Reportable	YES / NO
Circulate to Judges	YES / NO

IN THE LABOUR COURT OF SOUTH AFRICA
[HELD AT PORT ELIZABETH]

CASE NO: P483/11

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION	FIRST APPLICANT
NOKUTHULA TETYANA	SECOND APPLICANT
And	
NELSON MANDELA BAY MUNICIPALITY	FIRST RESPONDENT

Dates of hearing:17-18 August 2015
Date of Judgment: 24 November 2015

JUDGMENT:

Phatshoane AJ

1. The South African Municipal Workers Union (SAMWU) and Ms NokuthulaTetyana, the first and second applicants,launched these proceedings in terms of s 10(6)(a)read with ss 1 and 6(1) of the Employment Equity Act, 55 of 1998 (EEA). They claim that the respondent,Nelson Mandela Bay Municipality (the Municipality), unfairly discriminated against Ms Tetyana on the basis of gender in that she is being paid less remuneration for performing the same or similar work as her fellow male assistant directors.

2. The Human Settlement Directorate's structure of the Municipality makes provision for the employment of five assistant directors. According to Mr

MvuleniMapu, a director in Human Settlement, the positions of all the assistant directors were on grade 15 when the directorate was established.

3. The Municipality advertised the position of Assistant Director: Planning and Co-ordination in the Human Settlement Directorate around January 2010 at grade 15.Ms Tetyanasuccessfully applied for the position. She received an offer of employment on 04 October 2010 and accepted itthe next day. She commenced her duties on 01 November 2010. She was the only female assistant director appointed in the directorate while the remaining four assistant directors, Messrs David Toyise, SandisileMahashe, Tony Anthony and Rudi April were male. Save for Mr Toyise, who was employed at grade 16, these assistant directors, including Ms Tetyana, were appointed at grade 15.Mr Mahashe and Anthony were appointed at the same time as Ms Tetyana.

4. Ms Tetyana's pertinentcomplaint is that she is remunerated at a lower salary notch than Mr Mahashe and Anthony.Referring to the salary advices,she intimated that her basic salary as at 25 November 2010 was R26 766.00 per month whereas Mr Mahashe and Anthony earned R27 435.00 each[1]. As for Mr Toyise, the grievance by Ms Tetyanais that he is on grade 16 and remunerated at that same grade while she is on grade 15.She excluded Mr Rudi April as a comparator because he was appointed long before her and therefore did not probehis salary.

5. The assistant directors' grade is reflected on their job description as level 15. Ms Tenyana testified that all fiveassistant directors in the Human Settlement Directorate shared the same responsibilities regard being had to their job description[2].However, she intimated that she was given

[1] The salary slips appear at pages 114A, 114B and 114C of the consolidated bundle.
[2] The job description appears at page 1 of the consolidated bundle.

additional responsibilities because of her knowledge of human resources, financial management, performance management and other skills. She also took charge of the administration of the whole section whereas the other assistant directors were not given additional tasks. Mr Mapu and Mr Mahashe confirmed that the assistant directors had an identical job description which applied to all of them albeit Mr Mahashe added that others performedadditional work.

6. Ms Tetyana and the other four assistant directors were reporting to Mr Mapu.Prior to Mahashe's appointment as an assistant director, he was employed by the Municipality as a project manager on grade 14. He received the top notch or maximum salary in grade 14 salary range. On his appointment to the assistant director position at grade 15 Mahashe raised some dissatisfaction in respect of his salary in a letter he directed to Mr Mapudated 29 September 2010.It reads:

"**SUBJECT: APPOINTMENT AS ASSISTANT DIRECTOR CONTRACTS MANAGEMENT.**

I accept the above appointment for the position of an Assistant Director Contracts Management and further want to forward my appreciation for your confidence in me in undertaking such duties.
I also want to highlight the following challenging area with regards to the package offered and these relate to the following:
I highlighted during the interviews that this position was advertised as a grade 15 and during the advertising process, Assistant Directors in my directorate were upgraded to grade 16 and I requested that this anomaly be rectified.
My present salary is R 26 766.00 which is the top notch of my present grade (14) and the bottom notch of grade 15 is the same amount and the car allowance for grade 15 is R 5 890 per month.
The above challenge can be depicted underneath as follows:

Present Salary (Grade 14)	:	R26 766.00
Present Car Allowance	:	R 8 500.00
Totals	:	R35 266.00

Grade 15 Salary (Bottom Notch)	:	R26 766.00
Plus 2.5 scale progression	:	R 699.00
Grade 15 Car Allowance	:	R 5 890.00
Totals	:	R33 325.00

Grade 14 Totals	:	R35 266.00
Minus Grade 15 Totals	:	R33 325.00
Totals	:	R 1 941.00

……

The above calculations reflect very clearly that by being started at the bottom of the scale I will lose about R 1 941.00 but if I can be started at the top of the scale I will benefit an amount of R 377.00 only.

Whilst the issue of grading for Assistant Directors is being sorted out, I submit my request that I be started on the top of the scale so that I cannot be in a worse off situation.

Trusting that this receives your consideration."

7. Mr Mahashe testified that he did not receive a response to his letter. Mr Mapuconfirmed receipt thereof and intimated that he forwarded it to Executive Director Human settlement. Mr Mapu explained that the recruitment notification in respect of the filling of posts for assistant directors recorded that the post was on grade 16 whereas it was advertised at grade 15. During the interviews that were heldto fill thesevacancies he had a discussion with the other panellist, Executive Director Human Settlement and Executive Director Corporate services. They agreed that the post will be adjusted to grade 16.

8. Mr Mapudirected a letter dated 29 September 2010 to the Executive Director: Human Settlement headed: "Assistant Director: Contracts Management Motivation"[3]. Therein he reiterated the aforementioned agreement that was reached during the interviews. He further recorded that it was communicated to Corporate Administration that the interview panellists agreed that the grade be corrected on appointment. He then suggested that the positions be elevated to grade 16. He was of the view that the suggestion will resolve Mr Mahashe's complaint. In the alternative, as a last resort, he proposed that the positions be placed on the top notch of grade 15 to address the financial anomaly.

[3] The letter is on page 104 of the consolidated bundle

9. Mr Mapu conceded that he had no power to change the grading of the posts but intimated that the two executive directors and he were s 56 employees[4] and could therefore take a decision that the post be upgraded during the interviews.

10. Mr Mapu testified that Mr Anthony, who had been employed by the Municipality for many years, had a similar complaint as Mr Mahashe. Mr Anthony also directed a letter dated 05 October 2010 to him to the effect that the salary he was earning on grade 15 was less than what he earned as a project manager. Mr Mapu also forwarded this letter to the Executive Director Human Settlement. The response from Corporate Services to the complaints bythe assistant directors was set out in its letter of 24 November 2014 as follows:

> "The incumbents in the post of Assistant Director Contract Management and Assistant Director Planning Coordination, at this stage may not be upgraded to 16, as requested, as it is not aligned to Council policies or procedures. Both posts were *"interim graded"*, advertised at Grade 15 as per Municipal Circular 3 of 2010. However, the post will be subjected to job evaluation in the *TASK Maintenance Phase.*
>
> Please note that your recommendation to "consider the pay parity dispensation" for upgrading the incumbents in these post, failing your request above, remains your prerogative to submit with the portfolio of evidence and the said request to the Pay Parity Task Team for consideration.
>
> The Pay Parity Task Team, in its meeting with you, set out the terms for qualifying incumbents. The Pay Parity agreement and Terms of Reference published ….set out the guidelines.
> I trust this resolves the matter".

11. Mr Mapu responded to the aforesaid correspondence on 26 November 2010. He regurgitated the agreement made by the executive directors during the interviews referred to earlier. He further intimated that the incumbents had been on grade 14 as project managers and receivedhigher allowances than the assistant directors. Their

[4] Section 56 of the Municipal Systems Act, 32 of 2000, deals with the appointment of managers directly accountable to the municipal managers.

appointments as assistant directors, he pointed out, had no monitory value for them and were losing out while they carried more responsibilities. Mr Mapuwas informed that the matter was receiving attention but did not receive any feedback.

12. On 04 February 2011Ms Tetyanaand Mr Mahashe filed a grievance[5]: Unfair Labour Practice *viz* inequity in pay. They set out therein that their positions were graded at 15 while the other assistant directors were on grade 16. The desired outcome of their grievance was that they be remunerated and placed at grade 16 retrospectively from date of their appointment. Mr Mapu, as their immediate supervisor, dealt with the grievance. At step one of this grievance he recorded the following:

> "No need for this dispute because one of the assistant directors is on grade 16 whilst the job description is the same. I have made previous(sic)submissions on this matter to support the upgrading".

13. When the domestic grievance procedures proved unsuccessfulMr Mahashe, on one hand, referred an unfair labour practice dispute to the South African Local Government Bargaining Council (SALGBC) for determination. On 14 September 2011 the SALBC found that it lacked jurisdiction to entertain his dispute.On the other hand, Ms Tetyana referred "the unfair discrimination dispute concerning pay/conditions" to the Commission for Conciliation Mediation and Arbitration (CCMA). Following an unsuccessful attempt at conciliation of the dispute by the CCMA she referred her claim to this Court for adjudication.

14. A TASK Agreement was signed on 01 December 2013 by the Municipality and the Trade Unions. Subsequent to this, in March 2014 Ms Tetyana was placed on grade 16; however, at its minimum or

[5] The grievance is on page 125 of the bundle.

commencing salary notch.Her basic salary was R37 963.00 whereas Mahashe and Toyise earned R38 544.00 and R43 555.00, respectively.

15. Ms Tetyana testified that there was no rational basis or justification why she was earning less remuneration than her male counterparts and attributed the disparities in the remuneration to discrimination on the basis of her gender.Mr Mapu did not know why the other assistant directors were earning more than Ms Tetyana and ascribed this to administrative chaos and some measure of differentiation on the basis sex. Mr Mahashe does not know why Mr Anthony and he were earning more than Ms Tetyana. He indecisively attributed the pay incongruences to discrimination on basis of sex and intimated that although Tetyana and he had the same grievance, the latter was worse off in comparison to him.

16. At the commencement of the trial the Municipality reserved its right to pursue its plea that this Court lacked jurisdiction to entertain the claim. The trial proceeded in the normal course. At the end of the applicants' case the Municipality applied that it be absolved from the instance. Having argued the application the Municipality broached its point on jurisdiction. It is appropriate to dispose of the point as it may be dispositive of all the issues in contention insofar as they are before this Court for determination. It is always preferable to deal with a point *in limine* at inception stage. Reserving their right, as the Municipality did, may create uncertainty and lead to unnecessary time wastage if the objection is eventually upheld.

17. Mr Grogan, for the Municipality, argued that as far as Ms Tetyana claims that her post should have been elevated to grade 16 she ought to have referred her dispute to the SALGBC under the rubric of unfair labour practice relating to the "provision of benefits". Counsel contended that

insofar as her dispute concerns her notch within grade 15 she has no remedy in this Court or any other statutory forum as this is an interest disputethe remedy of which lies in negotiation and or industrial action. As for her dissatisfaction that she be placed at grade 16 on the basis of an agreement or a contractual undertakingher dispute resorted under the Basic Conditions of Employment Act, 75 of 1997.

18. Mr Voultsos, for the applicants, pressed that the conduct complained of constitutes unfair discrimination. He contended that the mere fact that the same facts may give rise to a collateral complaint in the form of an unfair labour practice does not deprive this Court of jurisdiction.Much will depend on the manner in which the employee cast the dispute in the pleadings, the argument went.In support of his argument counsel relied on *SA Maritime Safety Authority v McKenzie*(2010) 31 ILJ 529 (SCA) at 535 para 7 where the Court held:

> "..The question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded, but could possibly arise from the same facts."

19. In my view the contention that this Court has no jurisdiction to determine the applicants' claim is unsustainable. The following dictum in *Mangena& others v Fila SA (Pty) Ltd & others* (2010) 31 ILJ 662 (LC) 668-669 isparticularly apposite:

> "[5] The first question that arises is whether equal pay claims, and in particular claims for equal pay for work of equal value, are contemplated by the EEA. Unlike equality legislation in many other jurisdictions, the EEA does not specifically regulate equal pay claims. Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6(1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner. (See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at 325A.) 'Employment policy or practice' is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. **To pay an employee less for performing the same or similar work on a listed or an analogous ground clearly constitutes less**

favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature. In relation to claims where the differential that is asserted by the claimant is a difference in sex, the ILO Equal Remuneration Convention 1951 (No 100) situates the comparison to be made at the level of the value of work, and obliges ratifying member states to give effect to the principle of equal remuneration for men and women workers for work of equal value. To this extent, this court is required to interpret the EEA in compliance with South Africa's public international law obligations…
In *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC), Landman J said the following at 196F:
'In other words, it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, eg race or ethnic origin.' (My emphasis)

20. The principles lucidly set out in *Mangena& others v Fila SA* (supra) are on all fours applicable in this matter.I align myself with the views expressed therein. As dominuslitis an applicant determines his/her cause of action or relief sought or the forum that has jurisdiction. I therefore conclude that this Court has jurisdiction to determine the dispute.

21. The key issuesarising for consideration as foreshadowed in the applicants' statement of claim are as follows:

"4.1 Whether or not the Respondent [the Municipality], in failing to remunerate the Second Applicant on the same level as her fellow male assistant director (i.e. at grade 16 level), Toyise, is discriminating (within the meaning of sections 1 and 6(1) of the EEA) against the Second Applicant, whether directly or indirectly, on account of her gender. In this particular regard, the Applicants plead that the Respondent, contrary to the relevant statutory provisions as more fully set out above, is discriminating against the Second Applicant by improperly and unfairly failing to remunerate her at the same level as Toyise.

4.2 Whether or not the Respondent, in failing to remunerate the Second Applicant on the same level as her fellow male Assistant Directors, Mahashe and Anthony, is discriminating (within the meaning of sections 1 and 6(1) of the EEA) against the Second Applicant, whether directly or indirectly, on account of her gender. In this particular regard, the Applicants plead that the Respondent, contrary to the relevant

statutory provisions as more fully set out above, is discriminating against the Second Applicant by improperly and unfairly failing to remunerate her at the same level as Mahashe and Anthony."

22. The Court reaffirmed the correct approach to absolution from the instance in*De Klerk v ABSA Bank Ltd And Others* 2003 (4) SA 315 (SCA) In 323 para 10 as follows:

"[10] The correct approach to an absolution application is conveniently set out by Harms JA *in Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E - 93A:

'[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:
''. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307* (T).)''

This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ''evidence upon which a reasonable man might find for the plaintiff'' (Gascoyne (loccit)) - a test which had its origin in jury trials when the ''reasonable man'' was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ''reasonable'' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'

23. Section 6 of the Employment Equity Amendment Act, 47 of 2013, which commenced on 14 January 2014 substituted s 11 of EEA and revised the onus of proof in discrimination cases. Section 11 as amended provides:

"11 Burden of proof:

(1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-
   (a) did not take place as alleged; or
   (b) is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
   (a) the conduct complained of is not rational;
   (b) the conduct complained of amounts to discrimination; and
   (c) the discrimination is unfair.

24. Prior to its amendment s 11 of EEA provided that whenever unfair discrimination is alleged in terms of the EEA, the employer, against whom the allegation is made, must establish that the discrimination is fair. On the basis of this Court's decision in*Bandat v De Kock& another* (2015) 36 ILJ 979 (LC)[6]the parties accepted that the amendment to the EEA, was not retrospective.

25. No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more of the grounds listed in s 6(1) or grounds akin thereto.[7] Section 6(4) provides that a difference in the terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination. The approach that has been followed since the advent of our constitutional era was laid down by the Court in *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) at 321-322para 46 as follows:

[6] At 990 para14 of the decision the Court held: "In casu, there is nothing in the EEA or in the amendment thereof which indicates that it must be applied retrospectively. As such, the presumption that must apply is that it is not retrospective and that the existing procedure prior to the amendment must find application. This presumption can then only be rebutted if there exist particular considerations of fairness and equity to do so and if there is a clear intention to be gathered from the statute itself that it was intended to apply to even pending proceedings. I can find no indication in the EEA of any intention that the amendment applies to existing and pending proceedings, already in existence prior to the amendment."

[7] The grounds listed in s 6(1) includes: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground

> "[46] The determination as to whether differentiation amounts to unfair discrimination under s 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to 'unfair discrimination'. It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in s 8(2), which by virtue of s 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair."

See also *SA Airways (Pty) Ltd v Jansen van Vuuren& another* (2014) 35 ILJ 2774 (LAC) 2789 para 36.

26. In this case the disparate treatment would occur if it is established that the employer treated the complaining employeeless favourably on the basis of sex or gender by placing her on a lower remuneration scale for performing the same or similar work as her male comparators. It was not controverted that the assistant directors in the Human Settlement Directorate are performing the same or similar work, some with added responsibilities. It was also not in dispute that there are salary disparities amongst these directors. What remains for the employee todemonstrate is that there is a *causal nexus* between the differentiation on the basis of her gender or sex and the treatment accorded to her in respect of the grading of her post and the concomitant remuneration. In other words, that being female was a *sine qua non*for the less remuneration she earned. It has been held in a number of decisions in this Court that a mere say so of discrimination is not adequate for the onus to shift to the employer to prove that the discrimination was fair[8]. In *Mangena& others v Fila SA (Pty) Ltd & others* (supra) at 669-670the Court pronounced:

[8]See *Louw v Golden Arrow* (2000) 21 ILJ 188 (LC);*Aarons v University of Stellenbosch* (2003) 24 ILJ 1123 (LC) at 1129 para 18; *Nombakuse v Department of Transport & Public Works: Western Cape Provincial Government* (2013) 34 ILJ 671 (LC) at 678 para 28

"[7] This court has repeatedly made it clear that it is not sufficient for a claimant to point to a differential in remuneration and claim baldly that the difference may be ascribed to race. In *Louw v Golden Arrow*[(2000) 21 ILJ 188 (LC)] Landman J stated at 197B:
'Discrimination on a particular "ground" means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less [than] that [of] Mr Beneke's salary because of his race '.
This formulation places a significant burden on an applicant in an equal pay claim. In *Ntai& others v SA Breweries Ltd (2001) 22 ILJ 214 (LC)*, the court acknowledged the difficulties facing a claimant in these circumstances and expressed the view that a claimant was required only to establish a prima facie case of discrimination, calling on the alleged perpetrator then to justify its actions. But the court reaffirmed that a mere allegation of discrimination will not suffice to establish a prima facie case (at 218F, referring to *Transport & General Workers Union & another v Bayete Security Holdings* (1999) 20 ILJ 1117 (LC))."(My emphasis)

27. To sum up, Ms Tetyana's complaint is essentially twofold. Firstly, she contended that she was remunerated at grade 15 whereas Mr Toyise was remunerated at grade 16. Secondly, her discontentment is that her fellow male assistant directors in the Human Settlement Directorate are remunerated at a higher notch than hers.

28. It was not gainsaid by the applicants that the posts of assistant directors are on grade14 to 16. In its statement of response the Municipality state that Mr Toyise's post was incorrectly graded at level 16 and that the process to correct the errorwas afoot.Mr Mapu could not comment that Mr Toyise was incorrectly graded and intimated that the dispute was still pending. Ms Tetyana conceded that there was an attempt to reverse Toyise's grade.On the view I take of this matter whether MrToyise was correctly or incorrectly graded is not decisive of the issues and how the Municipality seeks to achieve the reversal after five years is another matter for another forum.

29. Ms Tetyana's claim of differential treatment on account of her gender with regard to the grading of her post from grade 15 to grade 16 like that of Mr Toyisecannot simply pass muster because her other male comparators, Messrs Mahashe and Anthony, were also on grade15. To this end on 04 February 2011 she jointly filed a grievance with Mahashe complaining of their grade and requesting that it be elevated to grade 16.If she learned that she was discriminated against in January 2011, as she says, it is inconceivable that when she filed her grievance she took no issue on discrimination.

30. The similarities between Ms Tetyana'sdispute and the complaint that was launched by Mr Mahashe at the SALGBC are quite remarkable. In summarising the nature of Mr Mahashe's dispute the SALGBC commissioner notes:

> "The applicant required that the benefits/salary of the applicant be adjusted to the level of his colleagues and be upgraded from grade 15 to grade 16.[9]"

31. Under these circumstances the employer's conduct in refusing to remunerate Ms Tetyana at grade 16 can hardly constitute discrimination on the basis of sex or gender in an instance where a similar treatment was accorded to her male colleague, Mr Mahashe.

32. The applicants argument that there was an agreement during the interviewsby Mr Mapu and other executive directors to the effect that the posts of assistant directors will be graded at 16cannot not avail Ms Tetyana because her male comparators in the directorate, save for Toyise, remained on grade 15. In any event had this agreement been implement it would have benefited not only Ms Tetyana but her other fellow male assistant directors as well.

[9] The outcome of Mahashe's case at the SALGBC appears at pages142-146 of the consolidated bundle.

33. The high watermark of Ms Tetyana's case is that she earned less remuneration than her male comparators. She could not point to any Remuneration Policy that discriminates against employees on the basis of their gender or sex and neither was her case based on the existence of a policy on this score. She intimated that "She thought that it was traditional"that she earned less than her male comparators as women are generally being disadvantaged and paid less.

34. It is common cause that Messrs Anthony and Mahashe had been in the employ of the Municipality as project managers prior to their engagement as assistant directors in the Human Settlement Directorate whereas Ms Tetyana was an external candidate. After Mahashe and Anthony's appointment they complained in writing to Mr Maputhat their remuneration was less than what they previously earned and requested the adjustment of their grades and/or their salary notches.Mr Mahashe and Mr Mapucould not say that Mr Mahashe and Mr Anthony were on higher notches because they were males. It is probable that they were on a notch higher than Tetyana's due to the obvious financial anomaly. Ordinarily the salary progression ofthese employees and that of Ms Tetyana could not have been the same given their background in the establishment.

35. Mention should be made that Ms Tetyanaintimated that if Anthony and Mahashe were female she would have still complained. Later on as her evidence progressed she tried to clarify this by saying that it would depend on the circumstances.The following remarks in*Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala*2008 (1) SA 551 (SCA); (2008) 29 ILJ 267 (SCA) at 271 para are instructive:

> Whether an employer has discriminated against an employee on the grounds of race (or on any other arbitrary ground) is a question of fact (whether the discrimination was unfair is a separate question). Where the evidence

establishes, as it does in this case, that the employer treated employees differently on grounds other than race, there is simply no scope to infer that the employee was discriminated against on the grounds of race, because the reason for the disparate treatment has been established to be something else. That the differential treatment was not justified is immaterial to the factual enquiry as to the reason that it occurred. In this case the company said that its disparate treatment of the two employees (Ferreira was white and the respondent is black) was because a formal complaint was lodged by the victim of the assault in one case but not in the other. Unless that explanation is rejected as no more than a smokescreen to conceal a more sinister motive (and in my view there are no proper grounds for doing so) there is simply no scope for an inference to be drawn that conflicts with that explanation.

36. To buttress her claim for discrimination Ms Tetyana referred to a grievance that was filed by Messrs Beatie and Potgiterprior to Tetyana's appointment.It so happened that these two assistant directors, who were employed in the Housing and Land Directorate, were dissatisfied with the grading of their posts at level 15 and filed a grievance. Ms Tetyana referred to the outcome of their grievance dated 05 June 2009 in which it is recorded that: "An appropriate retention strategy for them as occupiers of a scare skills category would be to place them on grade 16"[10]. It is not Ms Tetyana's case that the two were her comparators. Clearly Messrs Beatie and Potgieter were not in the same directorate as Ms Tetyana and performed different functions. This much she conceded. Her view that their grades were upgraded with ease because they are male is simply not enough to sustain her claim of discrimination.

37. I am not swayed that the difference in gender or sex was a dominant reason for the differentiation.There are other reasonable inferences that could be drawn from the facts, including what Mr Mapu and Mr Mahashereferred to as administrative chaos, which is gender neutral, which could be attributed to the disparity. On the wholeit cannot reasonably be inferred that the differentiation in remuneration was on the basis of the fact that Ms Tetyana is female. That causal nexus is absent

[10] See page 61 of the consolidated trial bundle.

in this case.In my view,SAMWU and Ms Tetyana did not establish the existence of discriminationas contemplated in s 6 of the EEA.

38. Although pleaded, the question of indirect discrimination on the basis of gender does not arise because no evidence had been tendered in support of this claim.I am satisfied that the application for absolution from the instance should succeed.

39. That brings me to the question of costs. Although the Municipality has achieved substantial success I am not persuaded that it be awarded its costs. This is so because the parties are still in an employment relationship. To my mind, it will not be in accordance with the requirements of the law and fairness for costs to follow the success where the applicants had been in pursuit of a courseaimed at vindicating an entrenched right not to be unfairly discriminated against. They should not be mulcted incosts.

In the result the following order is made:

Order:

1. The application by Nelson Mandela Bay Municipality, the respondent, to be absolved from the instance is granted.

2. No order is made as to costs.

Phatshoane AJ

Appearance for the applicant : AdvJG Grogan *Instructed by Doreen Mgoduka Attorneys*

Appearance for the first respondent: AdvLVoultsos *Instructed by Kaplan Blumberg Attorneys*