IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2368/15

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY	**Applicant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
ARBITRATOR MNS DAWSON, *N.O*	**Second Respondent**
IMATU obo SANMARI BRIEDENHANN	**Third Respondent**

Heard: **14 June 2017**

Delivered: **17 October 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant (The Municipality) seeks an order reviewing and setting aside the arbitration award dated 24 November 2015, which was issued by the second respondent (the Arbitrator) under case number GPD 091508. In the award, the Arbitrator found that the suspension of the third respondent (Sanmari Briendenhann) was unfair. The Arbitrator had ordered the Municipality to uplift the suspension; to pay Briedenhann compensation equal

to two months' salary, and to further pay the costs of the arbitration. The review application is opposed.

The background:

[2] Briedenhann is employed by the Municipality as Divisional Head: Projects in the Disaster and Emergency Management Services Department (DEMS). Her employment was with effect from 1 May 2014 in terms of a five-year fixed-term contract which is due to expire on 30 April 2019. Clause 2.1 of the contract stipulates that Briedenhann is employed in terms of section 56 of the Local Government: Municipal Systems Act[1] (The Systems Act). She reports to Moshema Mosia, who is the Head of Department, DEMS[2] Mosia in turn reports directly to the Municipal Manager.

[3] Briendenhann was issued with a pre-suspension enquiry notice on 1 September 2015, in terms of clause 14.1 of the Disciplinary Procedure Code Collective Agreement (DPCCA)[3]. The pre-suspension enquiry was held on 1 September 2015, where Briendenhann was represented by the Independent Municipal and Allied Trade Union (IMATU). At those proceedings, Briendenhann had requested to be furnished with further particulars regarding the allegations pertaining to *inter alia*, gross insubordination and gross negligence. She further requested that proceedings be adjourned to afford her an opportunity to properly prepare herself for the enquiry. Proceedings were postponed to 2 September 2015, and following her oral and written submissions, she was issued with a suspension letter on 7 September 2015.

[4] Briendenhann through IMATU referred a dispute to the first respondent, the South African Local Government Bargaining Council (SALGBC) on

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[1] Act 32 of 2000, which provide that:
56. Appointment of managers directly accountable to municipal managers
(1) (a) A municipal council, after consultation with the municipal manager, must appoint
(i) a manager directly accountable to the municipal manager.

[2] Also, clause 8.2, which provides that;
'The employee shall report to the Head of Department or his designated person on such matters and furnish such information as the Council, may from time to time require'

[3] Which provides that;
'The Employer may suspend the Employee or utilize him temporarily in another capacity pending an investigation into alleged misconduct if the Municipal Manager or his authorized representative is of the opinion that it would be detrimental to the interests of the Employer if the Employee remains in active service'

11 September 2015 to challenge the fairness of her suspension. In the referral, she had alleged that she *'was not afforded a fair hearing before her suspension; that her submissions were not considered; and that her contractual rights regarding reasons for suspension were unfairly violated'*. Conciliation proceedings held on 20 October 2015 failed to resolve the dispute. Following the referral of the dispute for arbitration, the matter came before the arbitrator on 20 November 2015.

The arbitration proceedings and the award:

[5] At the arbitration proceedings, only Briendenhann had testified. The immediate striking feature of the Arbitrator's award is that it is three pages long and chronically thin on details. All that is recorded of any substance is that, '*the matter is one of unfair suspension'*; and that, '*it was common cause that Briendenhann was a senior employee employed in terms of section 56 and 57 of the act'.*

[6] The Arbitrator then stated that Briendenhann *was not suspended in terms of the Local Government Disciplinary Code and Procedure for Senior Managers, and precept governing Senior Managers'*. He then concluded that '*In as much as the actions of the respondent were not in compliance with the laws governing Senior Managers I find that the respondent acted ultra vires'*. The basis upon which compensation was ordered is not explained in the award.

The grounds of review:

[7] The Municipality contends that the award is reviewable on a variety of grounds including that the Arbitrator;

a) Misconceived the nature of the dispute; started the enquiry on a wrong premise, and answered the enquiry incorrectly;

b) Exceeded his powers and ruled that Briendenhann's suspension should have been conducted in terms of the Senior Manager Disciplinary Regulations in circumstances where;

i. Briedenhann was not a Senior Manager as contemplated in section 56 of the Systems Act; did not report to the City Manager, and it was therefore not correct as concluded by the Arbitrator that it was common cause that Briendenhann is a section 56 and 57[4] Senior Manager;

ii. As a result of (a) above, the suspension of Briendenhann could not have been effected in terms of Senior Managers' Regulations. The applicable procedure therefore was in terms of the Disciplinary Procedure and Code: Collective Agreement (DPCCA);

iii. The suspension of Briendenhann was effected in compliance with the provisions of her contract of employment, and in terms of the DPCCA in that she was served with a pre-suspension enquiry notice on 1 September 2015, which was issued in accordance with clause 14.1 of the DPCCA, and in compliance with clause 18 (Precautionary Suspension) of her contract of employment;

iv. Upon attending the pre-suspension enquiry, Briedenhann as represented by IMATU was as per her request, furnished with the details of the allegations against her. Oral submissions were made in the enquiry by representatives of both parties, and they had also made written submissions. On 7 September 2015,

[4] **57 Employment contract for municipal managers and managers directly accountable to municipal manager**

(1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only –

(a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).

(2) The performance agreement referred to in subsection (1)(b) must –

(a) (i) be concluded within 60 days after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager, failing which the appointment lapses."

Briedenhann was issued with a suspension letter, in which reasons for her suspension were also detailed.

c) The Arbitrator arrived at a conclusion which no reasonable arbitrator could have arrived at; committed a gross irregularity in the conduct of proceedings; ignored and disregarded the evidence before him, more specifically the evidence and the admissions made by Briedenhann, including that she was not accountable to the City Manager, and had instead reported to the HOD.

Evaluation:

[8] The test on review remains that of a reasonable decision maker, with the enquiry being whether the arbitrator arrived at a decision which no other arbitrator would have arrived at in the light of the material placed before him or her. In the end, the Court must be satisfied that the arbitrator's decision falls within a range of decisions that a reasonable decision maker would make[5].

[9] Prior to dealing with the merits of the application, a few comments need to be made about the Arbitrator's award. The provisions of sections 138 (1)[6] of the Labour Relations Act (LRA)[7], enjoins commissioners to conduct arbitration proceedings in a manner that they consider appropriate in order to determine the dispute fairly and quickly, but to deal with the substantial merits of the dispute with the minimum of legal formalities. Section 138 (7)[8] of the LRA further require commissioners to issue arbitration awards with brief reasons.

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[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110

[6] Section 138: **General provisions for arbitration proceedings**

(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

[7] Act 66 of 1995, as amended

[8] Subsection (7): **Within 14 days of the conclusion of the arbitration proceedings -**

(a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner;
(b) the Commission must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings; and;

[10] The contents of the award of the Arbitrator in this case in the light of the evidence presented before him takes the meaning of *'brief reasons'* to a new low level. An arbitrator's award for the purposes of review proceedings is a first indicator (usually from voluminous records) from which the reviewing court can have a sense of what the dispute was all about. I do not therefore understand *'brief reasons'* to mean that the award must be written in encrypted codes and one liners from which a reviewing court or ordinary reader cannot appreciate what the dispute was all about, what evidence was led, and how the arbitrator came to his or her conclusions. There is an obligation on arbitrators to at least make an attempt to summarise the salient features of the evidence presented, and to indicate how a decision was arrived at.

[11] From the transcribed record of proceedings, it is apparent that Briedenhann had testified at length and was also cross-examined. The Arbitrator nonetheless failed to have regard to, let alone make any effort to summarise that testimony in the award. It is therefore not known what facts or evidence were taken into account in reaching the conclusion that the actions of the Municipality were *ultra vires*.

[12] Briendehann in her opposition to the review application contended that the 'award embodies a reasonable decision or a decision that could be made by a reasonable decision-maker based on the evidence that was presented to the arbitrator'. I fail to appreciate how this can be the case in circumstances where the award is essentially silent on the evidence led, and when it is not clear from that award as to what had informed the Arbitrator's decision. Ordinarily, if the distorting effect of that misdirection is to render the result of the award unreasonable, it should be reviewable[9].

[9] See *Head of the Department of Education v Mofokeng [2015] 1 BLLR 50 (LAC)* at para 33, where it was held that;

> "Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order

[13] At issue, and as correctly pointed out on behalf of the Municipality, is whether senior employees that do not directly report to the Municipal Manager, are required to be granted a hearing before the City Council prior to being suspended, *i.e*., to have their suspensions effected in terms of clause 6 of the Local Government; Disciplinary Regulations for Senior Managers, 2010[10].

[14] Aligned to the above enquiry is whether employees whose contracts of employment stipulate that they are employed in terms of section 56 of the Systems Act, but do not however directly report to the Municipal Manager should nevertheless be treated as 'Senior Managers'.

[15] Briedenhann's case at the pre-suspension enquiry as evident from her representations was that her suspension was not warranted in that there were no justifiable reasons to believe that she had committed any misconduct. She had further contended that the allegations against her were baseless, and had denied that her continued presence at work could compromise the integrity of any investigation into the allegations against her[11].

[16] Significant with Briedenhann's consistent approach prior to the arbitration proceedings is a letter written on her behalf by IMATU on 8 September 2015[12], in which it was acknowledged that the suspension was in accordance with clause 18 of her contract of employment, and the Municipality was implored to comply with the provisions of clause 18.2 by giving her written reasons for the suspension, which reasons must be in line with the grounds of suspension as stated in clause 18.1 of the contract.

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would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[10] Notice 344, GG 34213 dd 21/04/2011

[11] Pages 50 – 59 of Index to Pleadings

[12] Page 14 of Index to the Record vol 1

[17] At the arbitration proceedings, her contention remained that her suspension was unfair in the light of her defences to the allegations against her. She had nonetheless for the first raised the issue that she was at level 4 and hence a section 57 employee. She had contended that in view of her position, her suspension, other than being unfair, was also unlawful, as it was it was not in accordance with the provisions of the Disciplinary Regulations for Senior Managers.

[18] It is apparent from the above that Briedenhann's case at the arbitration proceedings had changed tune from what it was at the pre-suspension hearing. It was argued on behalf of Briedenhann that the fact that she had not complained about the correct procedure being followed at the pre-suspension enquiry or the failure by the Arbitrator to that take into account was of no consequence. The reasoning behind this contention was that the Municipality equally sought to deal with this issue in these proceedings in its heads of argument, without having pleaded it as a ground for review in this matter. I agree with the submissions made on behalf of Briedenhann, as it is trite that a case cannot be made out in heads of argument, nor is it permissible to raise a new issue in review proceedings that was not raised in the arbitration proceedings[13].

[19] Significant however with this change of texture of Briedenhann's case was that it was the sole basis upon which the Arbitrator disposed of the matter. The Arbitrator's conclusions were that Municipality's actions in suspending Briedenhann were *ultra vires.* In the same breath, the Arbitrator had also held that the suspension was unfair in that it was not effected in accordance with the Regulations. It was submitted on behalf of Briedenhann that this conclusion was unassailable, based on the principle that an unlawful act will always be both procedurally and substantively unfair[14].

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[13] *Albany Bakeries Ltd v Van Wyk and Others (2005) 26 ILJ 2142 (LAC)*

[14] In reference to *SARS v CCMA and Others (Kruger) (2016) 37 ILJ 655 (LAC)* at para 33, where it was held that;

> 'It bears mention that, often, too much is made of the distinction between substantive and procedural unfairness. The distinction is a useful forensic tool, not a principle of law creating two separate concepts. The distinction ought not to be made to do work which distorts its usefulness. An unlawful act will always be, within the Labour jurisprudence paradigm, both substantively and procedurally unfair. A lawful act *may* be both substantively and procedurally

[20] It is accepted that there are fundamental differences between employer's acts that are allegedly unlawful, invalid, unfair or *ultra vires*. Briedenhann's case was that her suspension was unlawful. Unlawfulness within this context implied that the right or power of the Municipality to effect the suspension was subject to the Regulations that prescribed a designated process, which the Municipality had failed to follow before implementing that suspension. This is distinguishable from conduct that is *ultra vires*, in that the allegation therein would be that the functionary effecting the suspension did not have the powers to do so. The unfairness of the suspension on the other hand is a matter determined within the context of section 186 (2) (b)[15] of the LRA. The Arbitrator's conclusions that the Municipality's conduct in suspending Briedenhann was *ultra vires* based on the use of an incorrect procedure is at odds with what I understood her case to be.

[21] For the purposes of suspending 'senior managers', in terms of the Regulation or Senior Managers' Code, only a Municipal Council may suspend a *Senior Manager*[16] following upon certain procedures including that the Council must afford that Senior Manager seven days' opportunity within which to make written representations in respect of the intended suspension. The Council must thereafter consider the representations before confirming the suspension.

[22] Briendehann holds the view that she is a senior manager or section 56 employee on the grounds that her contract of employment says so, and

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unfair, and sometimes only one or the other. Sometimes a defective and thus unfair procedure may taint an enquiry so as to prevent a fair decision on a substantive issue from being taken. Sometimes, an unfair procedure does not get in the way of discerning a substantively fair dismissal.

[15] Section 186: Meaning of dismissal and unfair labour practice:

(1)…

(2) `Unfair labour practice' means an unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

[16] Defined as' municipal managers referred to in s 82(1) of the Municipal Structures Act or s 56 of the Systems Act.'

further based on the Municipality's concessions at the arbitration proceedings. In this regard, she contended that;

i. clause 2.1 of the contract, stipulates that she is employed in terms of section 56 of the Systems Act.

ii. Clause 3.1 stipulated that she should conclude a performance agreement with the Council as contemplated in section 57 of the Systems Act.

iii. Clause 6.6 of the contract makes reference to a performance bonus being paid to her in accordance with Regulation 32 of the Local Government Performance Regulations for Municipal Managers (2006);

iv. Clause 8.2 of the contract required of her to report to the Head of Department on such matters and furnish such information as the Council may from time to time require;

v. Clause 8.5 required of her to be responsible and accountable to the Municipal Council for the duties and responsibilities mentioned in that clause and any other duties in terms of her job profile;

vi. The fact that the contract of employment was signed by the Municipal Manager on behalf of the Municipality, the implications of which were that she was appointed as a *'manager accountable'* to the Municipal Manager within the meaning of section 56.

vii. The concessions made by the Municipality at the arbitration proceedings that she was indeed a section 57 employee, and the failure by the Municipality to explain to the Arbitrator, the reason she should not, as a section 57 employee, be entitled to any rights that such employees are entitled to;

viii. The failure of the Municipality to explain the reason she was appointed as a manager accountable to the Municipal Manager, or the reason a fixed term contract could not be concluded with her without making

reference to a section 56 status if the intention was not to appoint her as such.

[23] The starting point in addressing Briedenhann's contentions is that to the extent that she and the Arbitrator held the view that she was to be suspended in accordance with the Regulations, a '*senior manager'* in Chapter 1 (Definitions), is defined as;

(i) A municipal manager referred to in section 82 (1) of the Local Government Municipal Structures Act, 1998 (Act No. 177 of 1998)[17]

(ii) A manager referred to in section 56 of the Act (Municipal Systems Act)[18]

[24] A *'Senior Manager'* in the *Regulations on the Appointment and Conditions of Employment of Senior Managers*[19] is further defined as;

> *'a municipal manager or acting municipal manager, appointed in terms of section 54A of the Act, and includes a manager directly accountable to a municipal manager appointed in terms of section 56 of the Act'*

[25] A reading of the above Regulations clearly indicate that a senior manager can only be a municipal manager, or an acting municipal manager. Within the context of section 56 (1) (a) of the Systems Act, it can only be in reference to an acting manager or a manager *directly accountable to a municipal manager*. No other meaning can be attributed to '*directly accountable'* other than its ordinary meaning.

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[17] Section 82 (1) provides that;

Appointment

82. A municipal council must appoint—

(a) a municipal manager who is the head of administration and also the accounting officer for the municipality: and

(b) when necessary, an acting municipal manager.

[18] Local Government; Disciplinary Regulations For Senior Manager, 2010 (Published under Government Notice 344 in Government Gazette 34213, dated 21 April 2011 Chapter 1. Definitions under (1) (j).

See also (Regulations on the Appointment and Conditions of Employment of Senior Managers on which defines 'senior manager' as

'a municipal manager or acting municipal manager, appointed in terms of section 54A of the Act, and includes a manager directly accountable to a municipal manager appointed in terms of section 56 of the Act'

[19] 17 January 2014 (GG No. 37245) (GN No. 21)

[26] A reading of Briedenhann's contract of employment and the clauses relied upon point to her being appointed in terms of section 56 of the Systems Act. To meet the requirements for the appointment of a *manager directly accountable* to the Municipal Manager under section 57 of the Systems Act, there must have been a written contract of employment and a separate performance contract[20]. These requirements were met in this case.

[27] *Prima facie*, the provisions in the contract of employment suggests that Briendenhann is section 56 employee. It was argued on her behalf that her appointment as an employee directly accountable to the Municipal Manager was a question of fact, and that the debate should end at that point. Inasmuch as one cannot quarrel with the premise that whether an employee is directly accountable to a Municipal Manager is indeed a question of fact, the matter however does not end there. Those facts should be examined to determine whether indeed an employee is '*directly accountable'*, as well as other legal considerations.

[28] On the facts, I did not understand Briedenhann's case to be that she reported directly to the Municipal Manager. Her contract in any event stipulates that she must report to the HOD. Clause 8.5 of her contract stipulates that she shall be responsible and accountable to the Council for such duties and responsibilities in terms of the job profile agreed upon. It cannot be read into this clause as suggested on her behalf, that it should be concluded that she was *'directly accountable'* to the Municipal Manager. Equally so with clause 8.2, which stipulates that she shall report to the HOD. It cannot be read into that clause that she should only report to the HOD on a limited scale and therefore not entirely accountable to him as suggested on her behalf.

[29] Every employee of the Municipality in whatever capacity is clearly responsible and accountable to the Municipal Council. It would therefore be untenable if all of them were to be assumed to be *'directly accountable'* to the Municipal Manager based purely on the say-so of contractual provisions, when the facts surrounding their employment and reporting lines indicate something else. From an administrative, hierarchical and logistical point, it makes sense to

[20] *Dihlabeng Local Municipality v Nthute and Others* [2009] JOL 23108 (O) at para 22

conclude that it cannot be correct that Briedenhann was *'directly accountable'* to the Municipal Manager within the meaning of section 56, when her role and reporting line does not require of her to directly report to the Municipal Manager. This even makes more sense for the purposes of discipline and performance management. In this case for example, and to the extent that Briedenhann was to be performance managed or disciplined, how could it have been expected of the Municipal Manager to take steps in that regard when she was not accountable or did not directly report to him or her. Thus, the mere fact that in accordance with clause 8.5 she is accountable to the Municipal Council, does not imply that in terms of reporting lines, she is directly accountable to the Council either.

[30] From trite legal principles, and in view of the issues for determination before the Arbitrator, an employee's right not to be unfairly suspended is fully and only determined by the provisions of the Labour Relations Act, subject to all the limitations in the Labour Relations Act. That right cannot therefore be implied into that employee's contract of employment or disciplinary code or other regulatory provisions dealing with suspensions[21]. This principle was succinctly set out in *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[22] as follows*;*

> 'The right to a hearing prior to a precautionary suspension arises therefore not from the Constitution, PAJA or as an implied term of the contract of employment, but is a right located within the provisions of the LRA, the correlative of the duty on employers not to subject employees to unfair labour practices. That being the case, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights.'

[31] In line with the above, and to the extent that the issue for determination before the Arbitrator was whether the suspension of Briedenhann constituted an unfair labour practice within the meaning of section 186 of the LRA or not, it follows that what was before the Arbitrator was whether the suspension was

[21] See *Mayaba v Commission for Conciliation Mediation And Arbitration and Another (J2204/2014) [2014] ZALCJHB 364 (19 September 2014*) at para 35 and the authorities referred, more specifically, *South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA)*
[22] (2012) 33 ILJ 2033 (LAC) at para 39

procedurally and substantively fair. Thus, even if as argued on behalf of Briedenhann that an unlawful act may be procedurally and substantively unfair, the enquiry, contrary to the Arbitrator's approach did not end at whether the suspension was lawful or not in view of the dispute referred and the primary issue he was called upon to determine.

[32] In the light of the conclusions reached that Briedenhann could not on the facts have been employed as a '*Senior Manager'* or a *manager directly accountable* to the Municipal Manager, the provisions of clause18[23] of her contract of employment merely provided a procedure to be followed in effecting her suspension, read together with the provisions of clause 14 of the DPCCA.

[33] In so far as the suspension of Briedenhann was effected in accordance with clause 18 of her contract of employment, and to the extent that it is concluded in this judgment that this was the correct procedure to follow, on the substantive leg of the enquiry, the nature of the allegations of misconduct against Briedenhann were sufficiently and in detail, set out in the notice of intention to suspend her as issued on 1 September 2015.

[34] The Municipality had on 7 and 11 September 2015, furnished her with details in regard to the allegations, and the reasons her suspension was necessary. I am therefore satisfied that for the purposes of addressing a *prima facie* case of alleged misconduct, the gravamen of the complaint was sufficiently clear to Briedenhann for her to put a *prima facie* case rebutting the allegations. There

[23] Which states that;

'18.1 The employer may suspend the employee on full pay if the employee is alleged to have committed a serious misconduct and the Employer believes that the continued presence of the employee at the workplace might jeopardise any investigation into the alleged misconduct or endanger the well-being or safety of any person or municipal property provided that before the employee is suspended as a precautionary measure, he/she must be given an opportunity to make representation on why he/she should not be suspended.

18.2 The employee who is to be suspended must be notified, in writing, of the reasons for his/her suspension simultaneously or at the latest within 24 hours after the suspension. The employee shall have the right to respond within 7 (seven) working days.

18.3 If the employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within 90 (ninety) days of the date of suspension, provided that the chairperson of the hearing may extent such period, failing which the suspension must be terminated in writing and the employee must return to full duty'

is further no reason to believe that the allegations against Briedenhann were not serious enough to warrant her removal from the workplace pending further investigations.

[35] In respect of the procedural leg of the enquiry, I did not understand Briedenhann's case to be that she seriously disputed that she was indeed notified of the intention to suspend her. She was invited to a pre-suspension inquiry; was duly represented at that enquiry; and was furnished with sufficient details to enable her to make representations as to why she should not be suspended. She had also made representations as to the reason she could not be suspended, and was also furnished with detailed reasons for her suspension. In the light of these factors, I fail to appreciate how it can be said that her suspension was unfair.

[36] In *Member of the Executive Council for Education North-West Provincial Government v Gradwell*[24], it was held that an opportunity to make written representations showing cause why a precautionary suspension should not be implemented, will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness. In this case, and in the light of the factors already considered, I am of the view that indeed there was not only adequate, but also substantial compliance with procedural fairness leading to Briedenhann's suspension.

[37] To conclude then, senior employees that *do not directly* report to the Municipal Manager, are not required to be granted a hearing before the City Council in accordance with the Regulations prior to being suspended, unless they satisfy the definition of *'senior employee'* as contained in the Disciplinary Regulations for Senior Managers. Equally so, the mere fact that an employee's contract of employment makes reference to the employment being in terms of section 56 of the Systems Act, is not an end in itself. Such a provision does not necessarily turn an employee into a '*senior manager directly accountable'* to the Municipal Manager, unless the surrounding facts of that employee's employment dictate otherwise. To this end, the decision reached by the Arbitrator that Briedenhann's suspension was either unfair or

[24] [2012] 33 ILJ 2033 (LAC*)* at para 44

that the Municipality's conduct in suspending her was *ultra vires*, is a decision that does not fall within a band of reasonableness, and thus ought to be set aside.

[38] Further in the light of the above conclusions and the material placed before the Court, I am in agreement with the submissions made on behalf of the Municipality that the Court is in a position to finally dispose of the matter. Given the circumstances of this case, the most appropriate relief to be granted is to review the Arbitrator's award and to substitute it rather than remitting the matter back to the First Respondent. I however have no grounds to interfere with the Arbitrator's order regarding costs payable by the Municipality to the First Respondent despite the latter not opposing the application. This is so in that no case was made out in the papers by the Municipality in that respect. There is further upon a consideration of the requirements of law and fairness, no need for a cost order to be made in respect of this application in the light of the ongoing relationship between the parties.

Order:

[39] In the premises, the following order is made;

1. The arbitration award issued by the Second Respondent dated 24 November 2015 under case number GPD 091508 is reviewed, set aside and substituted with an order that;

   'The precautionary suspension of Sanmarie Briedenhann did not constitute an unfair labour practice within the meaning of section 186 (2) (b) of the Labour Relations Act'

2. The Second Respondent's award in respect of costs of the arbitration payable by the Applicant stands.

3. There is no order as to costs in respect of this application.

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E. Tlhotlhalemaje
Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv. Zinhle Ngwenya with Adv. Greg Fourie
Instructed by:	Tshiqi Zebediela Inc
On behalf of the Third Respondent:	Mr. VG Mkwibiso of IMATU