THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J846/2017

In the matter between

IMATU obo J NATHAN **Applicant**

And

POLOKWANE LOCAL MUNICIPALITY **Respondent**

Heard: 11 July 2019

Delivered: 18 October 2019

JUDGMENT

LAUBSCHER, AJ

[1] This is an application in terms of section 158(1)(c) of the Labour Relations Act[1] (LRA) to make a settlement agreement an order of this Court.

[2] The applicant is the Independent Municipal and Allied Trade Union (IMATU) and it acts in these proceedings on behalf of its member, Mr Jeremy Nathan. The respondent is the Polokwane Local Municipality (the Municipality).

[1] Act 66 of 1995.

[3] At the hearing of this matter, the applicant was represented by Mr De Beer, an IMATU official. The Municipality did not enter an appearance.

The application for condonation

[4] Before considering the merits of the application, the Municipality's application for condonation of the late filing of its answering affidavit must be determined.

[5] The applicant's notice of motion and founding affidavit, both dated 31 May 2017, were filed in this Court on 6 June 2017.

[6] On the same day, the Municipality filed its notice of intention to oppose. In terms of Rule 7(4)(b) of the Rules for the Conduct of Proceedings in this Court,[2] the Municipality was required to deliver its answering affidavit within 10 days of receipt of the applicant's application, i.e. by no later than 21 June 2017. This was not done.

[7] On 25 August 2017, the applicant addressed a letter to the Municipality in terms of which it was recorded that the answering affidavit had not yet been received. It informed the Municipality that if an answering affidavit was not received by 31 August 2017, the applicant would proceed to set the matter down on the un-opposed roll.

[8] On 21 September 2017, the Municipality served its answering affidavit on the applicant. The answering affidavit, dated 9 September 2017, was deposed to by Mr Dikgape Herskovits Makobe (Mr Makobe), the municipal manager at the time. The answering affidavit was only filed in this Court on 6 December 2017.

[9] In accordance with Clause 11.4.2 of the Practice Manual of this Court,[3] the applicant objected to the late filing of the Municipality's answering affidavit and informed the Municipality that it was required to apply for condonation of the late

[2] The Labour Court Rules / the Rules.

[3] April 2013.

filing of the answering affidavit. This notice of objection was signed on 22 September 2017 and was filed in this Court on 4 October 2017.

[10] On 25 January 2018, the applicant filed its replying affidavit. This is outside of the prescribed period of five court days from the date on which the answering affidavit is delivered.[4] The Municipality did not file a notice of objection in respect of the late filing of the replying affidavit, and hence there was no need for an application for condonation for the late filing of the replying affidavit.[5]

[11] On 14 February 2018, the Municipality filed its application for condonation of the late filing of its answering affidavit. The court stamp on the notice of motion and founding affidavit respectively reflects the date of 15 February 2017. I assume that this is wrong, and must be 15 February 2018.

[12] The application for condonation is opposed.

[13] Rule 12(3) of the Rules empowers the court to condone non-compliance with any period prescribed by the Rules on good cause shown.

[14] What constitutes good cause is set out in *Melane v Santam Co Ltd*[6] as follows:

> "In deciding whether sufficient cause has been shown, the basic principle is that this Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good

4 Rule 7(5)(a) of the Labour Court Rules.

5 Par 11.4.2 of the Practice Manual.

6 1962 (4) SA 531 (A).

explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[15] The Constitutional Court has developed this test and has ruled that in determining an application for condonation, what must be considered is whether or not it is in the interests of justice that condonation be granted.[7] In doing so, various factors must be taken into account. The Constitutional Court held as follows in *Grootboom v National Prosecuting Authority and another:*[8]

> "[T]he standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.
>
> It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

[16] Writing for the minority, Zondo J held as follows:[9]

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[7] See: *Grootboom v National Prosecuting Authority and another* 2014 (2) SA 68 (CC) at para 22; *Steenkamp and others v Edcon Limited* (2019) 40 ILJ 1731 (CC) at para 36. See also the decision of this Court in *POPCRU obo Malekane v Safety and Security Bargaining Council & others* [2017] ZALCJHB 221 at par 14.

[8] 2014 (2) SA 68 (CC) at para 22 and 23.

[9] Ibid at para 50 and 51.

"In this Court, the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include: (a) the length of the delay; (b) the explanation of, or cause for, the delay; (c) the prospects of success of the party seeking condonation; (d) the importance of the issues that the matter raises; (e) the prejudice to the other party or parties; and (f) the effect of the delay on the administration of justice. Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

The interests of justice must be determined with reference to all relevant factors. However, some factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."[10]

[17] This principle was confirmed by this Court in *Mashishi v Mdladla and Others*:[11]

"This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused.

In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has long been qualified by the rule that where there is an

[10] Footnotes omitted.
[11] (2018) 39 ILJ 1607 (LC).

inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial."[12]

And

"This principle was recently affirmed in *Colett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC), a unanimous judgment of the LAC, Musi AJA held as follows:

> There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering prospects of success. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, it was pointed out that considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 523 C-D … should be followed, but:
>
> > 'There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects, no matter how good the explanation for delay, an application for condonation should be refused.'
>
> The submission that the court *a quo* had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit."[13]

[18] Disregard for the Rules of this Court severely impacts on the expeditious resolution of disputes. The Constitutional Court, in *Grootboom*, accordingly reiterated its displeasure with parties' failure to observe court rules, often with very flimsy explanations, or with no explanation at all.[14]

[12] Ibid at para 7 and 8.
[13] Id fn 23 at para 9.
[14] Id fn 2 at para 33-34.

[19] In *NUMSA obo N Bunu and Others v Aveng Africa Limited*,[15] this Court held that an application for condonation must accompany the process which is filed out of time. Where this is not done, there is a need for two explanations, namely the explanation for the late filing of the process concerned and the explanation for filing the condonation application at a later stage, and thus out of time.

[20] I now turn to the facts.

[21] The answering affidavit had to be served on the applicant by 21 June 2017. It was served on 21 September 2017. This is a delay of 65 court days, more than six times outside the prescribed period. The answering affidavit was only filed in this Court on 6 December 2017, thus a delay of 128 court days. These delays are inordinate and grossly excessive.[16]

[22] The explanation for the delay is that the Municipality's legal representatives had to research and satisfy themselves regarding "the consistency in the respondent's adherence to the main agreement in past grievance cases" and regrettably this took longer than anticipated.

[23] I am of the view that this is an extremely weak explanation. This matter concerns a grievance that was lodged regarding the grading of Mr Nathan's position and his consequent alleged unequal pay. The grievance was lodged in accordance with the grievance procedure contained in the main collective agreement by which the parties are bound. No detail is provided as to what had to be researched about the consistency in the Municipality's adherence to this agreement.

[24] The second delay pertains to the late filing of the condonation application. As stated above, the Municipality was required to file this application together with its answering affidavit. This was not done. The condonation application was only delivered on 15 February 2018, thus five months from the date of the answering

[15] Case Number JS228/2014 of 22 April 2016, at para 26.

[16] In *Bunu* (fn 15), the delay was 44 days, which was regarded as excessive.

affidavit, and four months after the applicant delivered its notice of objection. This too, is an unacceptable delay.

[25] The Municipality has given no explanation for this delay.

[26] In the circumstances, I am of the view that there has been an inordinate delay with no satisfactory explanation, and under normal circumstances, the application for condonation should be refused.

[27] I do not, however, believe that it is in the interests of justice to do so.

[28] The applicant's case is that a settlement agreement was concluded when the acting municipal manager, Mr Lubbe, recorded the following, which was signed by both parties on 24 January 2017:

> "I agree that the practice is not fair and that all Superintendents must be on the same level which is level 6 per Polokwane Municipality therefore Mr Nathan have to be placed on post level 6 with immediate effect." (sic)

[29] The issue is whether this is a settlement agreement for purposes of sections 158(1)(c) and 158(1A) of the LRA.

[30] The answering affidavit and the replying affidavit introduce important additional facts that may have a bearing on the determination of the main application. If condonation were to be refused, this Court would be precluded from considering these facts. In short, these facts are as follows:

30.1 Mr Leshilo, acting manager Legal Services at the Municipality, apparently considered and resolved Mr Nathan's grievance.

30.2 On 24 May 2017, Mr Makobe "rescinded" Mr Lubbe's decision by way of a letter to IMATU.

[31] The Municipality argues that it has good prospects of success because in agreeing with Mr Nathan's grievance, Mr Lubbe sought to overturn an earlier ruling in respect of the same grievance. This earlier "ruling" is Mr Leshilo's outcome referred to above. If it is true that Mr Leshilo's "ruling" applied, then Mr Lubbe's agreement referred to above would be of no force and effect, and there would be no agreement to be made an order of court. A proper assessment in this regard is only possible if due regard is had to the answering affidavit as well as the replying affidavit.

[32] Second, the Municipality argues that the dispute ought to have been referred to the South African Local Government Bargaining Council (SALGA) because it concerns an alleged unfair labour practice. This is, however, not so. The question before this Court is whether the decision reached by Mr Lubbe and signed by both parties amounted to a settlement agreement or not. Again, it is only possible to assess whether Mr Lubbe's "agreement" resolved the controversy in law, or whether Mr Leshilo's did, or whether Mr Lubbe's agreement was lawfully rescinded by way of Mr Makobe's letter of 24 May 2017, by considering all the relevant facts as set out in the various affidavits.

[33] For completeness' sake I point out that the Municipality further argues that the applicant's application is premature because the matter has not been referred to conciliation. There is, however, no requirement for a referral to conciliation in circumstances where a party seeks an order for a settlement agreement to be made an order of court, and this contention is accordingly without merit.

[34] The nature of the application is another factor that is relevant in determining the question as to whether condonation should be granted. This is an application for an order to make a settlement agreement an order of court. The agreement concerned is not a typical settlement agreement. It is contained in the *pro forma* grievance form of the Municipality, which was later sought to be rescinded. It therefore raises important issues of principle as to whether this amounts to a settlement agreement for purposes of section 158(1A) of the LRA.

[35] I need to reiterate the Court's displeasure with the Municipality's flagrant disregard for the prescribed time periods without an adequate explanation. This is exacerbated by the fact that neither the Municipality nor its attorneys of record entered an appearance when the matter was heard. It is, however, only because of the unique circumstances of this case that the late filing of the answering affidavit is condoned. Both the answering affidavit and the replying affidavit are therefore properly before this Court.

The main application

[36] Mr Nathan is employed as Superintendent in the Swimming Pool Section of the Sports and Recreation Business Unit at the Municipality.

[37] On 19 September 2016, Mr Nathan lodged a grievance in the following terms:

> "As part of the swimming pool section within the Sport and Recreation SBU I feel aggrieved by the conclusion of being positioned in an irregular manor as to the other superintendents in Polokwane Municipality. I have noticed that my post level is not appeared to be of a standardise grading as to other employees of the same job title. I feel that this kind of unfair labour practice is unreasonable on basis of equality". (sic)

[38] The outcome he sought was:

> "To rectify the grading of post levels of superintendents and to allocate me on the appropriate level as other superintendents are on. I appeal to Polokwane Municipality to be treated with fairness and integrity as other employee's of the same job title". (sic)

[39] The grievance was lodged in terms of the Grievance Procedure contained in the Main Collective Agreement, 2015-2020 concluded in SALGA.

[40] The grievance form reflects that Mr Nathan's immediate supervisor was not available to comment on the grievance, as he was on leave.[17]

[41] The grievance accordingly proceeded to step two in terms of the Grievance Procedure and was considered by Mr Mphihlela, the Manager: Sport and Recreation. Mr Mphihlela recorded on 10 October 2016 that the grievance raised an issue of organizational structure and development and referred it to the "business responsible for structure development", as Human Resource development would be more relevant to respond to the issue raised.

[42] Mr Mphihlela, Mr Nathan, and Mr Frans Thantsha (Mr Thantsha), the IMATU shop steward who represented Mr Nathan in the grievance, signed the relevant page of the grievance form on 10 October 2016.

[43] It appears from the grievance form that Mr Leshilo, the Acting Manager Legal Services, was thereupon instructed to chair the grievance hearing within ten days.[18]

[44] A hearing took place before Mr Leshilo on 10 November 2016. In summary, Mr Leshilo recorded that Mr Nathan felt that he was being discriminated against because his position was not graded at the same level as other superintendents in the Municipality, and that this amounted to an unfair labour practice. Ms Rasebotje argued on behalf of the Municipality that Mr Nathan's desired outcome, namely to upgrade his post from level 10 to level 6, could be entertained only once the evaluation report was made available, and that the Municipality was not responsible for grading and/or evaluation of positions.[19]

[45] Mr Leshilo concluded that Mr Nathan's grievance amounted to an unfair labour practice and that the grievance procedure could not be used to address a dispute of this nature.[20]

[17] Bundle page 14.
[18] Bundle page 13.
[19] Bundle page 32.
[20] Bundle page 33

[46] Mr Leshilo's outcome was, however, not recorded on the grievance form, it was not signed, and it was not communicated to Mr Nathan.

[47] On 24 January 2017, the matter came before Mr Lubbe, the acting municipal manager at the time. As set out above, Mr Lubbe recorded the results of the grievance investigation and the "decision of municipal manager or nominee" as follows:

> "I agree that the practice is not fair and that all Superintendents must be on the same level which is level 6 per Polokwane Municipality therefore Mr Nathan have to be placed on post level 6 with immediate effect." (sic)

[48] This was signed by Mr Lubbe and Mr Thantsha, the IMATU shop steward, who represented Mr Nathan.

[49] On 6 March 2017, Mr De Bruyn, the IMATU Regional Manager, addressed a letter to Mr Lubbe in terms of which it was recorded that despite the agreement that was reached, the Municipality had "failed to implement the terms and conditions of the settlement agreement". The Municipality was informed that should the agreement not be implemented by 15 March 2017, IMATU would have no other option but to bring an application to make the agreement an order of court.[21]

[50] It appears that a meeting took place between Mr Makobe and Mr Thantsha on 10 May 2017, and on 24 May 2017, Mr Makobe addressed a letter to Mr Thantsha.[22] Mr Makobe explained as follows:

> 50.1 Mr Nathan was employed as Superintendent in the Sports and Recreation Business Unit in May 2015. His post was advertised on post level 6. He accepted appointment at post level 6. (I pause to note that this must be incorrect. Mr Nathan had complained that he was employed on post level 10 and

[21] Bundle page 17.

[22] Bundle page 51-54.

that he ought to be employed on post level 6 as the other superintendents at the Municipality.)

50.2 The Municipality has various positions of superintendent in various business units. The requirements in terms of the required qualifications and the scope of work differ fundamentally among these positions.

50.3 The Local Government Municipal Systems Act[23], (the Systems Act) provides for the organisation of the administration of a municipality.

50.4 Section 66 of the Systems Act empowers the municipal manager to:

a. Develop a staff establishment for the municipality and submit it to the municipal council for approval;
b. Provide a job description for each post on the staff establishment;
c. Attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and
d. Establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.

50.5 The Municipality approved an organogram in 2002 and another one in 2012. The position of Superintendent for swimming pools is at level 10. The Senior Superintendent is at level 8.

[51] Mr Makobe went on to state that "the ill-informed decision of the acting municipal manager Mr Lubbe is therefore rescinded and cannot be implemented". This was because:

51.1 Mr Lubbe failed to take into account that the position of Superintendent Swimming Pools as per the Municipality's staff establishment is at post level 10 and that of Senior Superintendent is at post level 8.

[23] Act 32 of 2000.

51.2 The appointment of staff must be executed within the policy framework of the approved organizational structure. Mr Lubbe's decision was in violation of sections 51 and 66 of the Systems Act.

51.3 Mr Lubbe did not take into account the requirements and nature of job descriptions of superintendents in the different business units.

51.4 Mr Lubbe failed to consider that by placing Mr Nathan at job level 6, he would be two job levels higher than his immediate superior.

51.5 Mr Lubbe did not take into account the fact that he does not have the sole discretion to change or alter job levels.

51.6 Mr Nathan applied for the position at post level 10 and he was appointed as such.

[52] The applicant thereupon instituted the present proceedings.

[53] Section 158(1)(c) of the LRA provides that this Court may make a settlement agreement an order of court if certain requirements are met. These requirements are set out in section 158(1A), namely, there should be a) a written agreement, b) in settlement of a dispute, c) that a party has the right to refer to arbitration or to the Labour Court, but d) excluding disputes contemplated in sections 22(4), 74(4) or 75(7) of the LRA. Sections 22(4), 74(4) and 75(7) of the LRA deal with organizational rights disputes, disputes in essential services, and disputes in maintenance services respectively. The applicant's dispute does not concern any of these categories of dispute.

[54] In *Fleet Africa (Pty) Ltd v Nijs*,[24] the Labour Appeal Court (LAC) held that in order to be a settlement agreement for purposes of section 158(1)(c), it should comply, first,

[24] (2017) 38 1059 (LAC) at para 20.

with the common-law requirements of a valid contract, and second with the statutory requirements set out in section 158(1A).

[55] The LAC in *Fleet Africa* referred with approval to its decision in *Universal Church of the Kingdom of God v Myeni and Others*,[25] where the common law requirements were summarized as follows:

> "It is settled law that the intention of the parties in any agreement – express or tacit – is determined from the language used by the parties in the agreement or from their conduct in relation thereto. Further, not every agreement constitutes a contract. For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by the agreement, the *animus contrahendi*. The parties must also be *ad idem* (or have a meeting of minds) as to the terms of the agreement. Obviously, absent the *animus contrahendi* between the parties or from either of them, no contractual obligations can be said to exist and be capable of legal enforcement."

[56] The statutory requirements are that the agreement a) must be in writing, b) must settle a dispute and c) this dispute must be one which a party has the right to refer to arbitration or the Labour Court (excluding organizational rights, essential services and maintenance services disputes). The requirement is not that the dispute has been referred to arbitration or the Labour Court – simply that the nature of the dispute is one which a party could refer to arbitration or to the Labour Court.

[57] The Municipality does not contend that the statutory requirements are not met. It attacks the "agreement" on the basis that Mr Lubbe could not conclude the agreement because it concerned an "unfair labour practice" and thus fell outside the scope of the Grievance Procedure, that Mr Leshilo had dealt with the grievance and that Mr Leshilo's outcome was final and binding. It contends that if Mr Nathan was dissatisfied with this outcome, he ought to have referred the dispute to the bargaining council.

[25] (2015) 36 ILJ 2832 (LAC) at para 44.

[58] The applicant does not dispute that Mr Leshilo considered the matter. It is, however, disputed that the grievance was finalized at this stage of the process.

[59] On a balance of probabilities, the applicant's contention must be correct. First, Mr Leshilo's outcome was not signed and there is no evidence that it was communicated to the applicant. Second, Mr Leshilo did not sign the grievance form at step 3. Third, there would have been no need for Mr Lubbe to consider the merits of the grievance in January 2017 if Mr Leshilo had concluded the process. He would simply have referred the applicant back to Mr Leshilo's outcome. Fourth, there would have been no need for Mr Makobe to "rescind" Mr Lubbe's decision if Mr Leshilo's outcome concluded the process. Notably, nowhere in the letter from Mr Makobe to IMATU on 24 May 2017 is it stated that Mr Lubbe's decision was of no force or effect because Mr Leshilo had finalized the matter; rather, Mr Lubbe's decision is framed as having been "ill-informed" because Mr Lubbe failed to consider the scope of the different superintendent roles, and for this reason it had to be "rescinded".

[60] In the circumstances, Mr Leshilo's "outcome" was of no force or effect.

[61] The next question is whether Mr Lubbe's recordal on 24 January 2017 amounted to an "agreement" under the common law, and if so, what the effect was of Mr Makobe's letter of 24 May 2017.

[62] In order to have created a valid contract, there must have been an offer and an unequivocal, unconditional acceptance of the offer. As set out in *Fleet Africa*, the parties should have been *ad idem* regarding the terms of their agreement, and they should have intended to be legally bound by their agreement.

[63] The objective of the Grievance Procedure is to "resolve problems as quickly and as close to their source as possible and to deal with conflict through procedural and *consensual* means".[26] If the problem is resolved, that is the end of the matter and

[26] Bundle page 10. (Emphasis added).

the parties proceed accordingly. They are entitled to hold the other to the outcome, and to insist that the other acts in accordance with the manner in which the problem is resolved. If the problem is not resolved, it is recorded as such and the aggrieved party may proceed to the next step in the Grievance Procedure. The Procedure states that, if ultimately, the matter cannot be resolved by way of consensus, the aggrieved party may refer the grievance to the council for adjudication, provided such a dispute is declared and the party is entitled in law to declare such a dispute.

[64] The Grievance Procedure does not distinguish between categories of workplace problems that may be dealt with. Importantly, it does not exclude unfair labour practice, unfair discrimination or harassment complaints, and there is accordingly no merit in the contention that Mr Nathan's unequal pay complaint could not be the subject of a grievance on this basis.

[65] I do not agree that the nature of the grievance was an unfair labour practice complaint. But, in any event, whatever the nature or source of the grievance, it could have been sought to be resolved by way of the Grievance Procedure. The nature or source of the complaint would become relevant only if it could not be resolved by consensus. In such circumstances, the applicant's course of action, i.e. whether the matter could be referred to the bargaining council or not, would depend on the nature of the dispute as a dispute of right or a dispute concerning a matter of mutual interest. There was, however, no reason why the parties could not explore the resolution of the applicant's problem by way of the Grievance Procedure. The Municipality's contentions in this regard are accordingly without merit.

[66] The problem which the applicant identified was the fact that Mr Nathan's position was not graded similarly to those of other superintendents in the Municipality, and it was contended that this was unreasonable on the basis of equality. The desired solution was to rectify the grading and to adjust Mr Nathan's position accordingly. This was the offer.

[67] In the outcome at Step 3, Mr Lubbe agreed that the practice was not fair, that all superintendents had to be on the same level, and that Mr Nathan had to be placed on post level 6 with immediate effect. This was the acceptance.

[68] The acceptance was unconditional and unequivocal. There was no suggestion that the matter had to be referred to some other body, such as the Municipal Council or an evaluation board, for final approval. It was signed by both parties. It resolved the problem and thus met the objective of the Grievance Procedure. In the circumstances, an agreement came into force on which Mr Nathan was entitled to rely.

[69] It is noteworthy that the Municipality has not pleaded the invalidity of the agreement on the basis that Mr Lubbe, in his capacity as acting municipal manager at the time, was not properly authorized or empowered to make the decision. It attacks Mr Lubbe's decision on the basis that Mr Leshilo's outcome had to stand, that the nature of the grievance concerned was an unfair labour practice which was beyond the reach of the Grievance Procedure, and that the applicant had to refer the matter to the bargaining council. As set out above, these contentions are without merit.

[70] This brings me to Mr Makobe's letter "rescinding" Mr Lubbe's agreement.

[71] Properly construed, Mr Makobe's letter is not a "rescission" but constitutes a repudiation of the agreement that was reached on 24 January 2017.

[72] Rescission (or cancellation) of a contract is an extraordinary remedy that is available in limited circumstances. A party to a contract may rescind (or cancel) it if the other party is in breach of the contract, and if time is of the essence.[27] This is not the case here – the Municipality did not seek to cancel the agreement in response to a breach by the applicant. Rather, it expressed an unequivocal intention no longer to be bound by the contract.

[27] Hutchison et al "*The Law of Contract in South Africa*", 2nd Ed, p286.

[73] A repudiation does not dissolve the contract. It grants the innocent party two options, namely to either accept the breach and sue for damages, or to hold the repudiator to the contract. If the innocent party rejects the repudiation and holds the repudiator to the contract, the contract and the obligations created by it remain intact.[28]

[74] In response to the breach by the Municipality, the applicant could thus either have accepted the breach, cancelled the agreement and sued for damages; or it could have chosen to hold the Municipality to the agreement and require specific performance. The applicant's conduct in bringing this application clearly indicates the latter.

[75] In the circumstances, the agreement reached on 24 January 2017 complied with the common law requirements of a valid contract, and I now turn to the statutory requirements to make a settlement agreement an order of this Court.

[76] The agreement reached between the parties on 24 January 2017 complies with the statutory requirements of a settlement agreement:

76.1 The agreement is in writing and signed by both parties, namely Mr Lubbe, the acting municipal manager of the Municipality at the time, and Mr Thantsha of IMATU.

76.2 It has as its genesis a dispute, namely unhappiness, a controversy, or, in the words of the Grievance Procedure, a grievance or a problem, regarding the level at which Mr Nathan's position is graded vis-à-vis other superintendents, and thus the level at which he is remunerated vis-à-vis other superintendents.

[28] De Wet & Van Wyk "Kontraktereg & Handelsreg" Vyfde Uitgawe, p170.

76.3 It resolved or settled the dispute. Mr Lubbe agreed that the "practice is not fair" and that Mr Nathan's post had to be "placed on post level 6 with immediate effect".

76.4 The nature of the dispute is one that may be referred to arbitration or the Labour Court. The language used in the original formulation of the dispute is that "this kind of unfair labour practice is unreasonable on basis of equality". This is not an eloquent categorization as an unfair discrimination dispute, but the reference to the "basis of equality" strongly suggests that this is what the dispute is about. The categorization of the dispute as an unfair discrimination dispute is further evident from the unsigned "outcome" by Mr Leshilo. Also in argument before me, it was emphasised that Mr Nathan's complaint is that he is being unfairly discriminated against, ostensibly on an arbitrary ground, for purposes of section 6(4) of the Employment Equity Act[29].

[77] As emphasised in *Fleet Africa*, section 158(1A) does not require that a dispute should have been referred to a council/the CCMA or the Labour Court.

[78] In addition, it is not a requirement for the dispute to have strong prospects of success; all that is required is that it should be a dispute that the party would be entitled to refer to arbitration or the Labour Court. An unfair discrimination dispute would be such a dispute, as would an unfair dismissal dispute and an unfair labour practice dispute. A dispute concerning a matter of mutual interest would fall outside of the scope of section 158(1A) and agreements settling such disputes would therefore not be capable of being made an order of court in terms of sections 158(1)(c) and 158(1A) of the LRA. This is because they are not disputes in respect of which a right exists to refer them to arbitration or the Labour Court.

[79] If the applicant had simply complained about the level at which Mr Nathan's post was graded without a comparison to other similar positions, the position may well

[29] Act 55 of 1995.

have been that the dispute concerned a matter of mutual interest.[30] In such circumstances, Mr Nathan would simply have demanded an increase in pay without there being an existing enforceable right to such increase.

[80] In this case, I am, however, satisfied that the true nature of the dispute is an equal treatment dispute for purposes of section 6(4) of the Employment Equity Act. In essence, Mr Nathan complains that his post is the same, or similar or of equal value to those of other superintendents at the Municipality and that this unequal treatment offends the principle of equality and thus amounts to unfair discrimination.

[81] It may be so that the questions in this inquiry were not properly considered. These questions include whether the positions are in fact the same, similar or of equal value; and if so, whether Mr Nathan was treated differently because of one of the grounds listed in section 6(1) of the Employment Equity Act, or on the basis of another arbitrary ground, thus a ground affecting his human dignity in a comparably serious manner.

[82] The fact is, however, that Mr Lubbe "agreed" and on the face of it resolved the dispute by recording in writing that the manner in which Mr Nathan was treated was "not fair" and that Mr Nathan had "to be placed on post level 6 with immediate effect".

[83] In the circumstances, an agreement was concluded, and it complies with the principles set out in section 158(1A) of the LRA.

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

Order

1. The respondent's late delivery of the answering affidavit is condoned.

[30] See for example *Minister of Labour v Mathibeli and Others* (2013) 34 ILJ 1548 (LAC).

2. The settlement agreement concluded on 24 January 2017 is made an order of this Court.
3. There is no order as to costs.

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T. Laubscher

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr P De Beer (IMATU)

For the Respondent: No appearance