants that: **“In terms of the salary scale of the University, a Senior Lecturer is supposed to be paid a basic salary of E264, 744.00 (Two Hundred and Sixty Four Thousand Seven Hundred and Forty Four Emalangeni) per year which means is a sum of E22,062.00 (Twenty Two Thousand and Sixty Two Emalangeni)**

per month. Contrary to its salary scale, the University is paying our clients a sum of E18, 749.00 (Eighteen Thousand Seven Hundred and Forty Nine Emalangeni) salary per month thereby occasioning an unlawful deduction of E3, 313.00 (Three Thousand and Thirteen Emalangeni) per month.”

5.9 In the Applicants’ statement of claim it is averred that the underpayments had been going on for eleven (11) months (from the date of employment in April 2013 to February 2014, being the time the dispute was reported to the Commission), and that the Respondent during this period was indebted to the Applicants in the total sum of E36, 443.00 for each Applicant. The total sum allegedly due and owing for all the four Applicants is E145, 772.00.

5.10 The Applicants, with regard to the claim of Responsibility allowance, contend that in terms of the Respondent’s policy, they are entitled to be paid a Responsibility allowance calculated at 15% of the basic salary.

5.11 It is asserted that by virtue of having acted for a period exceeding six (6) months, they (Applicants) automatically became substantive Heads of Department. It is averred that in terms of the employer’s policy, they were supposed to be paid a Responsibility allowance calculated at 15% of the basic salary per month multiplied by five months (for the period from 1st October 2013 to February 2014). The total claim for all the Applicants is E66, 180.00.

5.12 On the contrary, the Respondent in its reply to the Applicants’ letter of demand and response to the Applicants’ statement of claim denied or disputed the Applicants’ claims.

5.13 In the letter dated 6th February 2014, the Respondent's attorneys acting on behalf of the Respondent responded to the Applicants' allegations contained in the aforesaid letter of demand and in part its response is as follows: **"Our instructions are that your clients were never appointed or instructed to be acting Heads of Department. We are further instructed that our client does not have departments at this stage, as it is currently restructuring itself. The actual position is that there will shortly be departments of the levels they are involved in and it is therefore inconceivable that your clients would have been Acting Heads of Departments which do not exist. Our instructions are that the positions which your clients occupy have always been non-remunerative, as such no allowance is due to your clients."**

5.14 With regard to the claim of unlawful deduction or underpayment, the Respondent disputes this claim. It is contended that there was never any unlawful deduction of E3, 313.00, and that the salary scale the Applicants rely on in support of this claim in question is not applicable. I will revert to this issue later on in my analysis when I closely look at the Applicants' evidence and submissions in support of their claims, as well as the Respondent's evidence in rebuttal of same. The Respondent also denies the claims of Acting allowance and Responsibility allowance.

5.15 Now I will look at the evidence led by the Applicants in support of the three claims herein, as well as the Respondent's assertion or evidence in rebuttal of these claims.

5.16 As shown from the above quoted contents of the letter of demand dated 18th December 2013, the basis for the Applicants' claims of Acting allowance and Responsibility allowance is that on or about April 2013 they were allegedly instructed to be Acting Head of Department *"in respect of the levels at which they were Head of Department for with their previous employer."* The claim of Unlawful deductions or Underpayment is separate from these two claims as it is based on the allegation that a different salary scale from the one initially given to the Applicants was used by the Respondent, and that this resulted in the underpayment.

5.17 However, during the arbitration hearing the Applicants' version as per the evidence of Clementine Mashwama and Theresa Ntshakala was that they (Applicants) were verbally requested by the Respondent through the Dean to continue with the level coordination or added responsibilities, and they obliged.

5.18 These witnesses testified that they performed the added responsibilities (level coordination) from the date of employment (April 2013) and they stopped when the Heads of Department were appointed sometime in 2014. According to Clementine Mashwama (AW1) she stopped performing the added responsibilities in April 2014 following the appointment of the substantive Head of Department. Theresa Ntshakala stated that she stopped performing the added responsibilities in June 2014.

5.19 It is common cause that at their previous workplace, Nazarene Nursing College the Applicants were working as Level Coordinators. The evidence revealed that when the Applicants joined SANU in April 2013, there was no Head of Department for the General Nursing and

Midwifery programme, and same was not yet departmentalized or formed into a department. It is not in dispute that the Applicants as per the Respondent's request continued with level coordination; they performed the added responsibilities since the date of employment in April 2013, until the time when the Heads of Department were appointed in 2014. This was also confirmed by the Respondent's witness, Stanley Ngcwane in his testimony. Mr. Ngcwane stated that the Applicants were requested to continue with level coordination at SANU as they had been doing while working for Nazarene Nursing College, in order to allow a harmonious transition.

5.20 The evidence (in the form of correspondences exchanged between the parties) further revealed that from the onset the Applicants asked the Respondent to remunerate them for level coordination or performing the added responsibilities in accordance with the SANU policies. They also requested the Respondent to appoint the Head of Department.

5.21 It is recorded in the minutes of a meeting between the Faculty Dean and the Applicants (former Nazarene Nursing College Level Coordinators) held on the 16th July 2013, inter alia, that: "**The former Nazarene College of Nursing level coordinators are requesting to be recognized financially for the managerial work they have done since employment(April 2013) with the University.**"

5.22 In the letter dated 23rd August 2013, from the Dean to the Applicants titled; **Programme Coordination of General Nursing and Midwifery** the Dean wrote that: "**The Executive Management Committee on its siting (sic) on the 19th August 2013 deliberated on the concerns raised by the Dean, FOHS with regards to remuneration of FHOS lecturers for coordination of**

the General Nursing and Midwifery programmes. The Executive Management Committee resolved to consider this matter and take it with the seriousness it deserves and deliberations are still on process. You will be informed of the outcome as soon as possible. The EXCO appreciates cooperation from all affected employees.”

- 5.23 In the letter dated 4th November 2013, from the Applicants to the Dean titled; **Request For Confirmation For Head Of Departments Position**, the Applicants stated that: **“Following that we....have been working as Head of Departments for...a period that is over six months, we request confirmation for the above positions in line with labour laws of the country. In addition, we request to be reimbursed for the period whereby we were acting on the above.”** This letter was also copied to SANU VC, PVC Admin and PVC Academic. However, the request or prayer to be confirmed as substantive Heads of Department was abandoned by the Applicants through their attorney, Mr. Madzinane during the arbitration hearing.
- 5.24 In the present matter, the main issue which falls for determination is whether or not the Applicants were instructed or requested by the Respondent to be Acting Heads of Department for them to be paid the Acting allowance and Responsibility allowance in terms of the SANU Policy. In order to succeed in this case, the Applicants must prove or establish that they were instructed or requested by the Respondent to be Acting Heads of Department during the period of transition.
- 5.25 During the giving of evidence none of the Applicants’ witnesses testified that they (Applicants) were requested to be Acting Heads of

Department. Their evidence was that they were verbally requested by the Dean to continue with the level coordination as they had been doing at Nazarene Nursing College, which thing they did as demonstrated in the foregoing evidence. During cross-examination both witnesses were asked whether they were instructed or requested by the Respondent to be Acting Heads of Department, and in response they reiterated that they were verbally requested to carry on with the level coordination or added responsibilities. The witnesses also stated that the level coordination or added responsibilities they performed were equivalent to the duties of the Head of Department, and that the employer (Respondent) benefitted from their services.

5.26 From the look of things the Applicants' case seems to be shifting or changing from the initial contention that they should be paid an acting allowance and Responsibility allowance on the basis of the fact that they were instructed to be Acting Heads of Department. Now their contention seems to be that since they performed these added responsibilities and the Respondent having benefitted from their services, they are entitled to be paid an Acting allowance and the Responsibility allowance. This position was revealed during the hearing when the Applicants' witnesses gave evidence, and when Mr. Ngcwane was being cross-examined by the Applicants' attorney. This is also revealed in the Applicants' closing submissions at page 8, paragraph 4.4 and page 9, paragraph 4.5.

5.27 At page 8, paragraph 4.4 of the closing submissions it is argued on behalf of the Applicants that: *"Clearly it was not disputed that they were carrying added duties of being...Level Coordinators. The contention by respondent that it was not remunerative position is unlawful and cannot be allowed to stand as applicants carried out*

added responsibilities for the benefit of the employer.” At page 9 paragraph 4.5 it is further submitted that: “Accordingly it remains unexplained why applicants were not paid by the respondent yet it is conceded that they carried out the work”.

5.28 The Respondent in its response to the Applicants’ letter of demand and statement of claim, as well as the oral evidence of Stanley Ngcwane denies that the Applicants are entitled to the claims in question. The Respondent’s contention is that the Applicants were never instructed or appointed to be Acting Heads of Department, and that their positions (as Level Coordinators) were non-remunerative, hence they are not entitled to Acting allowance and Responsibility allowance. It is further contended by the Respondent that the Applicants are not entitled to Unlawful deductions/Underpayment because the salaries paid to them is in accordance with the applicable pay scale. I will revert to the issue of Unlawful deductions later on when I look at it in detail.

5.29 In its closing submissions, the Respondent submitted that the Applicants have failed to prove that they were appointed to act as Heads of Department, more so because there were no departments at that time. It is contended that they could not have been appointed to non-existing departments.

5.30 In *casu*, it is common cause that the General Nursing and Midwifery programme was not crystallized into departments at this point in time, and as such there was no substantive Head of Department.

5.31 Therefore, in my view, it is inconceivable that the Applicants could have been appointed to be Acting Heads of Department where there

was neither an existing department nor Head of Department. There could be no acting where there was neither a department nor Head of Department. The question is, for whom were they acting and for which department because there were no departments yet. Again, may I point out that the Applicants' case is that they want to be paid an Acting allowance and Responsibility allowance because they were allegedly instructed to be Acting Heads of Department in terms of SANU Policies, not that they should be paid on the basis of the fact that they carried out the added responsibilities as they now allege. Seemingly they are now clutching at straws.

5.32 In light of the foregoing analysis, it is my finding that the Applicants have failed to prove on the balance of probabilities that they were appointed or requested to be Acting Heads of Department and that they should be paid an Acting allowance and Responsibility allowance in terms of SANU Policies. Therefore, their claims of Acting allowance and Responsibility allowance should fail.

5.33 Coming to the claim of Unlawful deductions/Underpayment; the Applicants' contention regarding same is that they were being underpaid in that the Respondent was paying them (at the time the dispute was reported) E18, 749.00 per month, yet in terms of the initial salary scale furnished to them by the Respondent, they were supposed to be paid E22, 062.00 per month. The Applicants stated in their evidence that when the position of Senior Lecturer was advertised by the Respondent the basic salary depicted therein was E264, 744.00 per annum, which translates to E22, 062.00 per month. Their contention is that as Senior Lecturers, their basic salary was supposed to be E22, 062.00 per month in accordance with the salary scale furnished to them by the Respondent.

5.34 On the contrary, the Respondent's contention is that it is not true that the Applicants are being underpaid. Mr. Ngcwane stated in his evidence that the salary scale on which the Applicants' claim of Underpayment is founded is not applicable. He said that this scale was only used as a working document during the negotiations with the Lecturers; it was never approved by Government. It was Mr. Ngcwane's undisputed evidence that the Swaziland Government pays the University 20% subvention, and that as such the Government did not approve the initial salary scale. He stated that the University had to review the salary scale, and that the current salary scale which is applicable to all the employees of SANU was drafted in line with Government's subvention.

5.35 On the other hand the two witnesses, Clementine Mashwama and Theresa Ntshakala conceded during cross-examination that the contract of employment entered into between the parties is valid and binding. They both admitted that at the time they signed the contract of employment they were aware that the salary of E18, 749.00 contained in the contract was lower than the one depicted in the initial salary scale, but despite this they signed same. Their excuse for signing the contract is that they were under pressure because they would not be paid if they were to decline signing same. This flimsy excuse is not accepted because they knew that by signing the contract of employment they waived their rights to contest its validity at a later stage, because there is nothing suggesting that the contract was signed under duress or undue pressure as they want me to believe.

5.36 Interestingly, when they were asked under cross-examination about the validity of the contract of employment, they admitted that the

contract of employment was valid and binding, and that it constitutes the terms and conditions of their employment. The Applicants were aware at the time they signed the contract that the salary reflected therein had been reduced, but they nevertheless signed it. On the other hand, Clementine Mashwama testified that she was aware that Government was involved in the issue of the reviewing of the salary scale because Government funds the University. She also stated that initially she was involved in the transition. She further conceded that the University negotiated with them for the reduction of the salary.

5.37 In light of the foregoing, it is my finding that the Applicants have failed to prove that the Respondent is underpaying them. The salary of E18,749.00 was agreed upon between the parties as shown in the contract of employment entered into between the parties. Therefore, even this claim of Unlawful deductions or Underpayment should fail as it lacks substance and merit.

6. AWARD

6.1 Pursuant to my foregoing findings, I make an order that the Applicants' claims namely; (a) Unlawful deductions (b) Acting allowance (c) Responsibility allowance, are hereby dismissed.

6.2 There is no order as to costs

DATED AT MANZINI ON THE DAY OF NOVEMBER, 2016

**ROBERT S. MHLANGA
CMAC COMMISSIONER**