

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no: JA20/05

In the matter between

Nicholas Pretorius

Appellant

And

Rustenburg Local Municipality

1st respondent

Munimed

2nd respondent

Municipal Gratuity Fund

3rd respondent

JUDGMENT

ZONDO JP

- [1] I have had the benefit of reading the judgment prepared by Comrie AJA in the matter. Regrettably I am unable to agree with his conclusion that the appellant has made out a case that he is entitled to the order that he seeks. My approach to the matter is rather

different from the approach adopted by Comrie AJA. In my view the appellant is not entitled to any relief and the appeal should be dismissed with costs.

- [2] In order to determine whether or not the appellant is entitled to the relief that he seeks, it is necessary to set out the material facts as well as the history of the dispute. In the course of doing so it will be necessary to also refer to the legislative measures that were taken during that history which will have a bearing on whether the appellant is entitled to the relief he seeks. I start off with the facts.

The facts

- [3] Since the advent of democracy in this country in 1994 many changes have occurred and, yet, still more changes need to occur. Local government and how it operates have been no exception in this regard. In 1998 the first democratically elected government enacted the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998) which created the Demarcation Board. The Demarcation Board's main function was to demarcate territorial boundaries of various local government authorities throughout the Republic. Once established, the Demarcation Board went ahead and did this. After this had been done, it was necessary to establish local government authorities in accordance with the demarcations made by the Board. This meant that some of the local government authorities which had been established under apartheid would have to be disestablished. Furthermore, the territorial jurisdiction of the new local government authorities would not necessarily be the same as those which had existed in the respective areas under apartheid. Accordingly, in some cases a new local government authority could have under its jurisdiction areas that previously fell under different local government authorities.

- [4] Another piece of legislation that was enacted in 1998 was the Local Government: Municipal Structures Act 118 of 1998 (“**the MSA**”).

In terms of sec 12(1) of the MSA a Member of the Executive Council for local government in a province was required to establish by notice in the Provincial Gazette, **“a municipality in each municipal area which the Demarcation Board demarcates in the province in terms of the Demarcation Act”**. In terms of sec 12(2)(a) and (b) of the MSA the establishment of a municipality was required to be **“consistent with the provisions”** of the MSA and would **“take effect at the commencement of the first election of the council of that municipality.”**

- [5] In terms of sec 14(1)(a) of the MSA **“(a) municipality established in terms of section 12 in a particular area, supersedes the existing municipality or municipalities to the extent that the existing municipality or municipalities fall within the area.”** In terms of sec 14(1)(b) **“(t)he superseding municipality becomes the successor in law of the existing municipality subject to paragraph (c).”** Sec 14(2), in so far as it is relevant herein, provides:

“(2)(a)If subsection (1) is applicable, the section 12 notice or any amendment of the section 12 notice, must –

- a) provide for the disestablishment of the existing municipality or, if only part of the existing municipality’s area is affected, the disestablishment of the existing municipality in the affected area; and**
- b) regulate the legal, practical and other**

consequences of the total or partial disestablishment of the existing municipality, including –

- (i) the vacation of office by councillors of the exiting municipality;**
- (ii) the transfer of staff from the existing municipality to the superseding municipality, or, if there is more than one superseding municipality, to any of the superseding municipalities;**
- (iii) the transfer of assets, liabilities, rights and obligations, and administrative and other records, from the existing municipality to the superseding municipality or if there is more than one superseding municipalities, taking into account the interests of creditors of the existing municipality;**
- (iv)**

Provided that if the superseding municipality is a district or local municipality a transfer referred to in subparagraph (ii) or (iii) must be effected in a way that would enable the superseding municipality to perform the functions or exercise the powers assigned to it in terms of section 84(1) or (2).

[6] Sec 12(3) of the MSA provides:

- “(a) The transfer of a staff member in terms of a section 12 notice must be –**
- i) on conditions of service not less favourable than those under which that staff member served in the existing municipality; and**
 - ii) in accordance with the Labour Relations Act, 1995 (Act 66 of 1995)**
- (b) A section 12 notice transferring staff of an existing municipality to a superseding municipality may determine that -**
- (i) the staff transferred from the existing municipality to the superseding municipality form an administrative unit that functions as such unit until the superseding municipality has established a staff structure and has appointed staff to positions on the staff structure; and**
 - (ii) such administrative unit functions under the control of the municipal manager or acting municipal manager of the superseding municipality.”**

[7] The appellant was at some stage employed by the Rustenburg City Council. That City Council later became or later formed part of the Rustenburg Local Transitional Council. That Council was later disestablished in terms of sec 12 of the MSA. The Rustenburg Local Municipality, the first respondent, was established by way of a notice issued by the Member of the Executive Council responsible for local government in the North -West Province. The

notice was notice NO 316 of 2000 which was published in the Provincial Government Gazette No 5574 of 29 September 2000. Such notice will be referred to herein as “**the sec 12 notice**”. The Rustenburg Transitional Local Council was only one of three municipalities which were disestablished and replaced by the Rustenburg Local Municipality. This means that the personnel that had been employed by the municipalities or local councils concerned were all to be transferred to the new Rustenburg Local Municipality, the first respondent.

- [8] In the sec 12 notice the relevant MEC stated: “**Under sec 12(1) and (3) and 14(1) and (2) of the Local Government: Municipal Structures Act, 1998 (Act NO 117 of 1998), I hereby establish the Rustenburg Local Municipality as set out in the Schedule hereto**” That was on the 26th September 2000. However, as would have been noted earlier in this judgment, in terms of sec 12 of the MSA the establishment of the Rustenburg Local Municipality was only going to take effect at the commencement of the local government election that was to follow. It is also at that time that the Rustenburg Transitional Local Council was going to cease to exist.
- [9] The local government election that was held after the issuing of the sec 12 notice was held on the 6th December 2000. That is also the date on which the Rustenburg Transitional Local Council ceased to exist and the date on which the first respondent was established.

The question which arises is: on the 6th December 2000 what happened to the personnel and all employees previously employed by the Rustenburg Transitional Local Council and the other local municipalities which were disestablished on that date?

- [10] In terms of sec 14(2)(b)(ii) of the MSA, if sec 14(1) of the MSA applied to a particular situation, the sec 12 notice or any amendment of a sec 12 notice was required to regulate the legal, practical and other consequences of the total or partial disestablishment of an existing municipality, including **“the transfer of staff from the existing municipality to the superseding municipality, or if there is more than one superseding municipality, to any of the superseding municipalities”**. For the sake of completeness it can also be mentioned that what a sec 12 notice was required by sec 14(2)(b)(ii) to do in regard to staff was also required by sec 14(2)(b)(iii) of the MSA in respect of **“assets, liabilities, rights, obligations and administrative and other records.”** In other words just as an MEC for local government could under sec 14(2)(b)(ii) transfer an employee from a disestablished municipality to any one of a number of superseding municipalities - where there was one or more superseding municipalities – which seems to suggest to me that the MEC could do this even against the employee’s will – the MEC could also transfer an asset or liability of a disestablished municipality to any one of the superseding municipalities even against the wishes of either the councillors or the personnel. One assumes that this would be permissible where to do so was in the

public interest.

[11] The question which arises is whether the MEC for Local Government in the North-West Province did transfer the personnel previously employed by the Rustenburg Transitional Local Council, which included the appellant, to the superseding Rustenburg Local Municipality by way of a sec 12 notice as contemplated in sec 14(1)(b)(ii) of the MSA. Item 8 of the sec 12 notice dealt with the transitional provisions relating to personnel. I think that the transition contemplated therein was to be the period from the entry of the personnel of a disestablished municipality in the employ of the superseding municipality pending the rationalisation or restructuring of the superseding municipality to the end of such rationalisation. The end of the transitional period would, as far as personnel were concerned, end when all the positions that had to be filled pursuant to the rationalisation were filled.

[12] In paragraph 3 of his founding affidavit the appellant stated that **“all assets and liabilities as well as all personnel of the erstwhile Rustenburg Transitional Local Council (hereinafter referred to as the TLC were transferred to the First Respondent.”** In the same paragraph he said that **“(t)his had been done (i)n terms of section 3 contained in the schedule to notice NO 428 of 2000 as published in the North West Extraordinary Government Gazette NO 5634 dated 21 December 2000 as well as in terms of sections 7(1) and 7(2) contained in the schedule**

to Notice No 316 of 2000, as published in the North West Extraordinary Government Gazette, No 55 74 dated 29 September 2000 proclaimed in terms of Section 14(2)(b)(iii) of the mentioned Act on Local Government: Municipal Structures ...”. In par 18 of its answering affidavit the first respondent stated that these allegations are not in dispute. This means that it is common cause between the parties that all the personnel who were employed by the Rustenburg Transitional Local Council – which included the appellant – were transferred into the first respondent’s employ. That is a transfer of personnel that the MSA and the sec 12 notice referred to. Accordingly, this matter must be approached on the basis that upon the disestablishment of the Rustenburg Transitional Local Council and the coming into existence and operation of the first respondent, the appellant was transferred into the employ of the first respondent.

[13] Item 8(1) of the sec 12 notice reads:

“Any person in the employ of the disestablished municipalities referred to in section 2(2) shall, in accordance with a determination by the responsible member made after consultation with the affected municipalities and with effect from a date mentioned in such determination, be transferred and placed in the service of the local municipality within the district area, on such terms and conditions of service as are not less favourable under which such person previously served;

Provided that –

- a) **
- b) **
- c) **
- d) Such person shall not, as a consequence of such transfer, acquire a right to retire or to be offered a severance or retrenchment package;**
- e) **
- f) **
- g) **
- h) Any person who refuses or withholds his or her consent to be transferred as contemplated by this section, shall not be entitled to any severance benefit or benefits.**

Provided, further, that the provisions of this subsection shall not prevent the municipality concerned from implementing a scheme to re-organise its personnel subject to the Labour Relations Act, 1995 (Act No 66 of 1995)."

Item 8(2) of the sec 12 notice reads:

"(2)The employment of personnel referred to in subsection (1)-

- a) must be regularised in accordance with any collective agreement reached between the municipality concerned and the trade unions**

representing those employees; and

- b) is subject to section 197 of the Labour Relations Act, 1995 (Act No 66 of 1995).**

Item 8(3)(a) provides that a determination contemplated in subsection (1) shall be published in the Provincial Gazette for information. Item 8(3)(b) and (c) read thus:

“(b) The effective date of a determination referred to in paragraph (a) may be a date prior to the date of publication of a notice for information as contemplated in this subsection.

- c) The responsible Member may amend a determination contemplated in subsection (1)”**

Item 8(4) reads thus:

“(4) The local municipality referred to in section 2(1) may, by agreement with the relevant district municipality or any other local municipality within the district municipal area and with effect from a date determined by such agreement, after due consultation with the relevant trade union and with the consent of the employee concerned, transfer or second any of its employees to or place the services of any such employee at the disposal of the district or local municipality concerned: Provided that in the event of a transfer such employee shall be employed on such rights and privileges as are not less favourable than those applicable to him or her

at the time of such transfer.”

- [14] Subsequent to the establishment of the first respondent, the first respondent embarked upon a re-organisation or rationalisation or restructuring to create posts which would be filled by employees. The employees who would fill such posts would include the former employees of the Rustenburg Transitional Local Council. One does not need much imagination to understand that, as there were two other municipalities which had been disestablished and were replaced by the first respondent, this was a situation where for any post there could be two or three people who had previously occupied similar or corresponding posts in the disestablished municipalities each of whom may have hoped to get either the corresponding post in the first respondent or a post as close as possible to the one they had occupied in the disestablished municipalities. Obviously, the first respondent had to deal with the challenge of how to accommodate all the employees from all the three disestablished municipalities. In most cases it would be impossible to give each employee exactly the same post or position that he or she had occupied in the relevant disestablished municipality. All that the first respondent could realistically be expected to do was to make employees reasonable offers of employment in certain positions. It would never succeed if it sought to satisfy every employee in respect of every issue. It is now necessary to consider the events which occurred subsequent to the disestablishment of the three municipalities and the establishment of the first respondent in so far as they are relevant to this matter.

- [15] In 1973 the appellant was employed by the Rustenburg Town Council. Later the Rustenburg Town Council was disestablished and replaced by the Rustenburg Transitional Local Council. This was in the post – 1994 period. The capacity in which the appellant had been employed by the Rustenburg Town Council was that of Assistant Town Engineer (Water and Sewerage Section) until 1974 when he was promoted to the position of Deputy Town Engineer. In 1989 he was promoted to the position of City Engineer: Civil Services. That was the position that the appellant occupied on the 5th or 6th December 2000 at the time of the disestablishment of the Rustenburg Transitional Local Council and the establishment of the first respondent.
- [16] In his founding affidavit the appellant referred to an agreement that was concluded on the 31st October 2000 between, on the one hand, the North-West Government Association (“**NORWELOGA**”), of which the first respondent was, at all material times, a member, and, on the other, the South African Municipal Workers Union (“**SAMWU**”) and the Independent Municipal Association of Trade Unions (“**IMATU**”). The appellant was at all material times a member of IMATU. A copy of that agreement was annexed as “**NP1**” to the appellant’s founding affidavit.
- [17] In the record there is an advisory arbitration award that was issued by an arbitrator who had been asked by either all or at least some

of the parties who had signed the “**NP1**” agreement to give an advisory arbitration award on a number of issues. The fact that the award is an advisory one means that it is not binding on any of the parties thereto. One of the issues on which the arbitrator had been asked to give an opinion was whether or not the “**NP1**” agreement is a collective agreement. The arbitrator concluded that the “**NP1**” agreement is not a collective agreement. Obviously, no court is bound by that conclusion. Indeed, as I have said, that conclusion is not binding even on the parties to that advisory award.

[18] The arbitrator who issued the advisory award based his conclusion in this regard on the provisions of the constitution of the South African Local Government Bargaining Council, particularly clause 3.2 thereof read with clause 3.1. In terms of clause 3.2 collective agreements in the bargaining council must be concluded at a certain level. The arbitrator stated that this had not been complied with in the case of the “**NP1**” agreement. For this reason he concluded that the “**NP1**” agreement was not a collective agreement.

[19] I am not certain whether the terms of reference of the arbitrator required him to give his opinion on whether the “**NP1**” agreement is a collective agreement on the basis of the constitution of the bargaining council or whether no restriction was placed with regard to what could form the basis of his opinion. What is conspicuous by its absence from the matters that the arbitrator took into account in arriving at his conclusion that the “**NP1**” agreement is not a

collective agreement is a consideration of whether the “**NP1**” agreement falls within the definition of a collective agreement contained in sec 213 of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”). That definition reads as follows:

“Collective agreement’ means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand –

(a) one or more employers

(b) one or more registered employers’ organisations; or

(c) one or more employers and one or more registered employers’ organisations.”

[20] Once an agreement is a collective agreement as defined in sec 213 of the Act, such agreement is binding on the employers’ employers’ organisations and their members and the trade unions which signed the agreement as well as their members. This is so by virtue of the provisions of sec 31 of the Act. In my view the fact that such an agreement may not have complied with any domestic or internal requirements of a particular organisation does not affect the question whether or not, for purposes of the Act, it is a collective agreement. I am unable to agree with the conclusion that the “**NP1**” agreement is not a collective agreement as defined in sec 213 of the Act. IMATU, the union of which the appellant is a member, is a registered trade union and it is party to the “**NP1**”

agreement. SAMWU is a registered trade union and it was a party to that agreement. NORWELGA is an employers' organisation. The provisions of the "NP1" agreement clearly relate to terms and conditions of employment and other matters of mutual interest between employer and employee. In my view the "NP1" agreement meets the requirements of the definition of a collective agreement in sec 213 of the Act and is, indeed, a collective agreement for purposes of the Act.

[21] Annexure "NP1" was one of the first steps, if not the first step, taken by the parties to that agreement to put in place structures and processes that would be necessary for, among others, the first respondent, once established, to manage and regulate the restructuring and reorganisation that had to be undertaken after the disestablishment of some of the old local authorities and the establishment of certain new municipalities.

[22] It is not necessary to refer to all the provisions of the "NP1" agreement. It will suffice to note some of its provisions. The preamble to the "NP1" agreement reads:

"Whereas the Structures Act and demarcation results necessitate the incorporation of personnel into one structure for each demarcated area.

Now therefore it is agreed as follows:"

This preamble makes it clear that the "NP1" agreement recognised that certain challenges lay ahead in the incorporation of personnel from different disestablished local authorities into municipalities

created as part of the restructuring of local government. Furthermore, through the “NP1” agreement the parties thereto sought to lay down principles that would govern the challenges that lay ahead and the processes that would have to be followed and the structures or bodies that would play different roles to deal with the challenges.

- [23] Clause 1 of the “NP1” agreement contained what it referred to as the “**STAFF PLACEMENT POLICY AND PROCESS**”. Clause 1.1. provides that the parties to the “NP1” agreement accepted that as a result of “**the need to restructure local government and functions within the applicable demarcated areas, the reorganisation of existing staffing structures (including geographic redeployment) [could] be necessary to meet operational objectives of service delivery.**” From clause 1.1 two observations can be made. The one is that the parties to the NP1 agreement – which included the appellant’s trade union - accepted that there was a “**need to restructure local government and functions**” within the newly demarcated areas. The second is that they also accepted that it could be necessary to have a reorganisation of existing staffing structures including geographic redeployment to meet operational objectives of service delivery. By the term “**geographic redeployment**” I understand that an employee could have to move from one geographical area to another geographical area in order to meet the operational objectives of service delivery.

[24] Clause 1.2 of the “NP1” agreement provided that municipal councils had to **“prepare the envisaged final organograms of departments wherever there is reasonable certainty as to the requirements and it [was] unlikely that any substantial changes to these structures [would] be required in the foreseeable future.”** This clause envisaged the preparation of final organograms of departments. Clause 1.3 provided that, where it was not possible at that stage **“to prepare final organograms, temporary deployment of staff [would] take place in terms of structures prepared on a cut-and-paste basis”**.

[25] In terms of clause 1.4. all organograms, whether on a final or **“cut-and-paste”** basis, would be referred, in the first instance, to a Local Labour Forum and, finally, to the Municipal Facilitation Committee/Municipality for final approval. In terms of clause 1.5 each municipality or Municipal Facilitation Committee was required to create a **“Placement Committee” “consisting of equal numbers of employer and employee representatives.”** The terms of reference of these committees were going to be **“to consider and make recommendations to the new municipality on the placement of existing employees into the new structures.”** In terms of clause 1.6 **“(s)taff [were] to be placed in these structures on a permanent basis.”**

[26] Clause 1.6 went on to say in the next sentence: **“Every attempt**

will be made to place all existing staff within these new structures. New or major changed posts [would] only be advertised where no ‘close-match’ placement [was] possible”

This suggests that it was within the contemplation of the parties to the “NP1” agreement that there would be new posts and that there would be **“major changed posts.”** The parties could not but also have contemplated that some of the posts that some employees may have occupied before could no longer exist. Clause 1.7 is very important. It reads as follows:

“The parties are committed to ensure (sic) continuity of employment and every attempt will be made to ensure that no retrenchment/ redundancy will occur provided that the affected employees are willing to accept alternative positions that are offered. Every effort will be made to ensure that such alternative offers are reasonable” (underlining supplied).

- [27] In clause 1.7 the parties to the “NP1” agreement committed themselves to ensuring that in effect there would be no retrenchment or redundancy arising out of the contemplated restructuring and reorganisation provided reasonable offers of alternative positions were made to employees. The employees to whom clause 1.7 applied included the appellant. What this meant is that, if an employee was offered a reasonable alternative position to fill, he could not demand to be retrenched and, if he did, he would not be entitled to severance benefits. The clause cannot

conceivably be construed to mean that, irrespective of an employee being offered a reasonable offer of an alternative position which he rejects, he would be entitled to demand that he be retrenched and be paid a severance package despite the parties having committed themselves to avoiding retrenchments and redundancies. Such a construction would wholly defeat the idea of clause 1.7 that every effort be made to make reasonable offers of alternative positions.

[28] In clause 1.7.1 and 1.7.2 of the “**NP1**” agreement the parties set out in express terms situations which would not constitute grounds for retrenchment or redundancy. These situations were given as:

- (a) **“a reasonable geographical deployment”** (clause 1.7.1), In my view this refers to a case where an employee was offered a position in a geographical area other than where he was based prior to December 2000 and that re-deployment was reasonable. I pause here to make the observation that, if an employee who is offered a position, for example, 30 km away and the offer is a reasonable one in the circumstances, had no right to be retrenched by virtue of such geographical re-deployment, it stands to reason that an employee who is made a reasonable offer without a geographical redeployment would a fortiori also not be entitled to demand to be retrenched. A construction of the agreement that would say that, if an employee was made an offer of alternative employment which was reasonable but which required him to relocate will not

be entitled to be retrenched and to receive severance pay if he rejected the offer but he would be entitled in the same circumstance to severance pay if there was no relocation would make a complete nonsense of clause 1.7 and 1.7.1

- (b) **“the transfer from one employer to another employer without any material changes to functions and/or conditions of employment”.** (clause 1.7.2).

Clause 1.7.3 provides that, notwithstanding clause 1.7.1 and 1.7.2, employees who felt aggrieved by decisions made **“in terms of the said clauses”** would retain the right to lodge grievances. This would have to be dealt with in terms of the grievance procedure provided for in clause 8 of the **“NP1”** agreement. That procedure leads to arbitration.

Clause 1.8 provides as follows:

“Prior to the Placement Committee forwarding their recommendations to the Municipal Facilitation Committee/Municipality, each member of staff concerned must receive a letter and copy of the section of the relevant organogram indicating their proposed post and the classification thereof, Department, service unit, where applicable, and Council in which they will be placed. Where changes to duty schedules and/or geographical relocation are envisaged, adequate consultation with affected staff will take place. In such instances a meeting of the affected employees concerned

should be convened with trade union representation at their discretion.”

[29] The picture that emerges from clause 1.1 to 1.8 of the “**NP1**” agreement is that all concerned accepted that:

- (a) there was a need for a restructuring or reorganisation in the different municipalities;
- (b) that positions/posts would be created some of which would be the same as positions previously held by some of the employees but that there would also be positions or posts which would be slightly different, some drastically changed and others completely abolished;
- (c) staff who had previously been employed by a municipality or local authority in one geographical area could be offered positions in different geographical areas;
- (d) as far as possible the municipalities should avoid retrenchment and redundancies;
- (e) to try and avoid retrenchments and redundancies, the municipalities were required, as far as possible, to make reasonable offers of alternative positions to employees;
- (f) reasonable geographical redeployments would be no ground for retrenchment;
- (g) the transfer from one employer to another employer was no ground for retrenchments if there were no material changes to functions and/or conditions of employment;
- (h) structures were established which would make recommendations or take the necessary decisions about positions to be created and offered but employees who felt aggrieved had recourse to an agreed grievance procedure.

[30] In terms of clause 2.1.1 the Placement Committee would consider and make recommendations to the new municipality on the placement of existing personnel within the new structure. The establishment of the Placement Committee was provided for in

clause 1.5 of the NP1 agreement. It was made up of an equal number of representatives of employers and employees. In fact clause 1.5 states quite clearly that **“(t)he terms of reference of [the Placement Committee] will be to consider and make recommendations to the new municipality on the placement of existing employees into posts in the new structures”**.

- [31] Clause 2.2.1 to 2.4 contained the processes that were to be **“followed in the placement of staff within the new structures.”**

There were three processes that were available for the placement of staff in new structures. The first was that the council would list certain posts and submit them to the Placement Committee for consideration and approval by the municipality. The posts which would be dealt in this way were **“unchanged posts”**, **“minor changed posts”** and **“redeployed posts.”** The unchanged posts were posts involving no change to their schedule of duties or geographical location. Minor changed posts were posts involving minor changes to the duty schedule e.g change of title with no change to duties or minor changes to the duty schedule which has no material effect on the level of responsibility. The re-deployed posts were posts involving no change or minor change to the duty schedule, but where a change in geographical location would occur.

- [32] Another process was one where posts and the names of proposed parties were to be submitted to the Placement Committee for the placement of such staff members on a **“close match”** basis but,

after these posts had been filled, they would be submitted for evaluation. The third process entailed that the posts, with their detailed duty schedules, would be submitted to the Placement Committee or the Municipality for consideration of the placement of existing staff on a “**close-match**” basis and, thereafter, sent to the Job Evaluation Committee for evaluation. If no suitable candidate was found within the council’s service, the post would be advertised. This process applied to new posts. New posts were posts which carried duties and responsibilities that did not exist in any form in the structures before the new municipality. The last process involved placing posts to the Placement Committee with appropriate proposals, followed by evaluation where necessary. This last process applied in the case of posts other than the categories of posts referred to above.

- [33] Clause 2.3 provided that every employee had to be informed in writing by the employer of the decision of the Municipal Facilitation Committee or Municipality. Clause 2.4 dealt with the decision-making process with regard to the filling of posts. It provides that the Placement Committee “**shall strive**” to reach consensus on the staff placement submissions under consideration. In other words this Committee – which was composed of an equal number of representatives of the employer and those of employees – would seek to make decisions about who would fill which posts on the basis of a consensus. Its recommendation would in terms of clause 2.4 “**be referred to the Municipal Facilitation Committee / Municipality for a final decision.**” Clause 2.4 further provided

that an employee or his trade union retained the right to lodge a grievance against any published decision and such a grievance would be dealt with in terms of the grievance procedure provided for in the “NP1” agreement – which leads ultimately to arbitration.

[34] Clause 4.4 provides:

“Employees shall retain their remuneration and all benefits as applicable before the amalgamation subject to clause 4.5 below:”

Clause 4.5 reads as follows:

“Within 1 year of the commencement date of this agreement, the Job Evaluation Committee of the Bargaining Council shall evaluate all the posts of the newly formed local authority. The relevant posts will be evaluated by the Job Evaluation Committee with due observance of the additional implications.”

Clause 5 deals with conditions of service. Clause 5.1(a) guaranteed employees the retention of their pre-new municipality years of service subject to (b) and (c) of clause 5.1. Clause 5.1(b) dealt with **“cases of resignation prior to amalgamation”** Clause 5.1 (c) provided that, notwithstanding the provisions of (a) and (b) therein, **“staff in all Councils would retain all other current conditions of employment following placement in the new structures until rationalisation of such conditions of employment has (sic) been completed.”**

- [35] Clause 7 deals with geographical relocation. Clause 7.1 provides that **“(a)ll submissions in terms of the abovementioned classification are to indicate whether geographical relocation of staff will be required.”**

Clauses 7.2, 7.3, 7.4 and 7.5 read:

“7.2 Geographical re-deployment of staff will only take place for sound operating and/or economic reasons;

7.2 The functions of the post/s are to be delivered in another geographical area.

7.3 The functions of the post/s may be reduced and/or combined resulting in a necessity to rationalise resources.

7.4 The functions of the post/s may be abolished in that particular geographical area.”

Clause 8 deals with the **“grievance-handling process.”** Clause 8.1 provides that **“(s)hould a grievance be lodged arising out of the placement (including geographical re-deployment) of any employee/s a meeting shall be convened within 5 working days between the employee/s, management and trade union concerned. All relevant information requested will be made available.”**

- [36] Clause 8.2 provides in effect that, if the parties reached agreement, the proposed placement/s would be implemented. Clauses 8.3, 8.4, 8.5 and 8.6 read thus:

“8.3 Should the parties disagree and should the matter not be resolved within a period of 10 working days as to whether the proposed placement is reasonable, then the matter will be referred for conciliation by the North - West Division of the SALGBC and should no agreement be reached at this level, the matter shall be referred to Arbitration within 30 working days from the date of conciliation.

8.4The arbitrator shall, after taking into account all relevant legislation and submissions by the parties give the final and binding ruling within 14 working days of hearing the submissions.

8.5Section 138 of the Labour Relations Act shall apply during the proceedings.

8.6Should the matter be referred to private arbitration, the costs of arbitrator shall be shared equally between the parties.”

[37] Sec 138 of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”) deals inter alia with how a CCMA commissioner is required to conduct arbitration proceedings. In paragraph 10 of his founding affidavit the appellant stated that the “**NP1**” agreement was “**the first step in an attempt by the parties involved thereto (sic) to regulate any restructuring processes that had to take place regarding *inter alia* the staff of the First Respondent and the**

reorganization of existing staffing structures at the time in terms of the Municipal Structures Act and the Municipal Systems Act and related legislation, including the Labour Relations Act (Act 66 of 1995)." It is also to be observed that in paragraph 11 of his founding affidavit the appellant says that **"it was always envisaged that negotiations by the First respondent with the affected staff members of the first respondent would take place between the relevant employer and trade union representatives."**

- [38] A **"staff communiqué,"** which was annexed as Annexure NP2 to the appellant's founding affidavit, was issued on the 2nd June 2002 by the first respondent. It included a portion on the second page thereof which read as follows:

"The RLM (i.e Rustenburg Local Municipality) has already embarked on conciliations and negotiations with trade unions represented in the Local Labour Forum on the restructuring of the municipality. Parties to the Local Labour Forum have reached consensus on the strategic direction, high-level organisational design as well as the unit level organisational design."

The next paragraph in the **"communiqué"** bore the heading: **"Placement of Employees into the New Organisational structure."** Thereunder came a paragraph that included the following passage:-

"Placement means the process of placing employees from

one post or position to another in the new organisational structure. The restructuring of the municipality will affect employees in some or other way. For many employees, these changes may be negligible, a change in reporting line, for example, may not affect the nature of the work done by the employee, the hours worked by that employee, or any other change to a term or condition of employment for that employee.”

[39] Annexure NP2 included an organisational structure with new positions that needed to be filled. One of the sections of the new organisational structure was the Directorate: Infrastructure Development and Management. There were four other directorates. Directorates were just below the level on which the municipal manager was employed.

[40] In paragraph 13 of his founding affidavit the appellant states that it is clear from annexure NP 2 that **“virtually the whole of the contents of my job description as City Engineering : Civil Services, would be transferred to a new directorate of the First Respondent, namely the Directorate: Infrastructure Development and Management which directorate was basically anticipated to take over all my responsibilities as city Engineer: Civil Services as well as the responsibilities of the City Engineer : Electrical Services, whose position was vacant at the time.”** An inspection of Annexure “NP2” does not reveal any

duties for the position of Director: Infrastructure Development and Management. The best that can be said is that the directorate relates to Infrastructure Development and Management.

- [41] The appellant goes on to say in paragraph 14 of his founding affidavit that, due to the similarities which, he alleged, existed between the duties and or responsibilities of the Director: Infrastructure Development and Management and those of the City Engineer: Civil Services, he was almost sure that he would be appointed to the position of Director: Infrastructure Development and Management. He goes on to say in effect that the policy of the first respondent that **“(i)f the positions in the new structure are the same or similar to those in the old structure, then the incumbents will be placed in the new positions or compete with each other if there is more than one incumbent”** was applicable to his case and that **“(i)n view of the vacancy at the time in the position of the City Engineer: Electrical Services”**, he would have been **“the only incumbent (sic) to fill the position of the Director: Infrastructure Development and Management in the circumstances, which expectation I submit was reasonable in the circumstances.”**

- [42] In paragraph 15 of the founding affidavit the appellant contends that the first respondent **“acted in a fashion that is directly in contest with the declared acceptance of the First Respondent and it is my contention that the actions of the first respondent**

mentioned below were executed with a positive intent to abolish my erstwhile post as City Engineer: Civil Services and to prejudice my person.” Thereafter he sets out in paragraphs 15.1 to 15.21 various matters which he contends support this. A reading of paragraph 15.1 to 15.21 does not, in my view, support the contention that the first respondent acted as alleged simply because it wanted to prejudice the appellant. Indeed, the first respondent denied the appellant’s allegations in this regard. The first respondent emphasised that the process of restructuring that it undertook was part of the broad process of municipal restructuring that took place across the country. It admits that the new structure did not provide for the post of a City Engineer nor did any of the new posts, in particular, the Director: Infrastructure Development and Management, equate with the responsibilities of the post of City Engineer. Referring to the position of Head: Technical Services which was offered to the appellant, the first respondent stated in par 29.7 of the answering affidavit that the appellant **“has not suffered any reduction in remuneration or any other benefits nor has he suffered any other prejudice.”**

- [43] In paragraph 16 of the founding affidavit the appellant submitted that he was more than suitably qualified to have been appointed as Director: Infrastructure Development and Management. In paragraph 19 the appellant submitted that, in the process of establishing the new structure, the first respondent had effectively abolished his post of City Engineer: Civil Services.

[44] The appellant also refers to the fact that the first respondent offered him the position of Head: Technical Services. He points out that, when this offer was made to him – which he says was at a meeting attended by himself, his lawyer and a Mr Andries Boshoff who represented the first respondent – his lawyer pointed out that it would not be possible for the appellant to make an informed decision on the offer before such position was evaluated. He says that at the meeting it was agreed that the first respondent would send details of that post **“for evaluation and that such valuation would be available not later than 8 (eight) weeks from the date of the said meeting which would have meant that this matter had to be held further in abeyance until at least 6 August 2003.”** In par 31 of the founding affidavit the appellant says that on the 29th July 2003 the first respondent resolved, **“apparently without having obtained an evaluation of the said post as agreed, to offer the post of Head: Technical Services to me, ...”**.

[45] With regard to the offer referred to in the preceding paragraph, reference can be made to annexure NP33 to the founding affidavit. That was a letter addressed to the appellant by the first respondent’s director: corporate support services dated 4 August 2003. The heading of that letter reads: **“Organisational Restructuring: Displaced Employees in the Corporate Pool.”** The letter contained an offer by the first respondent to the appellant of the position of Head: Technical Services. The body of the letter reads as follows:

“You are herewith informed that the Council has resolved on 29/07/2003 per item 400 to offer you the following final offer of employment:

Head: Technical Services, on the same employment conditions that you currently have on an open ended contract.

We trust that you will be happy in your new position and want to express our gratitude for the positive spirit and patient manner in which you have dealt with this difficult transitional time in your career.” (underlining supplied).

Annexure NP34 to the founding affidavit was the Council’s relevant resolution relating to the offer to the appellant.

[46] In a letter written by the appellant’s Counsel, who also appeared for him before us, Mr Van der Walt, to the first respondent on the 11th August 2003 and marked as annexure NP 35 to the founding affidavit the appellant’s Counsel *inter alia* stated that the appellant would not accept the offer of the position because it had not yet been evaluated. I must take this opportunity to say that it was unacceptable conduct for Mr Van der Walt as Counsel to engage in writing letters to the first respondent as that was the instructing attorney’s work. It should not have happened.

[47] The Acting Municipal Manager of the first respondent responded to annexure NP 35 by a letter dated 12 August 2003 marked annexure NP 36. It was addressed to the appellant’s Counsel, Mr Van der Walt. In that letter the Acting Municipal Manager indicated that:-

- the first respondent had **“the interests of all its employees at heart.”**
- the first respondent had categorically stated that **“all attempts would be directed to place all employees in a position which is not detrimental or less favourable than the position they occupied prior [to] placement.”**
- the first respondent **“values the technical expertise of [the appellant] and is convinced that his contributions in a technical capacity would enhance service delivery.”**
- **“in order to retain these (sic) expertise, [the first respondent] resolved per item 406 on 29 July 2003 to create the position of Head: Technical Services. The details of the role description must be completed in the TASK format.”**
- **“[the appellant] must sign the role description together with his trade union. The completed role description will then be submitted to Mr Slade Pillay, the Technical Co-ordinator of job evaluation in the offices of SALGA.”**

[48] On the 23rd September 2003 the Director: Corporate Support Services of the first respondent addressed a letter to the appellant's Counsel reminding him that the role description that had been sent to him for signature by the appellant had not yet been returned to the first respondent. In his founding affidavit the appellant sought to justify his failure to sign the role description on the basis that he was not yet the incumbent of the position concerned and that the contents thereof were new to him and had not been discussed with him.

[49] Annexure 37 included duties and responsibilities attached to the position of Head: Technical Services. A perusal of those duties and responsibilities leaves one with no doubt that the position carried

with it huge responsibilities. Section D of annexure 37 bore the heading: approval of job description. Thereunder appears the following writing: **“We the undersigned confirm that we have consulted on the content contained in the job description and hereby confirm that we consider that the information contained is a correct reflection of the context of the post and its content.”** Thereunder spaces were provided for various persons to sign. One space was for the signature of a representative of IMATU, the appellant’s union. The other was that of the **“incumbent.”** A Mr Stols signed in the space provided for a union representative. He did this on the 19th August 2003. The effect of anyone signing therein was that he or she was confirming that he or she had consulted on the content of the job description and that he considered the information to be correct. The appellant did not sign. The union subsequently wrote a letter seeking to extricate itself from the natural effects and consequences of its representative having signed section D in Annexure 37.

- [50] In a letter dated 2 October 2003 addressed to the Director of Corporate Support Services, the appellant’s Counsel, inter alia, said that the appellant was not prepared to sign the role description. He also accused the first respondent of having appointed certain people to certain positions for which they were not qualified and who would not be able to cope with the work **“without the assistance of a person of [the appellant’s] calibre (sic).”** One of the reasons given as to why the appellant was not prepared to sign

the role description was that the first respondent had not sent the post for evaluation. By a letter dated 3 October 2003 the Acting Municipal Manager informed the appellant's Counsel that he had submitted the job description to the Job Evaluation Committee "**in its current format**" for evaluation without the appellant's signature. He hoped that the Job Evaluation Committee would make its decision not later than 10 October 2003.

- [51] On the 5th November 2003 the Acting Municipal Manager informed the appellant's counsel that the position of Head: Technical Services had been evaluated "**in the TASK job evaluation system and the grade of the post [was] a TASK 16**". In the last sentence he informed the appellant's Counsel that the answer to his offer of employment was still awaited. The appellant's Counsel responded to this letter by a letter dated 25 November 2003 which was annexed as annexure 42 to the founding affidavit. In that letter the appellant said through his Counsel that he was rejecting the offer of the position of Head: Technical Services because, as his Counsel put it in the letter, "**the said position is inferior to the position that was previously held by my client and would have been held by my client, had his appointment to the said position not been made impossible due to ulterior considerations in the reconstruction process.**" In that letter it was also stated that the appellant was not prepared to "**remain in the [corporate pool of employees] and to leave this matter unresolved for an indefinite period.**" It was also stated

that it had become abundantly clear that the appellant's position **“has become redundant in circumstances and that the Council as employer has offered my client alternative employment at a lower level but at the same rate of pay which was rejected by my client as appears from the above. The Council should therefore deal with this matter on the basis of section 17.4.7.4. of ‘The Conditions of Employment (Transvaal) is concerned.”** In the second last paragraph of the letter (Annexure 42) the appellant's Counsel wrote thus:

“This letter serves as the final warning that our client intends to take legal action in this matter unless Council indicates on or before 10 December 2003 that it will be prepared to follow the route as indicated, namely to apply section 17.4.7.4. of the said conditions of employment.”

[52] By a letter dated 6 February 2004 the Director of Corporate Support Services informed the appellant's Counsel that the first respondent's Counsel had noted that it had offered the appellant a permanent job and he had rejected it. He rejected the appellant's demand that he be treated in terms of clause 17.4.7.4. However, he asked the restructuring committee to explore the possibility of using the appellant's services on a contract basis without having to pay retrenchment benefits.

[53] I am prepared to approach this matter on the basis that the post

which the appellant occupied before the coming into existence of the first respondent no longer exists. After all it was within the very nature of the local government restructuring that occurred that there would be employees of defunct local authorities whose previous positions in those local authorities would not be available after the restructuring. Indeed, there could be many employees who would find themselves in such situations. That notwithstanding, the restructuring was pursued for the greater good of the country. Indeed, if it was sought to ensure a restructuring that would not have such a result, there would have been no restructuring at all.

- [54] The appellant's approach, as set out in his founding affidavit and as argued before us, is that, once his position had become redundant, the first respondent became obliged to declare it redundant and pay him retrenchment benefits in terms of clause 7.4.7.4 of the collective agreement irrespective of the reasonableness or otherwise of any offer of employment that the first respondent may have made to him which he rejected. If that reasoning were correct, many employees of the three defunct local authorities of which the first respondent is the successor in law could have demanded to be paid out severance benefits because, I have no doubt, there would have been many employees who were offered positions that were lower than those that they had occupied in disestablished local authorities and who were not happy with them but, nevertheless, accepted such positions because they understood that it would be impractical for the first respondent to offer everyone exactly the same position or a position on exactly

the same level as the one that he held before. As the main objective of the local government restructuring was to ensure proper service delivery, that very objective would have been seriously undermined, if not defeated, if any employee who was offered a position that was lower than his previous one was entitled to get severance pay on demand irrespective of the reasonableness or otherwise of the offer of an alternative position made to him which he has rejected. At the same time it can also not be that an employee who is aggrieved by the fact that the position offered to him is lower than the one he had previously occupied was obliged to take any position that was offered to him at the risk of not getting any severance pay if he did not accept such position and was retrenched. The question, therefore, is: what, then, was the test to determine who would be entitled to a severance pay and who would not be entitled to severance pay if his position had become redundant and he had been offered a lower position than the position that he had previously occupied in a disestablished local authority?

- [55] It seems to me that the test in terms of the “**NP1**” agreement is that of the reasonableness or otherwise of the offer that the first respondent had offered. If it was a reasonable offer and the employee rejected it, he was not to be entitled to severance pay. If it was an unreasonable offer and he rejected it, then he would be entitled to severance pay. This accords with clauses 1.7 of the “**NP1**” agreement. Clause 1.7 provides that the parties to that agreement, which included the appellant’s own trade union and the

first respondent's predecessors, are committed to ensuring **“continuity of employment and every attempt will be made to ensure that no retrenchment/ redundancy will occur provided that the effected employees are willing to accept alternative positions that are offered. Every effort will be made to ensure that such alternative offers are reasonable.”** What would be the point of the commitment to make reasonable offers if an employee could reject such reasonable offer with impunity in the sense that he would still be entitled to be paid his severance pay despite his rejection of a reasonable offer of employment? In this regard it must be remembered that the restructuring of local government was aimed, among other things, at ensuring service delivery to the public. The appellant had skills that the local government needed. It made a reasonable offer to him. He rejected it and this deprived the public falling under the first respondent's jurisdiction of some of the technical skills which the first respondent needed in order to serve the public properly.

- [56] If the appellant's approach is correct, namely, that, after the disestablishment of the old local authorities, an employee who was previously employed by in a certain position by a local authority that has been disestablished is entitled, after the establishment of new local authorities, to a position that is exactly on the same level as his previous position or one that is higher than his previous position failing which he is entitled to retrenchment and payment of severance pay on demand irrespective of his rejection of a reasonable offer of employment by the new local authority, the

result would be that all employees who possessed key technical skills which the new local authority and the public required could reject reasonable offers and leave with huge retrenchment packages. In my view that is not what the legislation that was created to govern the restructuring of local government and the “NP1” agreement provide for and intended. With regard to the “NP1” agreement I have already referred above to the commitment which the signatories thereto took upon themselves to avoid retrenchments, to pursue continuity of employment and to make reasonable offers to employees. (see clause 1.7 and clauses 1.7.1 and 1.7.2 of the “NP1” agreement. I turn to deal with the question of what the relevant legislation provides for.

[57] I have referred to the relevant legislation earlier in this judgment. However, it is convenient to repeat the relevant statutory provisions. The preamble to the MSA include the following:

“Whereas past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services and disrupted spatial, social and economic environments in which our people continue to live and work;

Whereas there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, encourage a safe and healthy

environment by working with communities in creating environments and human settlements in which all our people can lead uplifted and dignified lives;

.....

Whereas municipalities now need to embark on the final phase in the local government transition process to be transformed in line with the vision of democratic and developmental local government;”

- [58] I have also referred above to the fact that sec 14(2)(b) of the MSA requires a sec 12 notice to, among others, **“regulate the legal, practical and other consequences of the total or partial disestablishment of the existing municipality ...”**. Such **“legal, practical and other consequences”** of the disestablishment of a municipality include, as provided for in sec 14(2)(b)(ii) of the MSA **“the transfer of staff from the existing municipality, or, if there is more than one superseding municipality, to any of the superseding municipalities;”** Sec 14(2)(b)(ii) is subject to a specific proviso contained at the end of sec 14(2). The proviso is to the effect that the sec 12 notice must regulate the legal, practical and other consequences of the disestablishment of an existing municipality including the transfer of staff from a disestablished municipality to a superseding municipality: **“Provided that if the superseding municipality is a district or local municipality a transfer referred to in subparagraph (ii) or (iii) must be effected in a way that would enable the superseding**

municipality to perform those functions or powers assigned to it in terms of section 84(1) or (2),” (underlining supplied).

Sec 14(3) of the MSA provides that **“(t)he transfer of a staff member in terms of a sec 12 notice must be –**

- (i) on conditions of service not less favourable than those under which that staff member served in the existing municipality; and**
- (ii) in accordance with the Labour Relations Act, 1995 (Act 66 of 1995).”**

[59] From sec 14 of the MSA it can be said that to the extent that the appellant can be said to have been transferred to the employ of the first respondent, such transfer was required to be in accordance with the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”). The sec 12 notice provided for in sec 14 of the MSA is required by sec 14(2) of the MSA to regulate the transfer of staff from a disestablished municipality to a superseding municipality. Item 8(1)(d) of the sec 12 notice in this case, which has been quoted above, requires that a person in the position of the appellant **“shall be transferred and placed in the service of the local municipality within the district area.”** It provides further that the transfer of such person **“be on such terms and conditions of service as are not less favourable under which such person previously served;”** That is the general rule that item 8(1) of the sec 12 notice prescribes. However, that general rule is not absolute. Indeed, such general rule is subject to two exceptions or provisos. The first is to be found in item 8(1)(d), the second in item 8(1)(h)

of the sec 12 notice. The proviso in par (d) is to the effect that a person who has been transferred from in effect a disestablished municipality to a superseding municipality on such terms and conditions as are not less favourable to those under which he previously served under the disestablished municipality:

“shall not, as a consequence of such transfer, acquire a right to retire or to be offered a severance or retrenchment package.”

- [60] Could an employee who has been transferred from a disestablished local authority to a superseding municipality take the attitude after the transfer that he is by virtue of such transfer entitled to payment of severance pay? Nobody could conceivably make such a claim. I can understand that somebody could, before a transfer, take the attitude that he did not want to be transferred to the superseding municipality and seek to be paid severance pay or to be granted early retirement. That situation is dealt with by item 8(1)(b) of the sec 12 notice and such person will not be entitled to severance benefits. In such a case that would be an employee who for some or other reason does not want to work for the superseding municipality. But it is difficult to imagine a situation where an employee who, having accepted the transfer to the superseding municipality, would simply turn around and say: by virtue of the fact that I have been transferred to this superseding municipality and by virtue of nothing else I should be retrenched and paid severance benefits!

[61] In my view what item 8(1)(d) of the sec 12 notice deals with is consequences of a transfer of an employee from a disestablished local authority to a superseding municipality. Properly construed, it means that from a consequence of a transfer such an employee does not acquire a right to retire early or to be offered a severance or retrenchment package. In my view that is the only viable way of construing the provision of item 8(1)(d) of the sec 12 notice because it could never have been intended to deal with an employee who, having been transferred and not having objected to the transfer, later sought to be paid severance benefits simply on the basis that he or she had been transferred and on no other basis because such a situation cannot possibly occur. In my view, the construction of item 8(1)(d) of the sec 12 notice I have given above covers a situation such as the one about which the appellant complains in this case. That is a case where, after the transfer, the position that the employee occupied in the disestablished municipality does not exist in the superseding municipality and he cannot be or is not granted a position that is exactly on the same level as his previous position. It also applies to a case where there are more than one employees who previously occupied similar positions in the disestablished municipalities but only one of them can be offered a similar position in the superseding municipality. In such a case item 8(1)(d) of the sec 12 notice prevents an employee who is aggrieved by that from acquiring the right to severance pay simply on the basis that he is not being offered exactly the same position or a position at exactly the same level as the position he previously occupied. It seems to me that this was provided for so

that an employee would need to show something more than simply that his previous position is redundant and he has not been offered the same position or a position that is at exactly the same level as his previous position before he could be entitled to severance benefits. It seems to me that that something more is the one contained in the further proviso which appears at the end of item 8(1) of the sec 12 notice. That is that “the provisions of this subsection – that is item 8(1) of the sec 12 notice – **“shall not prevent the municipality concerned from implementing a scheme to reorganise its personnel subject to the Labour Relations Act, 1995 (Act NO 66 of 1995).”** I discuss what this proviso means here below. The proviso contained in par (h) is to the effect that:

“Any person who refuses or withholds his or her consent to be transferred as contemplated by this section, shall not be entitled to any severance benefit or benefits.

Provided, further, that the provisions of this subsection shall not prevent the municipality concerned from implementing a scheme to reorganise its personnel subject to the Labour Relations Act, 1995 (Act No 66 of 1995)” (underlining supplied).

[62] Paragraph (h) of item 8(1)(2) effectively contains two provisos. The one deals with an employee who as at the relevant date of transfer of staff was employed by a municipality or local authority that was being disestablished in terms of the MSA. It provides that, if such an employee refuses to be transferred or withholds his consent to be transferred as contemplated by item 8, such employee will not be entitled to any severance benefits. I am prepared to

assume, without deciding, that this is not a case to which the first proviso in par (h) applies. However, it seems to me that the second proviso in paragraph (h) does apply. The second proviso in par (h) of item 8(1) qualifies, among others, the opening provision in item 8(1) to the effect that an employee in the position of the appellant **“shall ... be transferred and placed in the service of the local municipality within the district on such terms and conditions of service as are not less favourable under which such person previously served;”** (underlining supplied). The proviso or the qualification is *inter alia* that the provisions **“shall not prevent the municipality concerned from implementing a scheme to reorganise its personnel subject to the Labour Relations Act, 1995 (Act 66 of 1995).”** From the terms of this proviso it is clear that it does not only apply to (h) but also to all the provisions of sub-item (1) of item 8. It says that **“the provisions of this subsection shall not prevent ...”**.

- [63] This proviso was intended to make sure that a municipality would be able to go ahead and reorganise its personnel and would not be prevented from doing so by employees who demanded severance benefits in circumstances where the actions of the municipality were in accordance with the Labour Relations Act, 1995 or, broadly speaking, with our labour law. In our labour law if, as a result of restructuring or operational requirements, an employer can no longer offer an employee the same position that he occupied before the restructuring and offers the employee an alternative position but the employee unreasonably refuses such offer, the

employer is entitled to dismiss such employee after following the relevant procedure and such employee will not be entitled to severance pay. In this case the first respondent has not dismissed the appellant because it needs his technical skills and he has not resigned. The first respondent is, in my view, entitled to dismiss the appellant on proper notice and after following the relevant procedure if he continues with his stance and he will not be entitled to severance pay. He cannot be in a better position simply because he has not been dismissed.

[64] It seems to me that what the second proviso in par (h) of item 8(1) of the sec 12 notice means is that the fact that an employee such as the appellant was required to be transferred “**on such terms and conditions of service as are not less favourable under which [he] previously served**” is subject to the right of the superseding municipality to implement “**a scheme to reorganise its personnel**” but its right to reorganise its personnel must be exercised subject to the Labour Relations Act. That the local municipality’s right to reorganise its personnel is subject to the Labour Relations Act, 1995 means, in my view, that the respective rights and obligations of the employer and employee in such a reorganisation of personnel as provided for in the Labour Relations Act apply in such a case.

[65] The MSA is an Act that was passed in 1998. At the time when the MSA was passed, there was a provision in the Labour Relations Act which dealt with the rights and obligations of an employer and

employee with regard when an employer is obliged to pay severance pay and when there is no such obligation. The provisions were subsequently transferred as they were from the LRA to sec 41 of the Basic Conditions of Employment Act, 1997 (Act 75 of 1997) (“the BCEA”).

[66] Sec 41(4) of the BCEA contains the relevant provision. It reads:

“4. An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2)”.

In my view the fact that these provisions are no longer in the LRA but are in the BCEA has no bearing on whether or not they must be taken into account. The fact of the matter is that they were part of the Labour Relations Act when the MSA was passed and they deal with an issue that relates to the reorganisation of personnel. Even if the sec 12 notice – of which item 8 is part – was issued at a time when these provisions had already been transferred from the LRA into the BCEA, I would still be of the view that they must be taken into account because, applying purposive construction, the reference to the Labour Relations Act, 1995 in item 8(1)(h) is nothing more or less than to say that that part of our labour law that governs the reorganisation of personnel should be applied. It would be highly technical to say that that part of our labour law applicable to such situations which was previously part of the LRA but was transferred to the BCEA should be excluded from the reference to the LRA simply because it has since been transferred to the BCEA.

[67] In the light of all of the above I am of the view that the appellant's rejection of the first respondent's offer of alternative employment and his insistence that he be offered the same position or a position at the same or higher level is, in all the circumstances of this case, quite unreasonable. Accordingly, he forfeited whatever right he might otherwise have had to severance pay. He was going to suffer no reduction of salary. The position he was offered was quite a senior position. The first respondent had to try and accommodate all the employees. He was to report to the municipal manager. The first respondent made it clear that it needed his technical skills.

[68] I have so far dealt with the matter on the basis of the relevant legislation and the "NP1" agreement. I have not dealt with it in terms of the collective agreement on the basis of which the appellant brought his application in the Labour Court. That collective agreement was annexed to the appellant's founding affidavit as annexure "NP25". For convenience in this judgment I shall call it the "NP25" agreement. The "NP25" agreement is the **"Conditions of Service Agreement: Transvaal"** contained in Government Notice R1828 of 28 October 1994 as published in GG no 16047 in Regulation Gazette No 5416. That agreement was concluded on the 28th October 1994 and was to operate up to the 31st December 1997. It was concluded long before the passing of the MSA which sought to transform and restructure local government.

[69] When most of the provisions of the Act came into operation on the 11th November 1996, the operation of all collective agreements which were in operation then, which included the **“NP1 agreement,”** was extended for a period of up to 18 months after the 11th November 1996. By an agreement concluded on the 2nd September 1997 – that is within the 18 month period – the parties to the “NP1” agreement effectively extended the operation of **“all collective agreements”** including the “NP1” agreement **“to the extent that they are not in conflict with the constitution, until amended or repealed by the South African Local Government Bargaining Council.”** I am not sure whether the **“Constitution”** referred to is the Constitution of the Republic or the Constitution of the South African Local Government Bargaining Council. However, for purposes of this case, whichever it is does not appear to make any difference.

[70] A reading of the appellant’s founding affidavit reveals that for all intents and purposes he has based his claim to the relief that he seeks on the **“NP25”** agreement. The first respondent has stated that the **“NP25”** agreement does not apply in this case but that, even if it did apply the appellant is not entitled to the relief that he seeks. To the extent that there may be conflict between provisions of the **“NP25”** agreement, on the one hand, and those of the MSA, the sec 12 notice, the Act, sec 42 of the BCEA and or the **“NP1”** agreement, I am of the opinion that the provisions of the **“NP25”**

agreement do not apply or have to yield to those of the legislation referred to or the “NP1” agreement.

- [71] Even if the “NP25” agreement applies in this case, there are a number of provisions of the “NP25” agreement which, in my view, indicate that the appellant is not entitled to the relief that he seeks, particularly, the order that he be paid severance benefits. I do not propose to quote the provisions of those clauses. It suffices to simply identify the relevant clauses in this regard. The starting point is the definition of “**redundancy**” in clause 3 thereof as well as the definition of “**retrenchment**”. In this regard I point out that the definition of “**retrenchment**” contemplates a situation where the employee is “... **loses his job due to factors beyond his control**”. In this case the appellant has not lost his job but, even if he were to lose his job, he would not have lost it “due to factors beyond his control” because he has been offered a good job on the same salary and it is a senior position in the first respondent but he has rejected it. Clause 17 as well as clauses 17.3.1 to 17.3.8 and 17.4.1 to 17.4.8. need to be taken into account. Clause 17.4.3 provides in part that “**(a)fter the retrenchment programme has been drafted and all the steps described in clauses 17.3 and 17.4 have been taken, sufficient notice must be given to the employee and the trade union**”. Clause 17.4.3 provides that the main purpose of that notice is to “**initiate consultation with the trade union**”. The provision further says that, because of that, such notice must contain certain information specified in clauses

17.4.3.1 to 17.4.3.7. The appellant has not stated that these steps have been taken. Clause 17.4.3 makes IMATU, his union, an interested party in these proceedings because it is entitled to being given the notice contemplated in clause 17.4.3 before an employee who is its member can be dismissed for operational requirements so that it can be party to the consultations that must ensue after such notice. In fact this is in line with sec 189 of the Act which requires an employer who contemplates dismissing an employee who is a member of a registered trade union to give notice of such contemplation to the union of which the employee concerned is a member and thereafter to consult the union on a number of issues aimed at, among others, the avoidance of the dismissal of the employee. In this case the trade union of which the appellant is a member, IMATU, is to not a party to these proceedings and the appellant has not stated that the steps required in the “**NP25**” agreement in terms of procedure and those required by sec 189 of the Act have been taken and complied with. He did not file any affidavit from the union in the court a quo to the effect that it waives its right to the notice and to consultation in terms of clause 17.4.3 of the “**NP25**” agreement and to the notice and consultation to which it, as the appellant’s union, is entitled in terms of sec 189 of the Act. That affidavit cannot be filed at this stage of the matter because this Court, as a Court of Appeal, can only deal with the matter – in judging the correctness or otherwise of the judgment of the Labour Court – on the basis of the papers that were before the Court a quo.

[72] In the light of the above the conclusion is inescapable that the appellant's application in the Court a quo, if it had been granted, would have been granted in breach of not only the provisions of the "NP25" agreement, particularly the steps that the first respondent is required to take before any employee can be dismissed for operational requirements but also such an order would infringe IMATU's rights to notice and consultation by the first respondent in terms of sec 189 of the Act before its member could be dismissed for operational requirements. A court cannot make such an order. Both the Labour Court and this Court cannot be party to a process that would be in conflict with sec 189 of the Act without the union – which has various rights thereunder – having waived such rights.

[73] If provisions of the "NP25" agreement were to be construed to mean that the appellant has a right to be dismissed in this case and to be paid severance pay, that construction would be in conflict with the provisions of the MSA and the sec 12 notice. In that scenario, the MSA and the sec 12 notice would prevail because they were specifically passed in order to govern the specific situation that would arise with regard to personnel reorganisation flowing from the restructuring of local government whereas the "NP25" agreement was concluded in 1994 and, in my view, governed normal situations and not situations in respect of which there is specific legislation and collective agreements which govern the situation. Put differently, the "NP25" agreement governs the general whereas the MSA, sec 12 notice, sec 42 and the NP1

agreement govern the specific.

[74] In these circumstances I am of the view that, even if the “**NP25**” agreement is applicable, which I think it is not, its own provisions are such that the appellant is not entitled to any relief. I have already said above that on the basis of the MSA, sec 12 notice, sec 42 of the BCEA, the LRA and the “**NP1**” agreement, the appellant has no right to the relief that he seeks.

[75] With regard to costs I am of the opinion that the appellant must pay the costs of the appeal.

[76] In the result the appeal is dismissed with costs.

Zondo JP

I agree.

Kruger AJA

Appearances:

For the Appellant	:	Adv PG Van der Walt
Instructed by	:	F & F Van der Walt Inc
For the Respondent	:	Adv. Paul Kennedy SC
Instructed by	:	Nkaiseng Chenia Baba Pienaar & Swart

Date of judgment	:	21 December 2007
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