



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

HELD AT MBABANE

MB 158/05

In the matter between:-

**SWAZILAND NATIONAL ASSOCIATION
OF CIVIL SERVANTS (SNACS) O.B.O.
NURSING ASSISTANTS**

APPLICANT

And

**MINISTRY OF HEALTH AND SOCIAL
WELFARE**

1ST RESPONDENT

SWAZILAND NURSING COUNCIL

2ND RESPONDENT

**MINISTRY OF PUBLIC SERVICE &
INFORMATION**

3RD RESPONDENT

CIVIL SERVICE BOARD

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

CORAM

ARBITRATOR : Khontaphi Manzini

FOR APPLICANT : Ms Patricia Motsa – Mamba

FOR THE RESPONDENT : Mr. Vuyile Dlamini

ARBITRATION AWARD

**NATURE OF DISPUTE: ALLEGED UNFAIR TERMS AND
CONDITIONS OF EMPLOYMENT.**

DATE OF CONCILIATION: 31st August 2006

VENUE: CMAC – Asakhe House, Mbabane

1. PARTIES AND HEARING

1.1. The Applicant is the Swaziland National Association of Civil Servants (SNACS) representing the nursing assistants. SNACS is a duly registered trade union in terms of Section 27 of the Industrial Relations Act 2005 (as amended). The nursing assistants, so cited, are members of the union, and are employed under the Ministry of Health and Social Welfare. Mr. Quinton Dlamini initially appeared on behalf of the nursing assistants and later on the matter was taken over by Ms Patricia Motsa – Mamba, who acted as their representative up until its ultimate conclusion.

1.2. The Respondents in the matter are the Ministry of Health and Social Welfare, the Swaziland Nursing Council, Ministry of Public Service & Information, the Civil Service Board, and the Attorney General's chambers in their capacity as the Legal representative of the Swaziland Government. Mr. Vuyile Dlamini appeared on behalf of the Attorney General.

2. ISSUES IN DISPUTE

2.1 This arbitration relates to a number of issues which arise out of disagreement on certain terms and conditions of employment for the nursing assistants, for which they are seeking relief. The issues in dispute include the following:-

- (i) Failure by the nursing council to recognize their academic qualifications.
- (ii) Claim for payment of acting allowance
- (iii) Claim for housing allowance
- (iv) Claim for risk allowance
- (v) Claim for shift allowance
- (vi) Failure to provide a bridging course to Applicant's members
- (vii) The unlawful payments made to the nursing council, in respect of annual licence fees.

3. BACKGROUND INFORMATION

3.1 The dispute was reported to the Commission in terms of section 96 of the Industrial Relations Act 2000 (As it then was). The conciliation process which was pursued in order to try and settle the dispute amicably failed to bear fruits, as is clearly indicated by the contents of the certificate of unresolved dispute which was issued thereafter (certificate number 639/05).

3.2 Following this, the parties, by mutual consent, referred the dispute to arbitration. I was appointed on the 13th of February, 2006 to preside over this matter.

The arbitration process was characterized by a number of postponements, as it proved to be quite a challenge to find dates which were suitable for not only the parties and their respective witnesses, but also for the arbitrator as well.

During the pre – arbitration hearing, it came to light that all seven (7) issues remained in dispute.

4. **SURVEY OF EVIDENCE**

4.1 It is not my intention to summarise all of the evidence adduced by the parties, however, focus will be had to those aspects that have influenced my award. The Applicant's representatives called three witnesses to give oral testimony, and also submitted a number of documents. The witnesses were Ms Sonto Precious Dlamini, Ms Ntfokotiso Thulsile Dlamini and Mr. Jeremiah Magagula. The Respondent's representative called Mr. Mgcibelo Dlamini, Ms Siphwe Mhlanga and Mr. Henry Dlamini to give oral evidence, and also submitted some documentary evidence.

EVIDENCE OF SONTO P. DLAMINI

Ms Dlamini stated that she is presently employed by the Ministry of Health and Social Welfare, as a nursing assistant, and based at ward 18, of the Mbabane Government Hospital. She stated that she was trained at the Good Shepherd Hospital for two years.

As regards the claim for Acting Allowance, Ms Dlamini stated that her work called upon her to alternate with registered nurses at the ward. She stated that in the morning shift it was often the case that, she would be on duty with other nursing assistants, and also staff- nurses, but in the evening shift it is common that she, as a nursing assistant, may be on that shift alone. She stated that she would then report to the staff nurse when she came. Ms Dlamini stated that even on night duty she was sometimes called upon to work with a staff –nurse if one is available.

Ms Dlamini stated that she did alternate with staff nurses, and that as a nursing assistant, she attended to patients in the same manner as a registered nurse would do, and also dealt with the same conditions. She stated that although she does alternate with registered nurses, she was not being paid an acting allowance for this. This witness also testified that she worked according to a duty roster which was prepared by a nursing sister, who plays a supervisory role over the staff nurses and nursing assistants. Ms Dlamini highlighted that in the execution of her duties, she did not report to the staff nurses, but to the nursing sisters.

During cross – examination, Ms Dlamini maintained that she was supervised by the nursing sister and was assigned duties on a day – to - day by the said nursing sister.

Pertaining to the issue of shift allowance, Ms Dlamini stated that the nursing assistants at the Mbabane Government Hospital,

herself inclusive, worked shifts without being paid a shift allowance.

To support her averments, she submitted duty rosters for the periods of September/October 2003 and August 2004; this document was labelled "S1". According to the witness these rosters clearly depicted the allegation that nursing assistants worked shifts, and stated also that the abbreviation 'N/A' referred to a nursing assistant, whilst the abbreviation "S/N" referred to a staff nurse. Ms Dlamini reiterated that despite the fact that nursing assistants worked shifts, they were not being paid a shift allowance by their employer.

During cross – examination Ms Dlamini stated that these rosters are prepared by the nursing sisters, and that they were supposed to be signed and stamped. The witness explained that even though this was the way in which things ought to be done, it was however common, that rosters were neither signed nor stamped. When she was asked about who had prepared the roster that she had submitted as part of her evidence, she explained that she had merely made Photostats of the rosters at the hospitals. Ms Dlamini was also asked if it was abnormal for nursing assistants to work in shifts?. To this, she responded by stating that it was quite normal that they worked in shifts.

Ms Dlamini also testified that her job was quite a risky one, in that they had to handle blood and needles. She stated that as a result she was exposed to the risk of being pricked by H.I.V. contaminated needles. She attributed this risk to the fact that the hospital lacked the necessary utensils for storing the needles, and

stated that as a result they had to improvise, and these make –shift methods were not very safe.

Ms Dlamini stated that even soiled linen could result in a nursing assistant being placed at the risk of being infected with the virus, as well as other infectious diseases. The witness stated that even though their job was so risky, the employer did not pay nursing assistants a risk allowance.

Ms Dlamini stated that another factor that contributed to the risky nature of the job was that they had to work extended hours, for instance during the night shift. She explained that their employers did not provide them with anything to eat, or with any tea or water. The witness stated that this shift could last for twelve hours at a go, and these extended hours could lead to the weakening of the nursing assistant's immunity, thus leaving them vulnerable to contracting infectious diseases such as hepatitis and tuberculosis.

Under cross – examination the witness admitted that the employer had made provision to ensure that the nursing assistants had rubber gloves to protect them from direct contact with infectious substances, but stated that it was possible that a needle could penetrate the rubber and prick the skin. The witness was asked what the employer provided in case they were pricked by a needle. Ms Dlamini explained that they would, once they had been pricked by a needle, report this immediately to their superiors who then provided them with post – exposure prophylaxis which is used to give them protection against infection. Ms Dlamini stated that she did not provide this information during her evidence –in – chief because she had not been asked about this issue pertaining to safety precautions and treatments provided by the employer.

Ms Dlamini further admitted under cross – examination that their job was risky by its very nature, as it was not abnormal for people in the nursing fraternity to deal with needles and blood, however, she highlighted that this was because they handled these things on a day-to-day basis.

On the issue of the licence fee, Ms Dlamini testified that she and other nursing assistants were called upon to pay a yearly licence fee to the Swaziland Nursing Council, in the amount of E40.00. she testified. She testified that this licence fee was meant for nurses only and she was not a nurse.

During cross – examination Ms Dlamini stated that she understood that the purpose of the licence fee was in order for her to practice nursing in the country, and under the auspices of the Swaziland Nursing Council. When she was asked if it would be possible for her to pursue her profession without payment of the licensing fee, she stated that she believed that she could, because she was a nursing assistant and not a nurse. Ms Dlamini stated that she thought she could lawfully practice as a nursing assistant without a licence.

Ms Dlamini then produced a copy of her own licence for the year ending 31st December 2001. This document was labeled “S2”. According to the witness this document was meant strictly for general nurses and midwives, and stated that as a result, her own licence reflected, under the portion requiring the statement of qualifications, the abbreviation “N/A”, which according to the witness meant “Not Applicable”.

Mr. Dlamini put it to the witness that his instructions were that the “N/A” on the licence stood for “Nursing Assistant” and not “Not Applicable” as she had said. Mr. Dlamini further reminded the witness that she had earlier on in her own evidence, stated that the abbreviation stood for “Nursing Assistant” on the duty roster. Ms Dlamini was adamant that this time the “N/A” stood for “Not Applicable”, but failed to explain why the abbreviation for “Nursing Assistant” did not apply in this instance. Ms Dlamini further stated that if nursing assistants were expected to pay the licence fee, then the qualification of nursing assistant ought to have been printed on the licence just like those of “general nurse” and “midwife”.

Mr. Dlamini put it to the witness that the “N/A” on the licence stood for “Nursing Assistant” just as it did on the duty roster. He further put it to Ms Dlamini that nursing assistants are also registered, and issued with certificates to practice, and in the absence of this, they would not be allowed to practice.

On the issue of housing allowance, Ms Dlamini stated that she was aware that only the nursing assistants, who were not provided with houses by the Swaziland Government, were paid housing allowance. She stated that she was aware of this because she herself used to be housed by the employer, but since she now had her own accommodation she had to apply for housing allowance, and her application had been granted. Ms Dlamini stated that the employer paid her an amount of E185.00 as housing allowance, and she had good reason to believe that was what was being paid to all nursing assistants who were not housed by the employer.

During cross – examination Mr. Dlamini asked the witness if all those who are being paid this allowance had actually applied for it. Ms Dlamini clearly stated that she had no way of knowing this, and could only say as a matter of fact, that she herself had applied for the housing allowance that was being paid to her. Ms Dlamini was further asked if she knew if all other nursing assistants were paid the same E185.00 that she was receiving?. Ms Dlamini stated that she was only aware that this is the amount she is being paid, and could only assume that this was the standard figure being paid to the other nursing assistants.

During re – examination the witness was asked if she was aware of any employees of the Swaziland Government who were paid an amount above E185.00 per month in housing allowance. The witness responded by saying that she had heard that firemen were being paid an amount of E650.00. This piece of evidence was strongly objected to by the Respondent’s representative, on the grounds that not only was this evidence hearsay, but also because this evidence alluded to a claim made against the firemen’s employers and it was at a different forum, and that none of the parties present at this arbitration could testify on how the firemen had supported their claim, and also what factors had influenced the arbitrator in that matter to award the applicants (firemen) the amount which they received as housing allowance. Mr. Dlamini further stated that this evidence was also irrelevant, as the Applicants in the present matter were not firemen.

THE EVIDENCE OF MS NTFOKOTISO T. DLAMINI

Ms Dlamini testified that she is employed by the Ministry of Health and Social Welfare as a nursing assistant, and is based at the Lobamba Government Clinic. She stated that she has worked in this field for a period of fourteen years, and has worked at the afore – mentioned clinic for the past three years. She stated that she had worked in various clinics in the Lubombo and the Hhohho Regions.

As regards the issue of non – recognition of academic qualification, Ms Dlamini stated that she was trained at the Good Shepherd Nursing School, but was only designated as a nursing assistant, and not an enrolled nursing assistant. She stated that she was aware that there was something known as an enrolled nurse.

She stated that she had undergone training at the Good Shepherd Nursing School for twenty – four months. She stated that this was the standard duration of the nursing assistant’s course, but she was also aware of people who had trained for an additional eighteen months, and that this had occurred whilst she herself was still at the nursing school. She stated that even though they had trained for this extended time, they had still only obtained a nursing assistant certificate. Ms Dlamini stated that she had heard that it was necessary for those people to train for a longer period because they needed to “upgrade”.

Ms Dlamini then submitted a number of certified certificates as part of her evidence. These certificates were admitted, and labeled in the following manner.

- (i) “S3” - A certificate of enrolment for nursing assistants issued by the Swaziland Nursing Council. This certificate belongs to one Rose Matsenjwa, a nursing assistant, and it stated that she is the holder of a certificate from the Good Shepherd Hospital, upgrading 6 months for the 2 year course. Attached to this certificate is one from the Good Shepherd Nursing School, her as a nursing assistant, after upgrading for 6 months.

Ms Dlamini stated that she was not aware of these certificates, when she was asked by the Applicant’s representative.

- (ii) “S4” – certificate for enrolment for nursing assistants, awarded to one Grace Mkhwanazi, being the holder of a Good Shepherd Hospital Certificate.

Ms Dlamini was also asked if she was aware of this certificate, and she said that she was aware of it.

- (iii) “S5” – This is a certificate of training issued by the Good Shepherd Hospital, to one Grace Zintombi Maziya, certifying that she had successfully completed the Nursing Assistant course. It stated also that she had trained for 24 months.

Ms Dlamini was asked if she was aware of this certificate. She stated that she was aware of it.

- (iv) "S6" – A certificate of training issued by the Good Shepherd Hospital, to Grace Zintombi Mkwahwanazi, certifying that she had successfully completed a nursing assistant course, which had lasted for 20 months.

Ms Dlamini was asked how many certificates she had? She replied that she holds two certificates; one from the Good Shepherd Hospital, and the other from the Swaziland Nursing Council.

Under cross – examination the witness was asked why she had said she was not aware of the certificate labeled "S3"? Ms Dlamini explained that at first the certificate had looked unfamiliar, but she now recognized that it bore a similarity to her own certificates at home.

She also explained that there was one certificate that was not familiar to her because it belonged to people who had trained before her.

The Respondent's representative asked her what it is she did not find familiar about the certificates, as none of the certificates submitted belonged to her. Ms Dlamini explained that she meant that she was familiar with the appearance of the certificate.

Ms Dlamini was then asked about 'S4' and 'S5', and what she aware about these certificates? Ms Dlamini stated that she knew their appearance, and knew the holders of the certificates

to be nursing assistants. She did however; point out that she did not know the person who was the holder of 'S3'.

Pertaining the issue of acting allowance, Ms Dlamini testified that in the course of her duties she had to look after patients and the surrounding community, and she did almost the same duties as performed by a registered nurse.

She stated that the only things she could not do as a nursing assistant were those that a registered nurse could not do either. She stated that she had to report to the sister who is in charge of the region, and not to the staff nurse she worked with. Ms Dlamini stated that if a patient's condition was too complicated to be treated at the clinic, she was at liberty to refer that patient to the nearest hospital.

She also stated that in circumstances where she was scheduled to work together with a nurse, and the need arose to refer a patient to hospital; either the nurse or she herself went to the hospital together with the patient. Ms Dlamini stated that if the nurse accompanied the patient to the hospital, she would then be left to man the clinic on her own. The Applicants representative asked the witness if she was compensated for manning the clinic. The witness stated that she was not compensated for doing this; and further stated that despite the fact that she rotated with a nurse, and did the same duties as the nurse, she did not receive an acting allowance. Ms Dlamini highlighted that she did not report to the nurse, and stated that infact they performed the same duties as the nurse.

During cross – examination, Ms Dlamini was asked if she was aware of the distinguishing features between an enrolled nurse and a nursing assistant.

Ms Dlamini stated that she did not know the distinction, and only knew what it entailed to be a nursing assistant. Mr. Dlamini, asked the witness what her job description was? Ms Dlamini stated that she basically did the duties and tasks that were assigned to her, and that it was true that she manned the clinic when no one senior to her was present at the clinic. Ms Dlamini stated that the only restrictions experienced in her job were that she could not allow an expectant mother to await delivery at the clinic, and could only attend to emergency deliveries, if these did occur. Ms Dlamini admitted that she only manned the clinic when nobody senior to her was present, and this was only when the exigencies of their services demanded this; for instance when the staff nurse was on leave, or had taken a patient to the hospital.

During re – examination the witness was asked if she was ever assigned duties outside the scope of her duties, or area of expertise in terms of training? Ms Dlamini stated that this had never occurred. Ms Dlamini was also asked what would happen if she was assigned such duties, and she refused to perform the duties? Ms Dlamini stated that she did not know because this had never happened.

As regard the issue of housing allowance, the witness stated that she herself was housed by her employer, but stated that not all nursing assistants were provided housing by the Swaziland Government. She stated that those who were not

housed were paid housing allowance. She also stated that she had heard that the highest amount paid to Civil Servants as housing allowance was a sum of E650.00 per month.

During cross – examination, the Respondent’s representative asked the witness about her colleagues who are not housed by the employer, and how much they receive as housing allowance?

The witness replied that she had heard that her colleagues were receiving E180.00, whereas other civil servants were getting E650.00 per month, she stated that she had heard all of this from other nursing assistants.

Mr. Dlamini put it to the witness that her testimony consisted of hearsay, and therefore could not be taken as something she knew for a fact. Ms Dlamini admitted that it was hearsay, and stated that she had also heard about this on the radio, and had not heard a contrary version.

Mr. Dlamini asked her if she was in possession of any documentary evidence to support her testimony? Ms Dlamini stated that she did not have such evidence. Mr. Dlamini then put it to the witness that he had been instructed that only nursing assistants who were not housed by the employer were paid housing allowance, and that the amount paid depended on the grade on which a particular employee was paid. Mr. Dlamini stated that his instructions were that the amount paid to employees was not uniform, and was dependent on that particular employee’s terms and conditions of employment, and

further more, this allowance was only paid to an employee who had applied for it, and such application was granted.

Ms Dlamini responded by thanking Mr. Dlamini for enlightening her, and stated that she agreed with him on the point that the allowance had to be applied for before it was paid to an employee.

Ms Dlamini then testified on the issue of the risk allowance. She stated that her job was quite risky in that, as a nursing assistant, she was exposed to communicable diseases which are airborne, and her job necessitated that she have close contact with all sorts of sick people. She gave examples of the H.I.V. Virus, Tuberculosis and hepatitis. Ms Dlamini also said some patients behaved violently towards the nursing assistants during treatment, for instance, mentally imbalanced people. She stated that despite this risk, the employer did not pay her and other nursing assistants a risk allowance.

As regards the issue of shift allowance, the witness testified that at the clinic level shifts were scheduled in such a manner that they rotated, and as a nursing assistant she would be called upon to go to different departments, and the person who was previously in that department would go to the one she had previously worked at. She stated that she rotated with either a staff nurse, or another nursing assistant. Ms Dlamini stated that she worked both day and night shift, and was not paid a shift allowance by the employer.

During cross – examination the witness was asked if she was aware of any other nursing assistant who was paid a shift allowance? Ms Dlamini stated that she was not aware of any one who received such an allowance and furthermore, she herself did not receive this kind of allowance. Mr. Dlamini asked the witness if she even knew what this allowance was? Ms Dlamini stated that in fact, she did not know what it was, but knew that she wanted to be paid shift allowance (whatever it may be).

Ms Dlamini also admitted that ordinarily she did not work shifts at the clinic, but only did so during national events.

Ms Dlamini then testified about the alleged unlawful payment of licence fees to the Swaziland Nursing Council. The witness testified that she paid an amount of E40.00 per annum to the Council, and this payment was towards a licence which allowed her to practice. The witness was asked what would happen if she were not to pay?

Ms Dlamini stated that she would have to pay a penalty charge in addition to the basic fee of E40.00. She testified that as far as she knew all nursing assistants paid this fee.

During cross – examination Ms Dlamini was asked how often she paid the licence fee, and how much it was? The witness testified that she paid E40.00 per year. Ms Dlamini was asked what the licence was for? She explained that the licence allows her to practice her nursing skills. Mr. Dlamini then asked the witness why she had a problem with paying licence fee? Ms

Dlamini stated that she had a problem with paying the fee because staff nurses paid E50.00 in licence fee, which was only a E10.00 higher than the amount paid by nursing assistants, and yet there was a huge margin in terms of the salary of a staff nurse, and that of the nursing assistants. She further stated that this was the case, yet staff nurses and nursing assistants practiced the same profession. Ms Dlamini also stated that the Nurses, and Midwives Act, 1995 made no mention of the payment of licence fee by nursing assistants.

The Respondent's representative then put it to the witness that the payment of the licence fees by nursing assistants was in accordance with the Nurses and Midwives Act, 1965, which empowered the Minister of Health and Social Welfare to formulate and pass regulations under the Act, and it was with the assistance of the Swaziland Nursing Council that the licence fees were collected. Mr. Dlamini informed the witness that this licence allowed the Applicants members to practice lawfully as nursing assistants in Swaziland.

THE TESTIMONY OF MUSA JEREMIAH MAGAGULA.

This witness testified that he is engaged at the Ministry of Health and Social Welfare as a registered nurse, and is based at the Mbabane Government hospital.

In relation to the issue of acting allowance Mr. Magagula testified that in his work he alternated with nursing assistants, and this "alternating" meant that he was normally assisted by a nursing assistant and not another registered nurse. He testified

that the nursing assistant reports to the nursing sister and not to him, or any other registered nurse. According to the witness, nursing assistants performed all of the duties that are done by registered nurses, in that they administer medication to patients, and also admit patients to wards, amongst other duties. Mr. Magagula stated that this was not in accordance with practice, in that under normal circumstances, nursing assistants are supposed to work with a registered nurse all the time and not alone.

Mr. Magagula testified that he never worked in the maternity ward, and also that according to practice, it was not the function of a nursing assistant to administer an intravenous drip, or an injection to a patient. He stated that, this was solely the domain of registered nurses. Mr. Magagula stated that when the nursing assistants worked alone, they received instructions on what to do, from the nursing sisters, including the giving of injections which should be done by registered nurses.

Under cross – examination, Mr. Dlamini asked the witness why he had come to testify before the Commission? Mr. Magagula stated that he was there to testify with regards to the issue of nursing assistants who were being expected by the employer to perform duties they were not meant to do, and were further more not being remunerated for these.

Mr. Magagula was asked to explain the meaning of a registered nurse, and he stated that this was one who had undergone nursing training at a recognized nursing school (recognized by the Swaziland Nursing Council), and was in possession of a

certificate of registration issued by the Swaziland Nursing Council. He stated that this certificate of registration then qualified a nurse to be called a registered nurse. He stated that he did not know the meaning of an enrolled nurse.

Mr. Magagula admitted that he normally works with nursing assistants, and he was normally relieved by a nursing assistant when he was off – duty. He stated that even though this normally happened, it was not accordance with practice, as nursing assistants were not meant to work alone without a registered nurse being present. He stated that this happened on account of the fact that the nursing sisters scheduled nursing assistants to work in this fashion, and when he had enquired why, he had been told that there was a shortage of registered nurses.

Mr. Dlamini put it to the witness that he had been instructed that nursing assistants work under the supervision of a nursing sister at all times, even if the sister was not in the same ward as the nursing assistant, she was always within contact. Mr. Dlamini also put it to the witness that his instructions were that nursing assistants only performed duties within the ambit of their training and practice, and if a situation arose that was beyond this ambit, the nursing assistant had to report this to the nursing sister who was within contact the whole day. Mr. Magagula stated that it was true that a nursing sister was always scheduled to be present for 24 hours, but he stated that at times they did not come to the site of a problem when called by the nursing assistants, and only told them to call a doctor. Mr. Magagula said that later on the nursing sister would then

enquire from the nursing assistant or registered nurse what the doctor had done. He said what the nursing assistants did was acting, but was not sure if they were being paid for this.

Mr. Dlamini also asked if there was a difference between a registered nurse, and a nursing sister? Mr. Magagula stated that there was no difference in terms of academic training, but a nursing sister's position was higher in that they had been elevated to a supervisory position. Mr. Magagula also testified that he himself played a supervisory role in that he supervised nursing assistants.

Mr. Magagula also testified about the licence fee paid to the nursing council. He stated that he himself, paid an annual fee of E50.00. He said that this amount was for the renewal of the practicing licence, but he said that he did not know why he had to pay it, but he was aware that the nursing council required this to be done by all practicing nurses.

Mr. Magagula also testified that he was aware that some government employees who were not housed by the employer were paid E180.00, and others get E650.00 but stated that he did not know why there was this variance in the amounts of housing allowance.

THE TESTIMONY OF MGCIBELO DLAMINI

Mr. Dlamini gave testimony in support of the Respondent's case and stated that he was present at the hearing in order to testify concerning the recognition of the nursing assistants professional status, and training programme in Swaziland. Mr.

Dlamini stated that he is currently employed by the Swaziland Government, as a senior matron at the Piggs Peak Government Hospital.

He further explained that prior to this he had worked as the Registrar to the nursing council, from the period commencing July, 2000, and ending March, 2004.

Mr. Dlamini testified that there was a detailed process regarding the issue of recognition of the nursing assistants training programme. He began by submitting a form, which was labeled "R1", which is a form filled in by a prospective nursing assistant student. This form is titled "Application for Registration as a Student Nursing Assistant" and this form is sent to the nursing council by the student. Following this application, the council then issues to the student, a certificate known as a "certificate of Registration", which document was labeled "R2". According to Mr. Dlamini this certificate was indicative of the fact that the council acknowledges the student and it also acted as a sort of licence to even partake in practicals involving live patients.

Mr. Dlamini also stated that after the completion of the student's studies (which normally takes 2 years), the student then completes another form which is known as a "completion course", and this form was labeled "R3". According to the witness this form communicates to the council, the student's readiness to sit for final examinations, and the council issues a notice, which was admitted as evidence and labeled "R4". This notice informs student of examination dates, who the examiners will be, and who the invigilators will be. The witness testified that after the written examination, the council would then receive the

scripts from the examiners and finalise the results, which involves awarding grades as per the marks given by the examiners.

Mr. Dlamini stated that a student who has passed will then apply to the Council, yet again, for registration as a nursing assistant that is ready to go out and practice as such. The council then issues a certificate of enrolment which is issued under the Nurses and Midwives Act, 1965, and the certificate was labeled "R5". Mr. Dlamini stated that the certificate bears the signature and seal of the Registrar, and an applicant pays E20.00 in order for the certificate to be issued. Mr. Dlamini stated that this certificate is a conclusive proof that the council recognizes the nursing assistants training programme, and is also an indication that the holder of the certificate can go anywhere in the world in search of a job as he/she had trained in a recognized institution.

Under cross – examination the witness was asked why he was at the hearing to give evidence when he was no longer the registrar of the council? Mr. Dlamini explained that he was there to give testimony on account of the fact that he had still been occupying the position of registrar when the dispute at hand arose. When asked why the present registrar did not give evidence, as the current incumbent, Mr. Dlamini explained that he did not know the answer to the question.

Mr. Dlamini was asked if the qualification of a certificate in nursing assistant, would be recognized or considered if a holder of the qualification wished to further their education, be it general nursing or any other field? Mr. Dlamini explained

clearly that the council had very little influence, if at all any, on the admission regulations of nursing education institutions. He stated that the council was only concerned about the quality of the training programmes and not the admission criteria. He explained further that nursing institutions were regulated not only by the Nurses and Midwives Act, 1965 but also by the Education Act of Swaziland.

The Applicants' representative put it to the witness that her clients denied ever having completed the forms labeled "R1, R2, R3 & R4". Mr. Dlamini stood firm and stated that it was standard procedure for these documents to be filled so it could not be true that the Applicants had not done so and yet they were practicing nursing assistants.

It was further put to the witness that it was not true that the Council recognized the nursing assistants qualifications as some of them had furthered their education in the field of community development and also the area of eye – care and had encountered resistance from the council when it came to recognition of their academic achievements. The witness clearly explained that he had testified regarding the local training programme and how the council recognized it. He stated that if the training that the Applicants' representative was referring to had taken place outside of Swaziland, then it was possible that the requirements of that training institution were not up to par with local standards, and highlighted that the courses the Applicants' representative was alluding to were done post – general nursing, and hence it was difficult to envisage how a

person without the basic general nursing qualification could be admitted to study the courses.

Mr. Dlamini stated that the council has certain requirements when a person applies for registration with the council after pursuing the training programme, these being;

- 1) Registration certificate from the Nursing Council of the country where the course was offered.
- 2) Verification from that Nursing Council
- 3) A transcript from the Nursing School which offered the course.

According to the witness, recognition of academic qualification could only be evidenced by the issuance of a certificate of registration, and for the Swaziland Nursing Council to show that it recognizes a qualification, it simply issues a certificate of registration identical to the one labeled "R5".

The Applicants' representative asked the witness why it was that when a nursing assistant upgraded their qualification, they were still regarded as holding a certificate, and not at least a diploma, as they had undergone a longer period of study (for instance 9 months)?. Mr. Dlamini explained that the council could only register an applicant for registration in accordance with the certificate or qualification that they submitted to the council which was obtained from the nursing school where they had trained. If the candidate produced a certificate and not a diploma, they could only as a council, recognize that certificate which was submitted by the applicant for registration. He emphasized that the council was not responsible for setting the entrance requirements for nursing

schools, he did however, state that the council did set and maintain regulations relating to the nursing programmes offered in the form of curriculum and examinations, but not entry requirements.

He also said that the council also set standards for both education and practice, and also inspected the schools.

As regards the issue of the licence fee, the witness testified that the issue of payment of these was regulated by law, and submitted a legal notice no. 82/2001 which was labeled "R6". The notice clearly states in section 2 (a), that the registration fee payable by nursing assistants is to be E20.00, and the annual renewal fee for the licence is set at E40.00 according to Section 2 (d) (ii).

Mr. Dlamini stated that whilst still occupying the position of registrar of the council, the nursing assistants had paid this amount, and had done so without expressing any qualms in doing so. Mr. Dlamini submitted a copy of the licence that is issued by the council to the nursing assistants, and it was labeled 'R7". He explained that the licence is valid for only one year, and that a nursing assistant is only permitted to practice for gain during the validity of the licence. He stated that if the licence is not renewed, the nursing assistant will be de-registered. Mr. Dlamini stated that this was a requirement by practice, and these conditions are clearly stated at the back of the licence. The witness stated that if a nursing assistant practices for gain, without being in possession of a valid licence, that person would be guilty of an offence under the Nurses and Midwives Act, 1965.

Mr. Dlamini was asked if he was aware of the claim made by the Applicants that nursing assistants were being made to pay licence

fees illegally? Mr. Dlamini responded by stating that, regardless of what the Applicant opinion might be, but the law as contained in legal notice no. 82/2001 dictates that they pay for the annual licence fee. According to the witness, this legal notice was formulated by the Minister of Health & Social Welfare, as empowered by Section 13 of the Nurses and Midwives, 1965 which provides that the Minister can make any rules and regulations pertaining to the nursing profession.

Mr. Dlamini was also asked about what the Nursing Council was and what role it played? Mr. Dlamini stated that the council is a regulatory body, established under the Nurses and Midwives Act, 1965, and its function is to control nursing education and practice.

During cross – examination, the witness was asked about the contents of ‘R7’ - which is the licence, and why then, if it was provided by law that nursing assistants should pay for it, it did not have the qualification of “nursing assistant” printed on it just like it have “general nursing” and “midwife” printed on it? Mr. Dlamini replied by stating that the space provided below those qualifications on the licence allowed the authorities at the council to fill in the relevant qualification of the holder of the licence as these were many other nursing – related qualifications besides general nursing and midwifery. Mr. Dlamini stated that amongst the other nursing qualifications were the following;

- i) Nursing education
- ii) Nursing Administration
- iii) Enrolled nursing
- iv) Paediatric nursing

- v) Medical and surgical nursing
- vi) Orthopedic nursing
- vii) Ophthalmic nursing
- viii) Community nursing

Mr. Dlamini stated that the list given above was certainly not exhaustive, and the qualification of Nursing Assistant fell under the category of qualifications which were then filled into the space provided, as the licence was too small to contain all the possible qualifications a nurse might have.

Mr. Dlamini was asked if he knew the definition of a “nurse” according to the Nurses and Midwives Act, 1965, and whether nursing assistants were represented in the composition of the nursing council? Mr. Dlamini stated that as far as he was aware, there was no definition in the Act, but only an interpretation of the term “nurse”, which according to the Act includes a “male nurse”. Mr. Dlamini further explained that the Nursing Council is a body which represents the interests of the community and not individual groups. He stated that not only were nursing assistants not included in the composition of the council, but all the other cadres of nurses as well. He stated that the council is a regulatory body which is concerned with the interests of the public, or rather the Swazi citizenry, as the consumers of health.

The Applicants’ representative put it to the witness that the abbreviation of ‘N/A’ on the licence stood for “Not Applicable” as the nursing assistants were not by law required to pay for the annual licenced fee.

Mr. Dlamini stated that this was not true as the legal notice no. 82/2001 clearly set out that the Applicants were required to pay, and also the abbreviation stood for “Nursing Assistant”, and not what was being suggested by the Applicants representative.

Mr. Dlamini was asked what the function of the Nurses and Midwives Act, 1965 was? Mr. Dlamini stated that, its function was to regulate nursing practice and education. Mr. Dlamini was asked why the Act made no reference to nursing assistants? The witness stated that he did not know why this was the case.

Mr. Dlamini was also asked why it was that students of general nursing were considered to be senior to nursing assistants who were more qualified? Again Mr. Dlamini stated that he was not aware of the reason why, or if at all this was the case.

Mr. Dlamini was further asked what the procedure was where the council had to register holders of the other nursing qualifications which he had mentioned? The witness stated that all the persons qualifications were stated on the licence, and made an example of his own licence, which referred to general nursing, midwifery, nursing administration and also nursing education.

THE TESTIMONY OF SIPHIWE MHLANGA

Ms Mhlanga testified that she is employed by the Swaziland Government, as a Senior Human Resources Officer, and is based at the Ministry of Public Service and Information.

Ms Mhlanga stated that she has worked in this position for the past three years, and before this she was at the Ministry of Natural Resources, and was stationed at the personnel section there as well. According to the witness, her job entailed attending to queries pertaining to terms and conditions of service, and also interpreting the General Orders to those people who did not understand them. She also testified that her job required that she be responsible for the terms and conditions of the entire Civil Service, and not just a particular cadre.

Ms Mhlanga testified as regards the claim by the Applicants for shift allowances. She stated that all allowances are paid in accordance with what is provided in the General Orders, and in Chapter A of same, there was no such provision that nursing assistants ought to be paid such allowance. She went on to say that where there is no provision in the General Orders that meant that there was no authority for the employer to pay an allowance of any kind.

During cross – examination, the witness was asked if she was aware that nursing assistants worked shifts? Ms Mhlanga stated that she was aware that this might be the case, but reiterated that the General Orders made no mention for the payment of this kind of allowance to nursing assistants. She further testified that the only civil servants who were entitled to such allowance, in terms of the General Orders are firemen and doctors.

When the witness was re-examined, she related that circumstances that had led to the firemen and doctors, being paid this allowance. Ms Mhlanga stated that these employers had submitted applications to the Ministry of Public Service that they be allowed to work shifts, and also be paid an allowance for working such shifts.

The witness stated that the applications once made, had been granted. Ms Mhlanga stated that the Ministries responsible for these workers had submitted the application to the Ministry of Public Service.

The witness then testified as regards payment of acting allowance she stated that this sort of allowance is paid when the post has been approved by the Ministry of Public Service & Information as attracting acting – allowance. Ms Mhlanga stated that if this has not been done, then there is no way in which acting allowance may be paid. She stated that the position has to be approved first before it can attract acting allowance, and in the Ministry of Health and Social Welfare only the following posts attract acting allowance;

- i) Director of Medical Services
- ii) Deputy Director of medical services
- iii) Chief Nursing Officer
- iv) Chief Pharmacist
- v) Senior Medical Officer
- vi) Matron I
- vii) Matron II
- viii) Co-ordinator social welfare
- ix) Deputy Chief Nursing Officer

- x) Principal Secretary
- xi) Under Secretary

The witness stated that these posts were the only approved “Acting Paid Appointments”, as per Establishment Circular No. 5 of 1997. Ms Mhlanga stated that in her knowledge none of the Applicant nursing assistants had ever acted in any of the above – listed posts. She further stated that the only way in which the Applicants could be paid acting – allowance, is if their Ministry, which is the Ministry of Health and Social Welfare, were to submit a request for the post which the nursing assistants had supposedly acted in to be included as one of the posts which attract acting – paid allowance.

Ms Mhlanga further stated that generally, when a person has acted in a position which attracts acting – paid allowance, that person is only able to claim acting – allowance after acting in the position for a period of three weeks or more. She stated that if a person acts in an acting – paid position for a period of less than three weeks, then that person was merely relieving the absent officer. Ms Mhlanga stated that civil servants are never paid for relieving other officers. She further stated that in the present case the nursing assistants have claimed acting – allowance but had unfortunately not stated the name of the position that they claim to have acted in. She stated that in such a case she was at a loss, as to how to deal with this issue as the Applicants did not state in their papers which position they acted in.

During cross – examination, the witness was asked if the General Orders were law? She replied that they were not law, and neither do they supercede law. The Applicants representative referred the witness to a Court decision, being; ***NIKIWE S. NYONI vs THE SWAZILAND GOVERNMENT – Industrial Court Case No. 164 of 2005.***

According to the Applicants’ representative, the Applicant in that case had been acting in a post that did not attract acting allowance, and yet the Court had ruled that she be paid acting allowance.

Ms Mhlanga responded to this by saying that the post in question had in fact been one that does attract acting – paid allowance, as the Applicant in that case had been duly appointed by the relevant authorities to act as principal accounts officer. Ms Mhlanga stated that evidence of this could be found in circular no. 5/1997, which she handed in as part of her evidence, and it was marked “R8”.

The witness then testified as regards the Applicants’ claim for risk allowance. The Applicants’ representative asked Ms Mhlanga if her Ministry is responsible for determining if the Applicants’ are to be paid this allowance. Ms Mhlanga responded by saying that in her considered opinion, the relevant Ministry would be the Ministry of Labour, and in particular the Safety Section within that Ministry, and not the Ministry of Public Service & Information.

Ms Mhlanga was asked during re – examination if the General Orders even contained an allowance of this kind, that is, the risk – allowance” Ms Mhlanga stated that as far as she was aware there was nothing like that in the General Orders, and that no civil servant is currently being paid such an allowance.

When she was asked what exactly this risk allowance was, she stated that she had never heard of it, but was only aware of the Workmen’s Compensation that is paid to workers who are injured in the line of duty.

THE TESTIMONY OF HENRY DLAMINI

This witness testified that he is engaged by the Ministry of Health and Social Welfare, as a Human Resources Officer. He explained that his job entails the employment and recruitment of employees, and actioning such issues to the Civil Service Board. He stated that in his duties he also provided guidance to the Government institutions and subordinates about guidelines, pertaining to many issues, for instance; housing allowance, appointments, disciplinary hearings and transfers.

Mr. Dlamini was asked if he was aware that the Applicants in this matter have made a claim as regards the non – payment of housing allowance? Mr. Dlamini stated that all he could say pertaining this is that in accordance with circular no.14/1992, an employee who wished to be paid housing allowance had to fill in and sign an application form, which has to be supported by the workers supervisor, and approved by the Principal Secretary of that Ministry.

The approved claimed is then sent to the Ministry of the claimant and certain human resources policies are then implemented in order to effect the payment of the housing allowance. It was Mr. Dlamini's evidence that an officer is only paid housing allowance if he has applied for it, and such application granted.

He stated that this allowance, when it has been approved, is then incorporated into the salary of the claimant, and is in accordance with the grades as provided in the Establishment Circular 5 of 1996. This circular was submitted by the witness, as part of his evidence, and marked "R10". The application form for the payment of the allowance was also admitted, and marked "R9".

Mr. Dlamini stated that the circular stated how the claimants should go about making their claims, and provided how much was allowed per grade.

The witness was informed by the Respondents' representative that evidence had been led before the Commission to the effect that some civil servants were being paid on in housing allowance which is higher than the E200.00 which is reflected in "R10" as being the highest amount paid. Mr. Dlamini stated that he was not aware of this, and could neither confirm, nor deny this as he had no personal knowledge of it, or authority for it. He stated that he could only rely on the circular, as that was his only source of authority for payment of housing allowance.

Mr. Dlamini also testified that according to the circular only civil servants who were employed on a pensionable basis, and those who were on probation could apply for housing allowance. He stated that only employees who were not provided with a house by the employer could apply for housing allowance.

He further testified that the only advice he could provide to a civil servant who wished to be paid housing allowance, was to apply for this, through his/ her Ministry, and follow the circular in order for the claim to be properly processed in the normal way.

Under Cross – examination the witness was asked whether he was aware of the existence of civil servants, who were being paid housing allowance, without having applied for it? Mr. Dlamini stated that he was not aware of this. He was also asked if he was aware that some civil servants were being paid a sum of E650.00 as housing allowance?. Mr. Dlamini stated that he had only heard about the case of the firemen, who had filed a claim separate from the one at hand, and he stated that he was not aware of how the firemen had pursued or supported their claim. The Applicants' representative asked the witness whether the nursing assistants could be classified as being permanent and pensionable? The witness stated that he could not say for certain, and the only way to ascertain this was to look at the individual nursing assistants letters of appointment which stated that particular nursing assistants terms of employment, because even nursing assistants could be employed temporarily.

ANALYSIS OF EVIDENCE AND ARGUMENTS.

Failure to recognize Applicants' academic qualifications.

The Applicants' representative alleged that the Swaziland Nursing Council does not recognize the Applicants' academic qualifications, and to support this contention two witnesses were called to testify.

The testimony of Ms Sonto P. Dlamini did not in any way refer to this allegation except to say that she had trained for two years, so the only testimony to be relied upon will be that of Ms Ntfokotiso Dlamini. This witness submitted a number of certificates as part of her evidence, however none of these belonged to her. The only thing that Ms Dlamini could say with certainty about these documents was that she was aware of their appearance, and that she knew the holders of these certificates to be nursing assistants.

The certificates were submitted in an effort to show that some Applicants had trained for a period of more than the standard twenty – four months and had still only received a certificate in the nursing assistant qualification. According to the Applicants representative the extended period of training should have entitled the Applicant holders to a higher qualification and not just a certificate (perhaps a diploma). The witness herself stated that she was aware of some of her colleagues who had been re – called to go back to the nursing school after completing the twenty – four month course, in order for them to “upgrade” their studies.

The Respondent's witness, Mr. Mgcibelo Dlamini stated that the council does recognize the Applicants' qualifications, and this is evidenced by the fact that they are granted a certificate of enrolment, and a licence to practice as nursing assistants once they have produced their certificate which shows that they have successfully graduated from the nursing school, and are now qualified nursing assistants. Mr. Dlamini stated that this award, of an enrolment certificate showed beyond a shadow of a doubt that the council recognized the Applicants' qualifications, because if they did not, then they would not issue a certificate of enrolment to the holder of a certificate that was of dubious quality. This witness went on to explain that the council's role was to look out for the interests of the general public, as the consumers of the health services that are rendered by the nursing fraternity. In this endeavour, the council was therefore responsible for setting the standard for education and practice, Mr. Dlamini emphasized that the council was not responsible for dictating to nursing schools on how they should structure their entry requirements, but that the council was only concerned about the quality of the product of the nursing schools. This is of course, my own understanding of what was being said by the witness when he was delivering his evidence, and not his own words verbatim.

Ms Ntfokotiso Dlamini in her stated evidence that the people she was aware of who had trained for a longer period than she had, had done so, because they had needed to "upgrade" their studies.

This is to my understand, means that those people had not done well in their studies, and had to supplement the training that they had received in order to qualify for the nursing assistant certificate. I stand to be corrected, but it only seems logical that no matter how long ones takes in completing a course, as long as a course is designated as a certificate, or even a degree, that is the qualification that will be earned once that course has been successfully completed. It is not uncommon for some people to take six years to complete a three year Bachelors' degree, simply because they had to repeat some years because they had not passed some or even all of the subjects required.

I am persuaded by Mr. Dlamini's explanation that the council cannot be setting entry requirements for nursing schools, moreso because these schools are also regulated by the Education Act of Swaziland and are not the sole domain of the council or even the Ministry of Health and Social Welfare. It should be noted that therefore, the council would be acting outside the scope of its authority (*Ultra Vires*) in attempting to ensure that nursing schools exempted holders of the nursing assistants certificate from some years when enrolling to further their studies beyond the certificate they were in possession of.

The reason I am so persuaded by Mr. Dlamini's evidence, is that not only did it make sense, but also because the Applicants' representative did not produce any evidence which could controvert this testimony by Mr. Dlamini, save to say that his evidence should be dismissed, without saying why he should not be believed.

Another point about Mr. Dlamini's evidence that made sense to me was that the council could only register and enroll an Applicant for registration according to the certificate that he/ she produced to the council. So in effect, the council can only recognize the qualification that has been produced by issuing a certificate of enrolment recognizing the qualification that has been submitted by the Applicant. Again, this evidence was not disputed by the Applicants' representative.

It was also alleged by the Applicants' representative that one particular nursing assistant had failed to have her qualifications recognized by the council after furthering her studies in South Africa, and had acquired qualification in eye – care, and another nursing assistant had encountered the same problem after completing a course in community development. According to the Applicants' representative, these nursing assistants had tried in vain, to have their qualifications registered by the council. Despite the fact that this was not evidence that was placed on record by a witness under oath, I have not penalized the Applicant by disregarding it totally. This was put to Mr. Mgcibelo Dlamini by the Applicants' representative, to emphasize the point that the qualifications of the Applicants were not taken seriously by the council.

Mr. Dlamini explained the position quite well, by saying that the council had no problem in automatically recognizing qualifications obtained within Swaziland. He stated that the position is different when the qualifications in question were obtained outside Swaziland, because the requirements for

some of the training institutions outside the country were not on the same level as those in place within Swaziland. He stated that the courses that were given as examples were courses that are normally undertaken by people who had already obtained a qualification in general nursing, and as a result it was difficult to comprehend how a person without such qualification could be allowed to pursue a course that was done post – general nursing. Mr. Dlamini further stated that certain requirements have to be fulfilled before the council will register a person with qualifications obtained outside Swaziland, he stated that the following were required;-

- a) A registration certificate from the nursing council of the country where the course was offered.
- b) A verification certificate from that council
- c) A transcript from the nursing college where the qualification was obtained.

The witness stated quite clearly that if an Applicant for registration did not produce all these documents to the council, then the council would refuse to register and therefore, recognize the qualification. This piece of information clearly shows that the nursing council has certain standards, and regulations in place which still seek to maintain the high standards as regards to the quality of its health services. It is obvious that if the council were to relax their rules, then the standards and the quality of the nurses, who offer health services to the Swazi population, would also be compromised because even qualifications from institutions which are not internationally recognized would be accepted without any qualms.

This would obviously cast a dim shadow over the nursing fraternity as a whole, and is not in my view an indication that the council does not recognize the qualifications of nursing assistants.

It was further alleged by the Applicants' representative that further proof of the non – recognition of the Applicants' qualification can be found in that students of general nursing are treated as being superior to nursing assistants, and yet the Applicants were already qualified. This was again information which came to light from the Applicants' representative, and none of the witnesses testified to this being the case. When Mr. Mgcibelo Dlamini was asked about this during cross – examination, he stated quite succinctly that he was not aware of this allegation and could not as a result account for it, or even explain it. In my opinion this question was rather unfair, as it was not specified by Applicants' representative as to who exactly looks down upon the nursing assistants. It is possible that this is a notion that Applicants have, as they have been treated unfairly by the student nurses themselves, or by patients, or even by their superiors (be it staff nurses, nursing sisters, matrons or even by the council). It was not clear from whom the nursing assistants were receiving this alleged impression of being inferior to student nurses. Again, this in my view is not evidence that could found the allegation that the academic qualifications of nursing assistants are not recognized, more so in light of the convincing evidence of Mr. Mgcibelo Dlamini to the effect that recognition of qualifications is indicated by the issuance of a certificate of enrolment by the council.

On a balance of probabilities the evidence of Mr. Dlamini on all these points was more convincing than that of the Applicants witnesses; and was not effectively challenged by Applicants.

FAILURE TO PAY ACTING ALLOWANCE

Three of the Applicants' witnesses testified to this allegation. Ms Sonto Dlamini and Ms Ntfokotiso Dlamini both testified to the fact that as nursing assistants they were meant to work together with staff nurses, and not alone. They all testified that because of the shortage of staff nurses they were called upon to alternate with staff nurses, and work on their own. It was also the evidence of these witnesses that they were not paid an acting allowance for this, even though they believed they were in fact acting in the places of the staff nurses. They also were in agreement that they all worked under the supervision of nursing sisters when performing their duties. Mr. Jeremiah Magagula , who is himself a staff nurse, or a general nurse, also corroborated the evidence as adduced by the two nursing assistants.

The only problem with this evidence is that, when Ms Ntfokotiso Dlamini was re – examined by Applicants' representative, she admitted that she had never been assigned duties outside the scope of her duties, or area of expertise in terms of her training. She also testified that she would not be able to say what would happen if she ever refused to perform duties assigned to her by her superiors if they were outside or beyond her scope of practice, because this had never happened. This piece of evidence then casts a doubt in ones mind as to whether the nursing assistants actually act on behalf of, or in the place of general nurses, or

simply continue to perform their duties as usual, the only difference being that there is no staff nurse present at the time? Another thing that raised a question in my mind was the fact that both Ms Sonto Dlamini and Ms Ntfokotiso Dlamini testified that in the performance of their duties, they do not report to staff nurses, but to nursing sisters who are in a supervisory position. The evidence led was to the effect that even the general nurses, also report to the nursing sisters. This then begs the question of whether indeed there is a point when the nursing assistants then take over tasks which are not to be done by themselves, and are strictly the domain of staff nurses? The picture remained hazy in that respect, more so as the Applicants do not perform duties outside their scope of practice, and remain under the supervision of the nursing sister at all times, just as the general nurse is also under the supervision of the same nursing sister.

This position was not effectively clarified by the Applicants' representative, save for the fact that Mr. Jeremiah Magagula testified that nursing sisters do not always come to the site of the problem when they are called, but refer the nurse, or nursing assistant to the doctor. It is still not clear how this then means that nursing assistants are acting in a position they are not meant to be working in, because the nursing sister, according to Mr. Magagula, later on enquires what the doctor did about the problem, and not what nursing assistant did because it is obviously a condition best left to the expertise of the doctor.

I am not entirely convinced that nursing assistants therefore :”act” in positions outside their scope of practice, and this conviction is strengthened by the evidence of Ms Ntfokotiso Dlamini who stated very clearly that they are never called upon to do anything beyond their capabilities or scope of practice.

The evidence of Ms Siphwe Mhlanga further complicated the position of the Applicants on this ground because she stated that there is no provision for nursing assistants to be paid acting allowance in the General Orders, and that the only positions which attracted acting allowance were those listed in Establishment Circular No. 5/ 1997. Ms Mhlanga stated that the Civil Service as a whole is governed by these General Orders, and in order for a person to be paid an acting allowance they must be appointed to act in a position which is designated as attracting acting allowance, and the period of acting must be more than three weeks. She stated that none of the nursing assistants had ever acted in any of the positions which attracted acting allowance, and to further compound matters, the nursing assistants had not stated which position they wished to be paid acting allowance for.

The Applicants’ representative however countered this evidence by saying that the case of ***NIKIWE S. NYONI vs SWAZILAND GOVERNMENT INDUSTRIAL COURT CASE NO. 164/05*** was authority that the Applicants ought to be paid an acting allowance despite the fact that there was no provision in the General Orders, or in the Establishment Circular No. 5 of 1997.

Upon perusal of the case concerned, I have found that the applicant in that case was actually appointed by the Acting Commissioner of the Anti – Corruption Commission to perform the duties of Principal Accountant. In short, she was appointed to act as such, and was further placed on salary grade 12 on an acting basis. This means that the Applicant was duly appointed by her superiors to act in that position. On further perusal, it came to light that the duties of the Applicant as Principal Accountant were supervisory in nature, and these duties were listed in annexure “G” of the Applicants’ papers.

This position, I have further discovered, does in fact attract acting – allowance, as evidenced by page 5 of Establishment Circular 5/ 1997, and another distinguishing factor about this case is that the Applicant in that case demanded to be paid arrear acting allowance. This case is certainly different from the case of the nursing assistants simply because the Applicant in that case was appointed to act in a position which attracted payment of acting allowance, and the issue was not whether the allowance was due to her at all, but rather that she should receive payment for a particular period.

In casu, the nursing assistants have not stated which position they acted in, and for how long they acted as such. This makes it very difficult to ascertain if at all the position they claim they acted in does attract acting allowance, and therefore if the allowance is due to them in fact. This is further complicated by the fact that they do not say how long they acted in the said position, in order to help in computing how much they ought to be paid if at all they have to be paid anything.

It was stated by Ms Mhlanga that if the period of acting is less than 3 weeks, then this could only be termed “relieving” an absent official, and not “acting” per se.

In my view this case cannot be said to override the General Orders, as it does not seek to challenge the validity of any of its provisions, and neither does it challenge the provisions of the circular. In my opinion the case of the nursing assistants is entirely different from the case of Ms Nikiwe Nyoni, since I am not entirely convinced that the Applicants ever “acted” in any position, let alone that of a staff nurse, as there was no clear demarcation of their own duties, and when they are said to doing duties beyond their of practice and training. At least in the case of Nikiwe Nyoni, the Applicant was appointed to do the duties of Principal Accountant, and this position was supervisory in nature, and the duties were clearly specified and even annexed to the application filed to court. This has certainly not been done in the instant case.

In the premises, I cannot hold that the acting allowance claimed by the Applicants is due to them.

FAILURE TO PAY RISK ALLOWANCE

The Applicants witness testified to the point that the job that they perform is risky by its very nature, in that they are exposed to infectious diseases. The fact that this risk is present was not challenged by the Respondent’s representative. The only point that was however raised by the Respondent’s witness, Ms Mhlanga, is that there was no provision in the General Orders for the payment of such an allowance, and neither was there any

government employee who is presently being paid such an allowance. It was further her evidence that the relevant ministry to deal with issues pertaining to the safety of employees is the Ministry of Labour under the Safety Section, and not the Ministry of Public Service and Information. She further stated that she did not even know what this “risk allowance” was, and only knew about workmen’s compensation.

The fact that this “risk allowance” is an “unknown – commodity”, complicates the issue, and is compounded by the fact that even the Applicants do not specify what it is, and how much is to be paid, or at least how it is to be computed.

What makes matters worse is that the Ministry of Labour which is said to be the relevant ministry has not been cited as one of the Respondents in the dispute at hand, and as such it is difficult to comprehend how this allowance, even if the Applicants had stated how and when it should be paid, can be effected by an order of the Commission emanating from these proceedings.

The Applicant’s representative has cited Convention 149, of the International Labour Organisation, as being authority for the country having in place laws pertaining to employment and conditions of work and life of nursing personnel. However, the Applicants’ representative has not stated how the country has flouted these International Labour standards? The evidence of Ms Mhlanga is to the effect that the only thing related to such that she is aware of, is the workmen’s compensation which is paid to employees who are injured on duty.

The Applicants' representative has not enlightened the Commission on how this on its own does not suffice, or in fact on how it can be improved by the formulation of this new innovation in the form of a "risk –allowance" and how in the Applicants' contemplation this is to be computed and in what circumstances it is to be paid. I am in the circumstances, not convinced that the Applicants ought to be paid such an allowance.

FAILURE TO PAY SHIFT ALLOWANCE

The evidence led by the Applicants' witness, is to the effect that nursing assistants work in shifts, and are not paid an allowance for this. It was however, Ms Ntfokotiso Dlamini evidence that even though she did not know what this "shift allowance" is, she still insisted that she must be paid. She further stated that she does not, at the clinic level work in shifts, apart from special circumstances brought about by national events.

According to Ms Mhlanga's evidence, the only civil servants who are entitled to, and who are being paid shift allowance, are firemen and doctors. She further stated that what led to these employees receiving such an allowance is that they submitted applications, through their ministries, to the Ministry of Public Service & Information that they should work in shifts, and also be paid a shift allowance. Ms Mhlanga stated that it was only once the applications were granted that they were then entitled to receive the shift allowance. According to the witness, at present there was no provision for the payment of shift – allowance to nursing assistants.

This evidence went unchallenged by the Applicants.

From the evidence adduced by the Applicants', it is clear that some, but not all nursing assistants are presently working shifts. That being the case, it is further clear that no evidence was led to the Commission that the nursing assistants have pursued the channels set for applying to the Ministry of Public Service and Information in order for them to be paid a shift allowance.

It is therefore difficult to comprehend, how the Commission is then supposed to make an order on the issue as it stands. Not only are the nursing assistants not all working in shifts, but even those who are have not, it would seem, ever applied for the payment of shift allowance, just as the firemen and doctors have successfully done. If perhaps the Applicants had made such an application and properly motivated their claim, it would only be then that the Commission could then make an order on the issue. In the circumstances it is difficult to even start saying which nursing assistants ought to receive the shift allowance, in what circumstances and how it is to be computed?

I am certain that even Convention 149, cannot help me answer the above – mentioned questions. It is only the Applicants who could have assisted the process along, by supplying me with the evidence to substantiate this claim, and fortify their case as pertaining the payment of a shift allowance. It is difficult to make a ruling in a situation where the allowance has never been applied for in the proper way at all. In the premises, I cannot hold that the shift allowance is due to the Applicants.

FAILURE TO PAY HOUSING ALLOWANCE

The Applicants witnesses testified that they wished all nursing assistants to be paid housing allowance. It was the evidence of Ms Sonto Dlamini that those Applicants who were housed by the employer were not being paid this allowance, and those who were being paid, received an amount of E185.00 per month. She stated that she herself had once resided in a government house and had not received housing allowance, but once she vacated that house, she had then applied to the employer, who had then granted her an allowance of E185.00. Ms Ntfokotiso Dlamini stated that she herself was housed by the employer, and could only give hearsay evidence relating the amount offered or paid as housing allowance. Both these witnesses stated that they were aware that the employer was not being consistent in the amount paid to its employees as they were aware that firemen receive an amount of E650.00 per month. Mr. Dlamini, the Respondents' representative, put it to the witness that he had been instructed that only those employees who were not housed by the employer were paid a housing allowance, and that this amount was varied in accordance with that particular employees terms and conditions of employment. He further stated that in order for an employee to receive payment, they had to apply for it, and once it was granted it was paid to the employee depending on the grade on which they were remunerated. Ms Dlamini stated that it was true that the employees who were paid had to apply before getting the allowance, and stated that she was grateful for the information regarding the variance of the amounts paid in accordance with the grade of remuneration, as she had not been aware of this.

The Respondents' witness Mr. Henry Dlamini stated the payment of housing allowances to government employees is regulated by Establishment Circular 6/1996. He stated that according to the circular employees should claim housing allowance, and once approved the claimant is paid in accordance with their grade, and emphasized that only employees, not housed were entitled to housing allowance. Under cross – examination he admitted that he had heard that firemen were entitled to E650.00 as housing allowance, but he was also aware that the claim had before another forum, and had been motivated by the firemen in a different way from that of nursing assistants. The Applicants' representative in her closing arguments, also did tacitly acknowledge that it is a fact that government employees have to claim the housing allowance before it is paid, she did not refute this fact in any way.

The only point made by the Applicants representative in her closing arguments, was that there was an inconsistency in the payment of employees as firemen receive an allowance of E650.00. It would seem to me that what the Applicants are saying is that they wish to be paid the E650.00 that is being paid to the firemen. The Applicants are not saying that what they are being paid is too low, and wish for it to be reviewed to another amount apart from the amount received by the firemen. It would further seem to me that they are doing this in total disregard of how it came about for the firemen to be awarded this amount, and how they supported their claim.

I have perused the award in question, being **SNACS for Fire Services Employees vs The Swaziland Government DSPT 1244/03**, and have made the following findings of fact:-

- (i) The firemen demanded institutional accommodation, or alternatively:-
- (ii) That they be paid a Market related housing allowance

In the pursuit of their claim for the allowance the firemen conducted a survey, and submitted documentary evidence showing that an average “2 bedroom house at Ngwane Park” could be rented at E880.00

- (iii) They also claimed that they be housed in Government pool houses or be allowed to rent the government houses.

The arbitrator in that case, before deciding to award the Applicants the sum of E650.00 as housing allowance, was armed with this vital information by the Applicants. The firemen supported their claim for housing allowance by providing estimates of how much would be needed for them to rent accommodation, and this was only in the event that the employer was not able to house them.

In the present case, in as much as I personally am of the opinion that the E185.00 that is presently being paid to the Applicants is way too low, and is in no way market – related. I am however rendered unable to see how I can help the Applicants, despite my being sympathetic to their plight. This is occasioned by the fact that the Applicants have simply said that they wish to be paid what the firemen are receiving, and not that they wish that I award them a higher amount.

Had they done this, and supplied the necessary evidence regarding what amount would be adequate or even equitable, in view of the rental prices they have produced as evidence, I may have been able to be of assistance. As things stand, I cannot rule that they be paid what the firemen are being paid because that was what the arbitrator concerned awarded them in view of their own peculiar circumstances, and the evidence adduced to him. The Applicants' in my opinion have not properly or adequately motivated their claim.

FAILURE TO PROVIDE A BRIDGING COURSE

None of the witness of the Applicants gave any meaningful testimony as regards this claim. All that was stated by Applicants' representative during her cross – examination of Mr. Mgcibelo Dlamini, and also during her closing submissions is that holders of a certificate in nursing assistant, in wishing to further their education, are required to start from the first year of the general nursing course. The Applicants representative did not state how the Ministry of Health and Social Welfare, and the Swaziland Nursing Council could step in and provide a bridging course.

None of the Applicants witnesses testified on how they envisaged that this could be done, and this is further compounded by the fact that the Nursing Council is said to be a regulatory body which does not dictate to nursing schools on how they should structure their entry requirements. This is in accordance with evidence of Mgcibelo Dlamini, which evidence was not disputed by the Applicants representative.

Mr. Dlamini stated that the council is only concerned about the quality of the nursing training programmes, and also the practice of the nursing profession.

In light of this evidence, I find it very hard to hold that this same body can then set up a bridging course, if one is not already provided by the nursing colleges. It is my view that they would be acting ultra vires, in that they would be seeking to undertake functions that are beyond their scope of authority, as is laid out in the Nurses and Midwives Act, 1965 which establishes the council.

The Applicants' representative in her closing submissions stated that it was their "belief" that the Respondents and in particular the Ministry of Health and Social Welfare, and the Nursing Council do have the power to set up this bridging course. I am however, still not moved to hold that the Respondents do have this power, or how they can even go about exercising it in this regard, based on merely the Applicants' "belief", which is not supported by cogent and tangible evidence.

UNLAWFUL DEDUCTION OF LICENSING FEES

The Applicants; witnesses testified that they had a problem with being made to pay the annual E40.00 licensing fee, because the Nurses and Midwives Act, 1965 made no mention of nursing assistants having to pay for the licence. It was further argued by the Applicants that the "N/A" that is printed by hand, on their licences stands for "**NOT APPLICABLE**", thus signifying that they are not by law required to pay a licence fee.

To counter this, Mr. Mgcibelo Dlamini testified that the deduction of the licence fee is indeed lawful as it is provided for, and regulated by Legal Notice 82/2001 which is a statutory provision formulated by the Minister of Health and Social Welfare, as sanctioned by the Nurses and Midwives Act, 1965.

The question of the legality, or otherwise of the payment of the licence fee, is one that in my opinion, easily be put to rest by reference to the Legal Notice 82/2001. This is a legal statutory provision, and hence its provisions are lawful and binding on those to whom it applies. It is clearly stated in the legal notice that the Applicants are to pay the annual licence fee of E40.000. The Applicants have not challenged the validity of this legal provision, and have not produced any authority which seeks to set this provision aside.

Instead, they claim that the N/A printed on their licences stands for **“NOT APPLICABLE”**. This is in my opinion a very distorted way of reasoning, because from the evidence of the Applicants’ own witness, Ms Sonto Dlamini the abbreviation “N/A” when printed on the duty roster which she produced as evidence stands for **“NURSING ASSISTANT”**. Mr. Mgcibelo Dlamini also said that the **“N/A”** on the licence stands for **“NURSING ASSISTANT”**. The Applicants did not suggest a reason why the first interpretation as supplied by their own witness, Ms Dlamini, should be taken to apply only in relation to duty rosters and nowhere else.

I fail to understand why then, I should find that the deduction of the licence fees is illegal, moreso having regard to the fact that this is dictated by law, and the nursing assistants would be barred from practising their profession for gain, if they were to be de - registered on account of failing to pay.

It is obvious that the Applicants may not have fully comprehended the purpose or function of the licence, hence the outcry that the payments were being deducted illegally. This is signified by the Applicants' witnesses varying testimonies in regard to the purpose of the licence. Ms Sonto Dlamini testified that the licence fee was for nurses only, when she was asked what the licence was in aid of. On the other hand, Ms Ntfokotiso Dlamini knew that the licence was to allow her to practice as a nursing assistant, but still complained that the amount was only E10.00 cheaper than the one paid by staff nurses who earned more than they do. Mr. Jeremiah Magagula who is himself a staff nurse, testified that he was not aware why he had to pay the licence fee, but only knew that it was required by the nursing council.

It is in my view, clear that the licence fee is a legal requirement, which seeks to provide the Applicants with a licence to practice their profession for gain. If this fee were not to be paid by them, then they would be defying the law. I therefore find that the Applicants have not proved on a balance of probabilities that the fees are deducted unlawfully.

AWARD

Having heard the evidence, and arguments of the parties, I am of the opinion that the Applicants have failed to prove on a balance of probabilities any of the claims as set out in their papers. I hereby dismiss their application in its entirety.

DATED AT MBABANE ON THISSEPTEMBER, 2006.

KHONTAPHI MANZINI
ARBITRATOR