CCMA

ARBITRATION AWARD

Case Number: *GATW 4837-14*

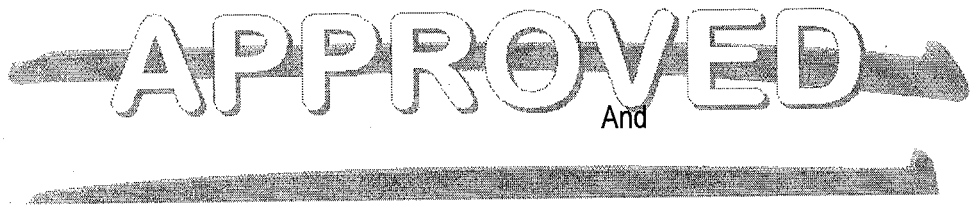
Commissioner: *Nathalie Willemse*

Date of Award: *20 May 2022*

In the **ARBITRATION** between

NEHAWU obo 18 MEMBERS and NUPSAW obo 16 MEMBERS

(Applicants/Employees)



And

NATIONAL LOTTERIES BOARD

(Respondent/Employer)

DETAILS OF HEARING AND REPRESENTATION:

[1] This is the arbitration award between employees, NEHAWU obo 18 MEMBERS and NUPSAW obo 16 MEMBERS (hereinafter referred to as "the Applicants") and employer, NATIONAL LOTTERIES BOARD (hereinafter referred to as "the Respondent").

[2] The proceedings were held over 20 days respectively. The proceedings were held at the Respondent's premises 333 Grosvenor Street, Hatfield, Tshwane. By agreement and for ease of employee records.

[3] The proceedings were recorded both electronically and manually.

[4] A selected few Applicants were present and represented by Mr. Makinta an attorney from E.S. Makinta Attorneys on behalf of Nehawu, Mr. S. Zulu an attorney from S.P. Zulu Attorneys on behalf of NUPSAW. The Respondent was represented by Advocate B. Ridgard instructed by Ramalifho Attorneys.

[5] Both parties prepared paginated and indexed bundle of documents, as regards the status of the documents, the parties agreed that the documents were what they purport to be, however, rights were reserved to lead evidence if deemed necessary as to the contents of the documents.

ISSUES TO BE DECIDED:

[6] The purpose of this arbitration is to determine the interpretation and application of a collective agreement relating to a salary benchmarking exercise and I am required to apply the appropriate interpretation in accordance with the provisions of **section 24 of the Labour Relations Act 55 of 1996, as amended (hereinafter referred to as the LRA)**.

BACKGROUND TO THE DISPUTE:

[7] The parties entered into a Settlement Agreement dated 6 March 2014 following a benchmarking exercise concluded in 2013. The parties agreed to a 50th percentile benchmark salary adjustment for 87 staff members.

[8] It was the case of the Respondent that the benchmarking adjustment was subject to an audit. Following the audit, the Respondent implemented the audited figures which were different to the spreadsheet figures annexed to the agreement. Aggrieved by this, the Applicants referred this dispute to the CCMA on 28 January 2014. It was the case of the Applicants that there was no *subject to an audit* clause in the agreement, the agreement was unambiguous and clear, with the exact figures payable to the Applicants.

[9] It was common cause that the Agreement had an annexure to it, setting out the exact amounts due and payable to each Applicant at the 25th and 50th percentile. It was the Respondent's case that the annexure had to be audited first prior to payment, as the agreement was signed at the CCMA and finance had to audit the figures. The Applicants argued that the annexure had clear; concise and audited amounts, which the Respondent agreed to and accepted.

[10] The dispute remained unresolved during Conciliation. The matter proceeded to arbitration before Commissioner P. Botha who issued an arbitration award in favour of the Applicants dated 23 July 2014.

[11] On 22 August 2014 the Respondent filed a Notice of Motion at Labour Court, seeking an order that the arbitration award made by Commissioner P. Botha, be reviewed and set aside. Nehawu opposed the application by the Respondent. After lengthy Labour Court proceedings, Honourable Madam Justice Prinsloo on the 10 May 2017, granted the application for review and set aside the arbitration award of Commissioner P. Botha, the Court Ordered that the matter be remitted back to the CCMA before a different Commissioner. Thereafter the matter came before me from 15 November 2017 with the last seating 29 April 2022.

[12] The proceedings were lengthy due to numerous difficulties: several pre-liminary points; change in representatives; covid-19 pandemic; illness of witnesses etc.

[13] It was noted that Nupsaw was not a signatory to the agreement, however their members were affected.

[14] The parties agreed, in closing, to the outstanding amounts payable to the Applicants, in the event that the award favours the Applicants. The Respondent argued that the amounts were correctly calculated and paid to the Applicants.

[15] Due to the lengthy arbitration proceedings, some Applicants left the organisation and others withdrew from the dispute. Ultimately there were only 34 Applicants.

[16] The parties agreed to submit written closing arguments on/before 6 May 2022. Only the Applicants complied and closing arguments were received.

SUMMARY OF EVIDENCE:

The purpose of the summary of evidence is not to restate evidence verbatim. I do not intend to deal with every aspect of the evidence and arguments and will only record the part of the evidence that I deem necessary for purposes of this determination

Applicants Evidence:

Four (4) witnesses were called to give evidence on behalf of the Applicants. They testified under oath, and I summarised their evidence as follows:

Witness 1: Mr. Crete Mashego:

[17] He testified that he is a Shop Steward for Nehawu since 2014. He was actively involved in the negotiations with the Respondent for the benchmarking. He personally engaged with the Respondent in 2013 concerning the benchmarking and the agreement.

[18] He explained that in 2013 the Respondent expressed to them that they will be embarking on a benchmarking exercise. There were 3 potential service providers, who were to make presentations to both the Respondent and Nehawu representatives on the evaluations and the extent of the benchmarking.

[19] He testified that the Respondent advised that they want to benchmark employees' salaries at the 25th percentile, however Nehawu requested they consider the 50th percentile. This resulted in a deadlock for the parties. The Respondent advised that they could not afford the demand. He stated that Nehawu requested some documentation from the Respondent to substantiate the financial constraints. He referred the seating to a letter that was sent to the Respondent on 8 November 2013: requesting figures on the differences for the 25th percentile and 50th percentile; requesting the benchmarking to be at 50th percentile and to place the implementation of the 25th percentile on hold.

[20] Mashego expressed that the Respondent failed to reply to them. They addressed a follow-up letter to the Respondent dated 12 November 2013 recording the lack of response by the Respondent; their intention to declare a dispute and for the benchmarking to be stayed.

[21] On 28 January 2014 Nehawu referred the dispute to the CCMA as a matter of mutual interest. Conciliation was set down for 26 February 2014 both parties were present. CCMA assisted the parties to extend conciliation to allow the parties to return to plant level negotiations and the Respondent agreed to share the documentation with Nehawu setting out the cost difference between the 25th percentile and 50th percentile, to allow Nehawu to negotiate their demand.

[22] It was his evidence that they agreed to extend conciliation to 3 March 2014 for parties to return to CCMA.

[23] He testified that on 26 February 2014 the Respondent replied to their letters: citing financial constraints as the main reason why they could not implement at the 50th percentile. The costing difference of 25th and 50th percentile was shared with Nehawu. The Respondent further expressed that the implementation of 25th percentile would be 1 April 2014. The budget for the exercise was R150 000 000.00. In addition, Nehawu received documentation setting out: various job evaluation report; benchmarking report; action plan and stats.

[24] Mashego testified that the parties returned to CCMA on 3 March 2014, parties tried to engage each other with little resolution. During the negotiations the Respondent made an offer for Nehawu to consider. He stated that a letter with an attachment which had a spreadsheet, was presented to Nehawu. The offer was a spreadsheet of the benchmarking report on the 50th percentile subject to the figures being audited. Mashego testified that Nehawu took the document and requested time to analyse the information and to consider the offer. He stated that Nehawu was not happy with the 'subject to an audit' clause and they requested that the Respondent furnish them with the final audited figures, thereafter the parties left CCMA.

[25] He led evidence that they arrived back at the office on 3 March 2014, at about 17:10 the Respondent furnished them with a letter stating following:
Kindly be advised that the Board resolved that benchmarking at 50th percentile be implemented with effect from 1st April 2014. The resolution excludes Executive and Management.

In view thereof, NLB would like to indicate to the union that approximately 87 staff members out of 132 will benefit should the benchmarking be implemented. Attached is the benchmarking report on 50th percentile with figures subject to being audited.

[26] Further to the above, he testified, that on 4 March 2014 they received an attachment with figures, which they assumed were audited because that was Nehawu's request after the CCMA process and the figures were different from what they saw previously.

[27] It was his evidence that after perusal of the document and mandate from members they accepted the offer. They proposed a meeting with the Respondent for 5 March 2014 to sign the offer. He stated that the parties met on 6 March 2014 and the settlement agreement was signed.

[28] The content of the agreement was:

RE: FULL AND FINAL SETTLEMENT AGREEMENT ON THE IMPLEMENTATION OF SALARY BENCHMARKING.

WHEREAS the employees had declared a dispute against the employer and

WHEREAS the matter was referred to the CCMA Pretoria for conciliation and

WHEREAS the parties have agreed to bring the matter to finalisation and have now reached a full and final settlement agreement on the matter under the following terms:

1. Salary adjustment on 50% percentile to be effected as from 1 April 2014 as per annexure A attached hereto;
2. Two (2) months back payment to be effected by end of March 2014;
3. The CCMA referral to be withdrawn by the 7th March 2014;
4. This is a full and final settlement of this matter.

[29] It was his evidence that parties returned to CCMA on 7 March 2014 to sign the final agreement, he was present with the Nehawu officials. He signed the agreement as the shop steward. He explained that after perusal of the documents, the noticed that the information was different, the Respondent brought the correct document, and the signatures were finalised.

[30] He led evidence that the annexure to the agreement they assumed was after the figures were audited.

[31] Mashego testified that shortly after the resolution of the dispute, the Respondent presented Nehawu with a document with position; grade; current salaries; 50th percentile; difference 50th percentile and 2 months back pay amounts. He explained that the document was different to the annexure which was agreed to. The Respondent confirmed it was different and explained that it was the audited figures. He testified that Labour declined and refused the implementation of the document as it was not part of the agreement.

[32] He testified that the Respondent proceeded to implement the document and Nehawu elected to refer a dispute to the CCMA and permission was granted by the Municipality on 23 June 2014 to picket and gather at the workplace between the periods 24 to 27 June 2014. He stated that a letter was sent to the Respondent setting out the reasons for picketing and the permission that was granted to Nehawu by the Municipality. He stated that the aim was to place pressure on the Respondent and to express their dissatisfaction that the Respondent failed to implement the signed agreement.

[33] During cross-examination the witness could not remember when the altered document was presented to them, he stated that it was after signing the agreement.

[34] The witness disagreed that the picket was for their dissatisfaction about the settmenet agreement, members were unhappy because of what was presented and implemented after the settlement agreement.

[35] It was put to the witness that conveniently he remembers the date of the agreement but fails to recall the date of the document that triggered the picket. The witness confirmed he could not recall everything as it was a while ago. He confirmed that there were many engagements between the parties however he could not recall the exact dates.

[36] It was put to the witness that he conveniently only recalls dates that was corroborating his case. There was no response.

[37] The witness read a Board Resolution dated 10 March 2014, organised labour was not present. The minutes of the Board Meeting states: "*After considering the reports of the three consultants, the board resolved to place all staff at the 50th percentile benchmark. This resolution is subject to an appropriate audit*".

[38] The witness agreed that the letter addressed to Nehawu, which was signed by Nehawu on 3 March 2014 at 17:10, states that the *attached was the benchmarking report on 50th percentile with figures subject to being audited*. The witness agreed that the Board Resolution and the letter to Nehawu states that the figures must be subject to an audit.

[39] It was put to the witness that it was the Respondent's case that the figures must be in line with the Board Resolution which was subject to an audit. The witness disagreed. It was put to the witness that the Respondent's case was that whatever figures were presented to Nehawu was subject to an audit. The witness disagreed and stated that the clause was rejected by the Union, audited figures were requested and after receipt of a document, they assumed it was correct.

[40] It was put to the witness that he was forgetful and that there was a possibility that he may conveniently forgotten the "subject to" clause. Witness disagreed.

[41] The witness agreed they assumed that the document given to Nehawu on 3 March 2014 was audited.

[42] During re-examination the witness agreed there were plenty meetings with the Respondent during October 2013 to March 2014, but he could not recall the dates.

[43] Nothing further emerged from the cross-examination and re-examination.

Witness 2: Nonkululeko Zonde

[44] The witness was a Shop Steward and Deputy Secretary for Nehawu since 2012. The witness assisted the Secretary with administrative work. They were aware of the benchmarking exercise in 2012 at the workplace. In 2013 Nehawu followed up in writing about the process and the Respondent replied with a Board Resolution dated 18 September 2013: CEO presented the demand of 50th percentile to the Board for consideration.

[45] The witness expressed that she addressed a letter to the Respondent dated 14 October 2013 requesting an update on critical items like benchmarking and Board resolutions, however there was no response. She expressed that they referred a dispute in terms of their recognition agreement and parties were granted 5 days to resolve the dispute. Due to the non-resolution, Nehawu elected to refer the dispute to CCMA in 28 January 2014.

[46] The witness led evidence of the CCMA experience and the extension of the conciliation process subject to parties reverting to plant level negotiations and the sharing of documentation. She stated that the trade union was seeking the benchmarking to be implemented at the 50th percentile. The Respondent declined this but at no stage did parties discuss any audit of figures.

[47] On 3 March 2014 the Respondent placed the offer with Nehawu, consisting of job levels and salary figures subject to an audit. Nehawu took time to peruse the document, but it was eventually rejected as they could not accept an offer subject to another process. She testified that Nehawu requested the Respondent to audit the figures and return with the final offer.

[48] It was her evidence that the parties continued to engage, the Respondent maintained that the figures had to be audited, however it was rejected. Thereafter the Respondent produced another document and assumed it was the final audited figures as the figures differed. They further received the Board Resolution which placed employees on the 50th percentile, but they did not receive the attachments. When they returned to CCMA, they received the annexure. They were satisfied and signed the agreement.

[49] It was her evidence that the regional representative of Nehawu, who signed the agreement, was late. After signature the Respondent implemented something different, and members were very upset. The parties attempted to resolve the matter, but with no success. The matter was referred to CCMA and a picket was held.

[50] During cross-examination the witness agreed that the parties had various agreements 5 years ago. The witness took the seating through the engagements: 2013 was the enquiring of the benchmarking process, no meetings were held but written correspondence. The witness accepted that it was a long time ago and she could not recall all the engagements and its purpose. It was agreed that due to the passage of time, it was possible for parties to forget the content of certain engagements.

[51] The witness stated that the Respondent presented 2 documents to Nehawu prior to signatures and settlement.

[52] At CCMA the Respondent stated they had financial constraints, Nehawu requested audited finances to confirm the financial constraints; she could not recall who signed the agreement, but it was signed at CCMA.

[53] The witness agreed that Mr. Lesley Ramalifo was the representative for the Respondent during most of the meetings.

[54] It was put to the witness that throughout all the meetings and prior to signature of the agreement, parties were aware of the 'subject to an audit' clause. The witness disagreed and stated that Nehawu was always opposed to the subjected to clause.

[55] It was put to the witness that upon signing the document, parties were aware of the audit that had to follow. The witness disagreed.

[56] It was stated to the witness that the Respondent will argue, that due to the passage of time, you may have forgotten content of meetings. The witness disagreed. She accepted that she may have forgotten some things.

[57] During clarity questions by the Commissioner the witness confirmed that the purpose of the benchmarking exercise was to address salary anomalies. The Respondent did the exercise every 2 years. The aim was to create a balance on salaries, to adjust salaries and to address gaps.

[58] The witness explained that the purpose of an audit was for a process to verify figures and affordability. The witness agreed that after the signing of the agreement, parties continued engagements, the Respondent indicated that they did not have the finances and they would be reckless to implement the agreement.

[59] During re-examination the witness agreed that she could not remember all the meetings and the contents, what she does recall is accurate and true.

[60] Nothing further emerged from cross-examination and re-examination.

Witness 3: Mr. Tshepo Masemola:

[61] He is a trade union official for Nehawu. He is responsible for organising members in the union for the specific sector.

[62] He was aware of the negotiations with the Respondent which resulted in a settlement agreement which he signed as a witness. He stated that he was not part of the negotiations, he was kept abreast by the shop stewards.

[63] On the day the agreement was reached, he accompanied his colleague, who is now late to the premises of the Respondent. Upon their arrival the legal representative of the Respondent gave them a draft agreement with an annexure. After discussion with leadership, they accepted the offer, and they signed the agreement.

[64] During cross-examination the witness says that he got involved after an office discussion with his late colleague and he wanted to view the process. He described the agreement as a good agreement for members.

[65] The witness agreed that he did not witness the agreement but rather witnessed the process. The witness could not remember everyone present.

[66] Nothing further emerged from cross-examination and re-examination.

Witness 4: Mr. Phatlane Henry Malete:

[67] He is a Client Liason Officer for the Respondent, he commenced employment on 1 September 2010. He testified that in 2014 he was a non-unionised member at the workplace, during a staff meeting he heard about the benchmarking exercise which was concluded and signed off.

[68] He testified that the HR Executive announced that parties had reached a settlement agreement and all concerns had been addressed. Shortly after the implementation, staff were disgruntled and unhappy as the agreement was not implemented correctly.

[69] He led evidence that they received a presentation on the implementation at the 50th percentile. They had an expectation which was not met by the Respondent.

[70] During cross-examination he could not recall the date of the staff meeting or the date for the presentation. He further could not recall all the engagements during the staff meeting. The witness confirmed he was not a member of the trade union at the time the agreement was concluded, and he agreed that he could not have instructed Nehawu to accept the 50th percentile.

[71] The witness agreed he could not tender any evidence on the settlement agreement, the discussions and engagements with the parties. His evidence was secondary. He did recall during the staff meeting staff were consumed with the benchmarking exercise.

[72] The witness confirmed that he may have forgotten certain evidence, due to the lapse of time. He disputes that he selectively recalls evidence.

[73] It was put to the witness that his evidence was hearsay; leading and selective and that his evidence was not aimed at painting the correct picture and may be manipulative. The witness failed to respond.

[74] The witness agreed he was not aware of the subject to an audit clause in the agreement, he stated that it may be possible that parties agreed to it.

[75] Nothing further emerged from cross-examination and re-examination.

[76] The Applicants closed their case.

Respondent's Evidence:

One (1) witness testified in support of the Respondent's claim, after being sworn in, his evidence was summarised as follows:

Witness 1: Mr. Lesley Ramolifho:

[77] He testified that he is an admitted attorney and represented the Respondent since 2014 and was actively involved with the salary negotiations in 2014 as well as the agreement before the CCMA.

[78] He testified that he was aware of Nehawu being present in the negotiations, prior to his involvement the parties were involved in a 3 days negotiations concerning the benchmarking and salary levels.

[79] He explained that upon his involvement, all his mandates and instructions were based on Board Resolutions and minutes, which was backed up by 3rd party studies and reporting. He was aware of the Board Resolution from a Board meeting dated 3 March 2014; mandate was given to move to the 50th percentile subject to an audit process.

[80] It was his evidence that there was a threat to strike by Nehawu; his role was to find a solution to the deadlock within the ambit of the Board Resolution.

[81] He testified that the offer was put to Nehawu and placed it writing, which eventually resulted in a resolution to the dispute. He explained that the union did request figures, which the Respondent agreed to furnish subject to an audit process. Shortly after, HR returned with the figures an agreement was put in place which was later signed, he signed on behalf of the Respondent.

[82] It was his evidence that the agreement should not be read in isolation, there was a chronological order of events from the Board resolution to the signing of the agreement. He stated that the Applicants were aware of the audited process, it was expressed upon them that the amount was not final and had to be audited, Applicants were interested in what they could expect. Annexure A to the agreement was subject to an audit, which was conveyed to the Applicant party, and they agreed.

[83] During cross-examination the witness agreed he was acting in his professional capacity on the Respondent's behalf. His role was to represent the Respondent, as the Executives had conflicting interest in the matter.

[84] He confirmed he was involved in the negotiations from 3 to 6 March 2014; the parties met daily. He confirmed that he told the Applicants the figures in annexure A were subject to an audit. He was not able to confirm when the audit was to be conducted, he was not involved with the audit process.

[85] The witness testified that prior to signing the agreement there were many drafts. One draft had the subject to audit reflecting, the Respondent removed it but the Respondent always made its intention clear. The Applicants did not want the wording reflected on the agreement and therefore it was removed, however the Respondent did not change its mandate.

[86] The witness disputes that the Applicants were misled, the Respondent would be reckless to enter into an agreement contrary to the Board Resolution; he stated that regardless of whether the subject to clause reflects in the agreement or not, the final figures were always going to be audited.

[87] He confirmed that he was the author of the agreement. The annexure was figures of what had to be audited, he stated, because the Applicants wanted to see what to expect, HR gave them the figures which required auditing. The figures that were shared and annexed to the agreement was a calculation of the financial implication subject to an audit.

[88] He explained that the intention of the Respondent was only for the 87 employees to be benchmarked subject to an audit and in line with the Board Resolution.

[89] Nothing further emerged from the cross-examination and there was no re-examination.

[90] There was no further cross-examination and re-examination.

[91] The Respondent closed their case.

ANALYSIS OF THE EVIDENCE AND ARGUMENT:

[92] In disputes relating to **Section 24 of LRA: Disputes about collective agreements**

(1) *Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.* Therefore, Commission must determine the true intention and interpretation of the parties and apply the interpretation.

[93] In accordance with the provisions of **section 23 of the LRA**, collective agreements are binding on the parties. The purpose of **section 24 of the LRA** is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to interpret or apply its terms either correctly or at all[1].

[94] The principles applicable to the resolution of such disputes are trite as restated in **Western Cape Department of Health v Van Wyk and Others**[2]:

(I) *When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement;*

(II) The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

(III) A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.

[1] See *PSA obo Liebenberg v Department of Defence and Others (2013) 34 ILJ 1769 (LC) at para [2].*
[2] (2014) 35 ILJ 3078 (LAC) at para 22.

(IV) The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made[3].

(V) The "parole evidence" rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear.

(VI) Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.

[95] From the above authority regard was had to each of the abovementioned elements. From the evidence before me, it was common cause that a written agreement was compiled to reflect the terms and conditions to which the parties have agreed to at the time of its conclusion. All the witnesses for the Applicant party could not recall all discussions and engagements between the parties. However, a common threat throughout their evidence was displayed to express their intention. The Applicants maintained that there was no agreement on an audit process after the parites agreed on the spreadsheet setting out the figures which were to be implemented by the Respondent. The trade union consistently expressed that the offer to include an audit process was rejected. This evidence was corroborated by the witness of the Respondent Mr. Ramolifho, who was the author of the agreement and conceded that the Applicants rejected the audit process clause, which he removed from the agreement.

[96] It was further the case of the Respondent that the intention of the Respondent was always to subject the agreement to an audit process. This intention was shared with the Applicants from the onset of the negotiation process. The Board resolution was shared with the Applicants.

[97] Consequently, I was faced with conflicting versions by the parties, both versions drive their intentions at the time of the agreement.

[98] In **Sasol Mining (Pty) Ltd v Ngqeleni NO and Others** the Court held that: *One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him...'*

[3] See *Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA)*

[99] Similarly in **Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others**, the Court, in dealing with issues of a commissioner having to determine conflicting evidence, held as follows: '*To resolve the factual controversy between parties, the commissioner had to embark upon a balanced assessment of the credibility, reliability and probabilities associated with their respective versions'.*

[100] Thus, in the matter before me, the witnesses of the Applicants were found to be forgetful witnesses. Mr. Malete and Mr. Masemola were not actively involved in the negotiations and had very little knowledge surrounding the agreement, the parties' engagements and ultimately the intention of the parties. As a result, very little to no weight was attached to their evidence. Their evidence was found to amount to hearsay and to a degree irrelevant, which was inadmissible.

[101] Turning to Mr. Mashego and Ms. Zonde both witnesses were actively involved in the negotiations. Both were found to be clear, direct and credible witnesses. They were found to have forgotten certain events; however, this was due to the passage of time. Their versions were aligned with the chronological events that Mr. Ramolifho of the Respondent testified to, who was also found to be a direct, clear and credible witness, who played an integral role in the negotiations.

[102] From the parties evidence it was apparent that the Applicant party rejected the audit process. The agreement was only achieved when the Respondent removed the clause from the agreement. Therefore, it was found that the intention of the parties, in meeting minds and resolving the dispute, the settlement was only achieved if the audit process was removed. It would appear that the Respondent merely agreed to get the Applicant party to call off the impeding strike action.

[103] Further to the above, it was unclear what the audit process entailed and what the results would yield. For that reason, it would be nonsensical for any party to enter into an agreement subject to a further process which was unclear. It was therefore apparent that Respondent's reliance on the provisions of a *subject to an audit* of the Agreement, is clearly misplaced, as the parties had not established an agreement on the clause and that was the reason, they removed it from the initial agreement. The Respondent's witness confirmed that the clause was removed to settle the dispute.

[104] Consequently, the interpretation adopted, and which is fair to the parties, as it would give to the words used by the parties their plain, ordinary and popular meaning in the absence of ambiguity. I am satisfied that the settlement agreement entered into by the parties was reached once the

Respondent removed the *subject to an audit process* clause. The annexure attached to the agreement was not subject to an audit.

[105] The intention of the parties and the agreement of the parties must be interpreted as the: *Salary adjustment on 50% percentile to be effected as from 1 April 2014 as per annexure A attached hereto.*

Remedy:

[106] On the last day of the arbitration the parties agreed to the outstanding amounts due and payable to Applicants. The Respondent compiled a spreadsheet of the amount due to each Applicant in relation to the benchmarking at the 50th percentile; the amount paid to the Applicants in 2014/15 after the agreement and the difference owed to the Applicants.

[107] The spreadsheet further set-out the annual wage increment from 2015 to 2022.

[108] Holistically, this dispute related to the intentions of the parties at the time of the agreement and the application of the agreement. The case of the Applicants was for the correct interpretation and application of their agreement.

[109] Consequently, the appropriate remedy would be for the Respondent to compensate the Applicants only the difference owed to the Applicants as per the agreement. To clarify the difference between the amount paid in 2014/15 and the amount the Respondent ought to have paid, must be paid to the Applicants. The annual salary increments thereafter do not form part of this dispute.

[110] For purposes of this award the Applicants are:

Nehawu:

1) Sive Mdudu
2) Tumelo Segwape
3) Joel Mokgoko
4) Vudzani Maphangwa
5) Chuene Mushi
6) Mali Mthombeni
7) Ratsamai Selemela
8) Montsho Pheaha
9) Ntsae Busang

10) Mavis Maremane

11) Thembi Nkuna

12) Henry Petrus

13) Ariel Rikhotso

14) Ridovhona Nthangeni

15) Lerato Legwale

16) Crete Mashego

17) Funani Mashwanganyi

18) Mofolo Motaung

Nupsaw:

1) TL. Oloyede

2) BN. Kgophane

3) T. Moalusi

4) S. Pilas

5) B. Mampane

6) NC. Radzilane

7) TZ. Mathopa

8) MP. Ramphefa

9) S. Sithole

10) N. Sekotlong

11) L. Makgalemane

12) K. Masikana

13) O. Maboya

14) KS. Serarile

15) KH. Malapo

16) PH. Matete.

AWARD:

[111] It is my finding that the Collective Agreement between the Applicants, NEHAWUO obo 18 MEMBERS and NUPSAW obo 16 MEMBERS must be interpreted as the: *Salary adjustment on 50% percentile to be effected as from 1 April 2014 as per annexure A attached hereto.*

[112] The Respondent, NATIONAL LOTTERY BOARD, is ordered to pay the Applicants, NEHAWU obo 18 MEMBERS, the difference between the amounts implemented in 2014/15 and the amount they ought to have paid as set out in Annexure 2 of the quantum bundle, column 3 titled *Difference* and totalling: **R951 136.00 for Nehawu members**.

[113] The Respondent, NATIONAL LOTTERY BOARD, is ordered to pay the Applicants NUPSAW obo 16 MEMBERS, the difference between the amounts implemented in 2014/15 and the amount they ought to have paid as set out in Annexure 1 of the quantum bundle, column 7 titled *2014 Different in benchmark for Claimed implemented* and totalling: **R907 096.30 for Nupsaw members**.

[114] That the payments *supra,* paragraph [111] and [112], be made to the Applicants by no later than **Monday 6 June 2022.**

Signature:

Commissioner: ***Nathalie Willemse***

Sector: ***National Lottery***