**Before the South African Local Government Bargaining Council.**

**In the matter between:**

**Case Number: EMD111712**

**JM SHANDU**

**M BULOSE**

**E MABITSELA**

**S MTOLO** **Applicants.**

**and**

**ETHEKWINI METROPOLITAN MUNICIPLAITY**

**(METRO. POLICE)** **Respondent.**

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**Award**

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**Introduction.**

The hearing before me in this matter commenced on the 23rd of July 2018 and continued for a number of days. The applicants were represented by Mr D Khanya, a SAMWU shop steward and the respondent was represented by Senior Superintendent V Singh (SS Singh). I am grateful to both Mr Khanya and SS Singh for their helpful submissions and assistance. The parties drafted and submitted a pre-arbitration minute. It is common cause that the applicants are employed by the respondent as constables and were suspended on full pay from 11th of September 2017 to the 11th of December 2017. It was alleged that they failed to report for duty when instructed to do so. The applicants returned to work on the 11th of December 2017 and were acquitted at subsequent disciplinary proceedings of failing to

comply with lawful instructions. The respondent took issue with the correctness of the decision to acquit the applicants made on the 19th of June 2018 but the decision of the presiding officer remains undisturbed.

**The issue:**

The applicants contended that their suspensions were unlawful because the person who took the decision to suspend them was not legally authorised to do so and further that the decision to suspend them was substantively unfair. They submitted further that as a consequence of the suspension they have suffered financial and reputational prejudice and now seek an order declaring the suspension to be unlawful and to be compensated as a consequence. The issue that falls for determination is whether the suspension of the applicants was unfair. The key question is whether there was a fair basis to suspend the applicants and whether it was done in a procedurally fair manner.

**The witnesses**

Constables Mabitsela and Shandu testified initially on behalf of the applicants. They thereafter called Captain Khethukuthula Khuzwayo (K Khuzwayo) and Senior Superintendent Mthetwa to support their arguments. The main witness for the respondent was Deputy Head Mchunu (DH Mchunu). Ms Thembi Sihiya, Inspector L Ngubane, Senior Superintendent P Sewpersad and Inspector T Mdunge testified next for the respondent. At the request of the applicants, Senior Superintendent E Khuzwayo and Director A Dove were subpoenaed and testified. I do not propose summarising the evidence of each of the witnesses as their evidence has been recorded. I will refer to the evidence of the witnesses in my analysis when determining the issues to be decided.

Bundles of documents were handed up and as I will be referring to the documents in the course of this award, it is necessary to describe them.

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| Bundle A | Applicant's Bundle |
| Bundle B | Respondent's Bundle |
| Bundle C | Ruling of the Disciplinary Hearing |
| Bundle D | Labour Court Application |

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| Bundle E | Letter from Macgregor Erasmus Attorneys and other documents |
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**Analysis of the evidence relating to the substantive fairness of the suspension**

The applicants, in an e-mail dated 22nd August 2017,[1] were informed that they were to be deployed to the North Region to assist with traffic congestion caused by the construction of the Gateway Bridge. They were to work under the command of Regional Commander Eric Khuzwayo. The applicants did not report for duty. In the arbitration before me, they argued that the e-mail, which was read to them by Captain K. Khuzwayo, had no date by which they had to report to the North Region. Further they submitted that they were awaiting feedback from Captain K Khuzwayo as to when they should report to the North Region. Captain K Khuzwayo testified that he was awaiting word from Director Dove as to when the deployment was to take effect after he (Captain K Khuzwayo) requested clarity from him.

The respondent contended that the applicants directly defied and refused to abide by an instruction and were thus insubordinate. It was submitted on behalf of the respondent that the applicants defied the order because it had been issued by DH Mchunu. In deciding whether the suspensions were substantively fair, I need to determine whether on a balance of probabilities there were fair reasons for the respondent to form the view that the applicants defied an instruction or whether the applicants were genuinely uncertain about the date when they were meant to assume their duties in the North Region.

Further, the applicants alleged that their notices of suspension were signed by SS Singh and that in terms of the Standard Operating Procedure Guidelines (SOPG), she was not authorised to do so. Mr Khanya indicated that the testimony of Constables Mabitsela and Shandu would apply to all the applicants as the material facts are the same. He thus indicated that there would be no necessity to call all the applicants.

Constable Mabitsela has been a constable for about 10 years. He was stationed at Crowd Management Control. It is alleged that one of the supervisor's, Captain Spilsbury, used the

[1] . Page 2 of Bundle B.

highly racist and derogatory term, kaffir, when referring to a colleague of Mr Mabitsela. A complaint was lodged and the applicants and others was relocated to the Head Quarters. At the time the complaint against the supervisor was lodged, DH Mchunu was the divisional commander and was given the responsibility of dealing with the complaint. When the then head of Metro. Police, Mr Nzama retired at the end of July 2017, the applicants were told to report to Albert Park and did so. The instruction to move from the head-quarters to Albert Park came from Director Dove and was communicated to the applicants by Captain K Khuzwayo. So it is apparent that the applicants complied with a directive to move from head-quarters to Albert Park in August 2017.

Constable Mabitsela testified that Captain K Khuzwayo read out the contents of the email sent by DH Mchunu to them on or about the 22nd of August 2017. I can therefore accept that all the applicants were familiar with the contents of the e-mail.

Constable Mabitsela was clearly unhappy with the manner in which DH Mchunu had conducted the investigation into the allegations of the racist and derogatory language allegedly used against a fellow colleague. He testified that DH Mchunu did not investigate the matter effectively. The alleged racist utterances clearly angered the applicants. The fact that they decided to approach the former head of Metro Police through their captain is further evidence of their unhappiness with the manner in which DH Mchunu investigated the allegations. Their dissatisfaction with the manner in which DH Mchunu investigated the allegations of racism is a material factor in this matter. It emerged on the 2nd day of the hearing, that the complaint of using racist and derogatory terms against Captain Spilsbury was dismissed. Further the 3 officers who made the allegation were also disciplined for making unfounded allegations. Thus, as the facts stand at the moment, I must proceed on the basis that a disciplinary hearing had concluded that these officers had made false allegations against a colleague and that Captain Spilsbury had not made the racist and derogatory comments. It also bears mentioning that the supervisor who is alleged to have uttered the racial slurs was based at the Crowd Management Control Unit.

In terms of the e-mail of the 22nd of August 2017, the applicants were required to relocate to the North and would have been under the supervision of Captain Eric Khuzwayo. They would not be reporting to or be under the supervision of the officer against whom the allegations of uttering racist comments had been levelled. There was thus no direct link between the

applicants being deployed to the North and the investigation into the allegations of racist utterances.

The main issue is whether the applicants, either because of their unhappiness with the manner in which DH Mchunu conducted the investigation or as a result of their perception that the deployment was not lawful, decided not to abide by his instruction to move to the North, or whether the applicants were genuinely unaware of the date on which the redeployment was meant to take effect.

The objective documentary evidence provides a useful starting point. On the 29th of August 2017, Macgregor Erasmus Attorneys[2], acting for the applicants, wrote to the respondent asking that the deployment be stopped. The second paragraph[3] of the letter reads:

> We are instructed that our client's members were simply told that they would be redeployed to alternative regions/units on or about 25 August 2017, in an email authored by your Acting Deputy Head: Operations ahd (sic) that upon their arrival for duty this morning, 29 August 2017, they found their names removed from the duty sheet.

The authors refer to the e-mail of the 25 August 2017 on a few occasions and it appears that this is an error and that they intended to refer to the e-mail of the 22 August 2017. I am satisfied that no pertinent e-mail regarding the transfers/redeployments was sent on the 25th of August 2017. Both parties accepted that this was an error and that reference ought to have been made to the e-mail of the 22 August 2017. In the founding affidavit reference is correctly made to the email of the 22nd of August 2017. It is clear from an analysis of the contents of the letter, that the authors intended to refer to the e-mail of the 22nd of August 2017 and erroneously referred to it as the e-mail of the 25 August 2017. In a subsequent paragraph[4] the following is stated:

> In the circumstances, our client's members are under no obligation to report for duty as per the email of 25 August 2017 instructing them to do so. Our client's members will continue to report for duty and to tender their services in accordance with the undertaking given by the former Head: Metro Police, Eugene Nzama, on the 19 April 2017.

[2] Bundle E
[3] . Page 1 of Bundle E
[4] . Page 2 of Bundle E

The only reasonable interpretation is that the members represented, including the applicants, had decided to report for duty in accordance with the undertaking given by the former head and not comply with the deployment instructions contained in the e-mail of the 22nd of August 2017.

The conclusion that they are under no obligation to report for duty in terms of the instructions contained in the e-mail of the 22nd of August 2017 is reached, according to the authors of the letter, because there was no compliance with the Secondment and Transfer Policy. They point out that their clients were not afforded at least one month's notice of the transfer, the decision to redeploy was not approved either by the Deputy City Manager or the City Manager and that no consultations took place with the affected members.

It does appear that the applicants knew that the e-mail of the 22nd of August 2017 required them to report for duty to their new places of deployment with immediate effect but chose not to do so. No mention is made anywhere in the letter from Macgregor Erasmus that the applicants were unsure of the date on which the redeployments were to take effect. In addition, no mention is made of them awaiting a response from anyone in authority to a request for clarity about the dates. If they were uncertain about the contents of any aspect of the e-mail they could have requested clarity. However they adopted an emphatic and unequivocal approach. They would not report for duty as per the e-mail but would continue reporting for duty in accordance with the arrangements made by the previous head. The only reasonable interpretation that can be ascribed to the contents of the paragraph of the letter is that they felt that they are not legally obliged to report as required in the e-mail of the 22nd of August 2017 and that they would report in terms of the instructions given by the previous head. The letter provides a reason for the applicants not complying with the instructions contained in the e-mail of the 22nd of August 2017.

Also of significance is the statement in the letter from Macgregor Erasmus that the applicants realised when they reported for work on the 29th of August 2017 that they were taken off the duty sheet. Director Dove explained that this probably occurred as a result of him requesting Captain Hugo of his duty office to liaise with the duty office of the other regions to facilitate the movement of the members. He assumed that Captain Hugo had done that and hence the applicants were no longer on the duty sheet on the 29th of August 2017. According to Director Dove's uncontradicted evidence, if the applicants were not on the Albert Park duty schedule,

they would have to be on some other duty schedule. He further testified that if they did not appear on any duty schedule, there would be a difficulty paying them. Their removal from the Albert Park duty schedule occurred soon after the e-mail of the 22nd of August 2017 was issued. It was reasonable for the applicants to infer that they were being placed on the duty schedule of the North Region after the 29th of August 2017. Having being removed from the Albert Park duty schedule, they could not reasonably believe that they could continue reporting to Albert Park after the 29th of August 2017. It was this realisation that prompted their attorneys to demand an undertaking from the respondent 'retracting the decision to redeploy them.'[5] It is clear that the applicants concluded that the decision to redeploy them had been made and in the letter from McGregor Erasmus were seeking a retraction of that decision. If a decision had not already been made, there would have been no need for the applicants to demand a retraction of the decision to redeploy them.

They requested an undertaking by or before 1 September 2017 that their clients would not be deployed as conveyed in the e-mail. As this letter was written on the 29th of August 2017, the respondent was given a few days to respond. In response, in an undated letter, the respondent categorically stated that disciplinary action would be taken against the applicants 'should they persist with refusing to follow instructions.'[6] It is clear from the founding affidavit that this letter from the respondent was received on the 1st of September 2017. [7] This was a clear statement that, from the respondent's perspective, the applicants were refusing to follow instructions. Further there was an unequivocal and clear warning to the applicants that if they persisted with their refusal to follow instructions, disciplinary proceedings would be taken. Importantly the head of legal services informed the applicants that the transfer policy that they were relying upon had no application to this matter. They was thus informed by the respondent that they could not rely on the Secondment and Transfer of Employees Policy as a justification for not reporting as directed in the e-mail of the 22nd of August 2017.

I am satisfied that the applicants were fully aware, at the very latest by 1st September 2017, that they were supposed to report to the North region and they were in breach by failing to do so. The real reason for the applicants' not complying with the instructions contained in the

[5] . page 2 of Bundle E
[6] . page 6 of Bundle B.
[7] . Para 27.3 of Bundle D

e-mail of the 22nd of August 2017 emerges clearly from the letter of their attorneys. The applicants did not move because they felt that they were not being treated in accordance with the applicable policy. They persisted in this refusal despite the respondent informing them that in its view the Secondment and Transfer of Employees Policy had no application to their matter. This is wholly incompatible with the explanation that they did not move to the North region because they were unsure of the exact date when they were supposed to report to the North Region.

After the applicants received the response from the respondent's head of legal services that disciplinary action would be taken against them if they persisted with refusing to follow instructions, they launched the application in the Labour Court to interdict their redeployment. [8] This application is important because it indicates the contemporaneous thinking of the applicants at the time the e-mail of the 22nd of August 2017 was received. The application was brought on an urgent basis and in essence the applicants sought an order interdicting and restraining the respondent [9]' from unilaterally deploying / transferring / seconding the applicants pending the outcome of the referral to the Bargaining Council…' This urgent application was brought on behalf of a number of police officers including the applicants in the matter before me. The contents of the application, including the founding affidavit deposed to by Constable S Gxekwa therefore applies directly to the four applicants before me.

In essence the applicants, in the application to the Labour Court, argued that the secondment and transfers that were to be effected in accordance with the e-mail of the 22nd of August 2017 were contrary to the eThekwini Municipality Guidelines on the Secondment and Transfer of Employees. It was also apparent from the evidence of SS Eric Khuzwayo that there is a belief amongst some of the police officers that the transfer/deployment that occurred in terms of the e-mail of the 22nd of August 2017 was not in accordance with the secondment policy. The affidavit[10] deposed to by Constable S Gxekwa under the heading 'Reasonable apprehension of harm' states:

[8] . Annexure D contains the notice of motion and founding affidavit.
[9] . 3rd page of Bundle D
[10] . Para 26 of Bundle D

We submit that there is a real apprehension of harm that the intended deployment will adversely affect the Applicants for the following reasons:

1. Travelling to
2. Additional travelling time
3. Incurred costs
4. Time away from families.
5. The real one being that as at the 5th of September 2017, we have received word that should we, as the applicants, refuse to take our redeployed positions, we shall be subjected to disciplinary enquiry which effectively one can surmise amounts to insubordination and perhaps even gross dereliction of duty, which are both considered serious offences may (sic) well result in the Applicants being dismissed from the employ of the First Respondent.

Under the heading "No Alternative Remedy'[11] the following is stated:

> On or about the 22 August 2017, the Applicants referred a dispute to the South African Local Government Bargaining Council alleging the unilateral change to terms and conditions of employment alleging that the dispute arose on 22 August 2017, which was the same date of the email attached hereto send by the Third Respondent. The result that we seek in that referral is that the Applicants remain in their current present working areas pending the representations and or discussions with regards to the changes to the areas of their work and their conditions.

Further para 27.2 stated:

> In addition to the above, a letter was send to the Second respondent on 29 August 2017 which was brought to the Third Respondent's attention, … that the impending/purported transfers to deploy of (sic) the applicants could not go ahead due to the short notice given, the implications thereof if they proceeded with it, which would be in violation of the policy and an endeavour to give us an undertaking by no later than 4 pm on Friday, 1 September 2017 that they would not proceed with the intended deployments/ transfers until such time that this matter had been resolved either by way of referral or between the parties themselves.[12]

The affidavit[13] then refers to a response from the Legal Services Department of eThekwini dated the 1 September 2017 saying that the guidelines are of no application. Importantly the letter [14]also states:

> Please be advised that the transfer policy has no application in this matter, since your clients were redeployed within the Metro Police unit for operational reasons.

[11] . Para 27.1 of Bundle D
[12] . This paragraph is quoted verbatim from the founding affidavit.
[13] . Para 27.3 of Bundle D
[14] . Page 6 of Bundle B. Although the letter in the bundle is undated, when read with the affidavit, it is clear that it was sent on the 1st of September 2017.

Finally under the heading 'Urgency' the founding affidavit stated:[15]

> I submit that it is self-evident that this application is urgent not only due to the financial and personal hardships that the Applicants will face but also the possibility of disciplinary action which the Respondents have suggested, not necessarily by way of correspondence but way (sic) of discussions that were heard around the workplace that we may face disciplinary actions if do we (sic) not adhere to the instructions of the Third Respondent in his letter dated 22 August 2017 …

The applicants brought an urgent application to prevent the respondent from implementing the deployment/ transfers. There is no mention in the founding papers of any uncertainty as to when the deployments were meant to take place. It is apparent that they were told as at the 1st of September 2017 that disciplinary action would be taken should they persist with refusal to follow instructions. Implicit in this statement is that by not reporting as directed they were refusing to follow instructions. On their own admission, it was clear that disciplinary action was pending for a failure to 'adhere to the instructions of the Third Respondent in his letter dated 22 August 2017.' They sought an urgent interdict not because of any uncertainty regarding the terms of the e-mail of the 22nd of August 2017 but because they believed that the deployments were in violation of the policy and prejudicial to them. They sought an urgent interdict to stop the respondent transferring/deploying or seconding them. Had the interdict been granted, it would have provided a legal basis for them not to move until the referral to the Bargaining Council was finalised. They were unsuccessful as the Labour Court found that the application lacked urgency.

In his testimony, Constable Mabitsela stated that that they went to court because they wanted the allegations regarding the racist comment investigated first before the transfers took place. His evidence that they were prepared to be deployed immediately if there was clarity about the date is inconsistent with the reason for bringing the application for an interdict. It was the unhappiness with the transfer/ deployment that prompted them to bring the application which they paid for themselves. Given that they brought an application to interdict the transfers/deployment on the basis that it did not comply with the Secondment and Transfers of Employees Policy, it is most improbable that they would have accepted the redeployments if dates upon which they were to report for duty were stated in the e-mail.

[15] . Para 28 of Bundle D

The wording of the letter from McGregor Erasmus and the founding affidavit indicate clearly that the applicants felt that DH Mchunu was not acting in accordance with the Secondment and Transfers Policy. This was the real reason for their non-compliance with the instructions contained in the e-mail of the 22nd of August 2017.

Constable Mabitsela was repeatedly asked why he and the other applicants did not seek clarity from DH Mchunu. His response was that they were waiting for Captain K Khuzwayo to get back to them as to the date on which they were meant to report. Similarly when Constable Shandu testified, he offered the same explanation. These explanations are unconvincing. Captain K Khuswayo was also aggrieved by the decision to transfer/deploy made on the 22nd of August 2017 and was one of the applicants that sought an urgent interdict. Given that he and others were seeking to stop the deployment, it is most unlikely that he would simultaneously be making efforts to give effect to it. As the applicants were part of the legal initiative to stop the transfer/deployment, they must have realised this.

In addition, Captain K Khuzwayo testified that he had directed this query to Director Dove and was awaiting a response from him. However Director Dove's evidence contradicted this. Director Dove recalled having a meeting with representatives of the applicants on a Friday which was probably the 18th of August 2017. The applicants and others had been moved from the Multiple Operations Response Team (MORT) to Head Office after the allegation that racist language had been used. After the then head left Metro. Police, the applicants were unsure as to where to report and did not want to return to MORT, if Captain Spilsbury was not removed. After a discussion with DH Mchunu, Director Dove deployed the applicants to Albert Park for the week-end until the matter was addressed more fully. Director Dove considered the e-mail of the 22nd of August 2017 which he received later, after that week-end, as providing the necessary instructions. He went on to state that once he received the e-mail, he informed his duty officer, Captain Hugo, to liaise with the Duty Office of the regions to which the applicants were to be deployed, to facilitate the movement of the members. He was satisfied that Captain Hugo had done that.

He stated that after he forwarded the e-mail of the 22nd of August 2017 to Captain Hugo, he put the issue out of his mind as he was of the opinion that the members would be deployed in accordance with the instructions. He testified that he was not informed either by Captain Hugo or by Captain K Khuzwayo that the members were still reporting to Albert Park after the

22nd of August 2017. Director Dove was categorical that he could not understand why Captain K Khuzwayo would say that he (Captain K Khuzwayo) was awaiting further instructions and clarification from Director Dove after the receipt of the e-mail of the 22nd of August 2017. Director Dove testified that had Captain K Khuzwayo requested clarity about the date of the deployment, he would have remembered that and would have responded. According to Director Dove, he could not recollect any such request. He stated that he had not promised Captain K Khuzwayo any feedback.

I am satisfied that it would have been entirely irresponsible of Director Dove not to respond had such a request been made. It would also have been very easy for him to have followed up, had the request been made. Further had the request for clarity about the date been made, it is most unlikely that Director Dove would have asked Captain Hugo to liaise with the duty office of the regions to which the applicants were to be deployed to facilitate their movement without first getting the required clarity. The fact that Director Dove took the view that the matter was closed and that the applicants were to report to the North region as directed suggests, on a balance of probabilities, that no request was made for clarity as to the date by Captain K Khuzwayo.

DH Mchunu testified that Director Dove did not ask him when the members were meant to report to the North thus corroborating Director Dove in this context. Accordingly I find that Captain K Khuwayo did not seek clarity from Director Dove as to when the members were meant to report to the North.

Further DH Mchunu testified that Captain K Khuzwayo discussed the deployment with him and requested that he be transferred to the training section. This request was declined but according to DH Mchunu there was no discussion about uncertainty regarding the date of the deployment. If the applicants were genuinely uncertain about when they were meant to report to the North Region, Captain K Khuzwayo would have discussed this with DH Mchunu when he had the opportunity. It is clear that he did not do so. I therefore reject the evidence of Captain K Khuzwayo that he had made enquiries and was awaiting a response about the date of deployment from Director Dove. The facts simply do not support this version.

As stated earlier, it is apparent from the evidence that the real reason for not complying with the instructions contained in the e-mail of the 22nd August 2017 was that the applicants felt

that there was a failure to comply with the provisions of the Secondment and Transfer Policy. This was further confirmed by an e-mail[16] sent by Captain Justice Radebe to SS Eric Khuzwayo on the 1st of September 2017. In the e-mail, Captain Justice Radebe states[17]:

> For your information PC Mtolo. book off sick OB. number 897851 and PC Bulose 4xdays leave and the following two members (PC Mabitsela and J Shandu) did not report on duty this morning then I contacted them via cell phone and they advised me that they are instructed by union rep and their Attorney to carry on report to Central under Capt. Khuzwayo.[18]

Both sides accepted the veracity and authenticity of the e-mails. It is apparent that it was anticipated that Constables Mabitsela and Shandu would report for duty in the North Region but did not do so. Importantly Constables Shandu and Mabitsela are recorded as saying that they were instructed by their union representative and attorney to report to the Central region. This is in accordance with what McGregor Erasmus stated in their letter of the 29th of August 2017. The applicants thus consciously chose to act in accordance with the advice given to them by their union representatives and attorneys.

Constable Mabitsela denied having any conversation of this nature with Captain Radebe, However Constable Shandu confirmed that he had a conversation with Captain Radebe. Constable Shandu confirmed that he informed Captain Radebe that they were at Albert Park and that the issue of the transfer was with the courts and that he (Captain Radebe) should speak with Captain K Khuzwayo. There was thus a direct refusal on the part of Constable Shandu to abide by the deployment. If the real reasons for the applicants not moving to the North region was the uncertainty about the date of when they should report, I would have anticipated that Constable Shandu would have informed Captain Radebe about this. But it is clear from the evidence that this did not happen.

After having received the letter from the respondent denying that the Secondment and Transfer Policy had any application and warning of disciplinary proceedings if the applicants persisted with their refusal to follow instructions, the applicants then launched their application to interdict their deployment. This application was dismissed for lack of urgency.

[16] . Page 5 of Bundle B
[17] . I quoted verbatim from the e-mail
[18] . I quoted verbatim from the e-mail.

Also of importance is the e-mail sent by the Acting Deputy Commissioner Mchunu dated 22nd August 2017. The applicants quite correctly stated that there is no date mentioned in the e-mail as from when the deployment is to occur. DH Mchunu explained that he could not put down a specific date as some members may have been on their rest days. He was unsure when all the members were meant to report for duty after their rest days.

The applicants emphasised that the language used in the e-mail suggested that the deployment was to occur at a future date. They pointed out that in respect of them, the e-mail stated[19]:

> The following members *will be deployed* to the North Region to assist with the Traffic congestions in the construction of the Gateway Bridge under the Command of Regional Commander Eric Khuzwayo. (my emphasis)

The argument made by the applicants was that there was no unequivocal instruction that they were to report to the North region immediately. DH Mchunu testified that he had met with various police officers, including the 4 applicants, on the 18th of August 2017. At the meeting he informed them that they would be moved immediately from Logistics to Operations and would report to Director Dove at Albert Park. DH Mchunu testified that in Logistics, there was no proper chain of command and that the members appeared to have a free reign with very little accountability and hence the decision to transfer them immediately to Albert Park. He also testified that at this meeting, he informed the members that the deployment to Albert Park was temporary and that a further deployment would be forthcoming. Thus the applicants were informed that the current deployment to Albert Park was temporary and that they would be told of further deployments.

The e-mail of the 22nd of August 2017 did exactly that. The tone and text of the e-mail when assessed holistically indicates that the members were to move immediately. The e-mail commenced by explaining that high level meetings were held and it was decided that certain areas 'need intensified police presence.' It is clear from this statement that the identified areas currently needed an intensified police presence. The deployments were deemed necessary to meet clearly identified policing responsibilities and duties. It is apparent that these were current responsibilities and had to be addressed.

[19] .Page 2 of Bundle A

Also of importance is the last paragraph of the e-mail which reads as follows[20]:

> Any member with concerns regarding the deployments must comply and report where he or she has been deployed but make representations individually as to personal circumstances which may inconvenience his deployment or his person. The office of the Deputy head Operations will consider his representations and may review the deployment.

This is an instruction requiring members to comply with the deployment and report to where ' he or she has been deployed' and then to make representations individually to the deputy head. This clearly indicates that the decision to deploy had been made and that members needed to report to where they had been deployed. If the e-mail intended to convey that the members would be deployed at some future date, there would be no necessity for representations to be made after the deployment. If there was to be a time period between the 22nd of August 2017 and the date when members were meant to report for duty at their new posts, representations could have been made during this time period. The fact that they were told to make representations after complying is an indication that the deployment was to occur immediately when they reported for duty

It is also relevant that the majority of members reported for duty in accordance with instructions contained in the e-mail of the 22nd of August 2017. According to DH Mchunu's evidence, about 6 to 8 members stationed at Albert Park did not adhere to the instructions. So it is clear that the majority of members did not share the apparent confusion of the applicants as to when they had to report for duty. Neither did Director Dove. DH Mchunu also indicated that officers had made representations to him about being financially prejudiced by the move and that he had implemented measures to address their concerns. He also testified that he refused a request from Captain K Khuzwayo to be deployed to the training section. DH Mchunu confirmed that no mention about a confusion of the date of the deployment was mentioned in the Labour Court.

I am satisfied that the e-mail of the 22nd of August 2017, when assessed in context and holistically, was reasonably clear. Members were told that their services were required to meet policing needs, given specific instructions as to the areas to which they were to be deployed and told to make representations about personal circumstances after they

[20] . Page 2 of Bundle A. I have quoted verbatim from the e-mail.

complied. The e-mail effectively required members to report to the areas to which they were deployed forthwith when they returned to duty. Questions about the absence of the date in the e-mail of the 22nd of August 2017 appeared to surface for the first time at the suspension hearing. The fact that the applicants did not raise this in the letter from their lawyers and in their court application is a strong indication that this was not the real reason for their failure to carry out the instructions contained in the email of the 22nd of August 2017. The real reasons for this failure was their dissatisfaction with the manner in which the allegations against Captain Spilsbury were handled and their belief that the deployment was not in accordance with the provisions of the Secondment and Transfer of Employees Policy.

On the 19th of June 2018, all four of the applicants were acquitted of the charge of failing to comply with lawful instructions from the Deputy Head. The correctness or otherwise of this decision is not an issue before me at this arbitration. However it is pertinent to point out that Captain Radebe, who was a material witness given his interactions with the applicants, should not have been requested to prosecute this matter. His interactions with the applicants should have been placed before the Presiding Officer. SS Eric Khuzwayo stated that when he and others appointed Captain Radebe, they were unaware that he would be a material witness at the hearing. This is unconvincing. Captain Radebe sent an e-mail[21] to SS Eric Khuzwayo on the 1 September 2017 in which he detailed his interactions with the applicants. SS Eric Khuzwayo was thus aware of these interactions and it was a serious error to get Captain Radebe to lead the evidence at the hearing as opposed to being a witness at the hearing.

I strongly recommend that Presiding Officers provide a detailed set of reasons to demonstrate that they have come to grips with the main contentions made by the parties and have fully evaluated all the evidence and the arguments before reaching a conclusion. Filling out a few lines in matters of this importance should be discouraged. However the decision to acquit the applicants is legally binding and thus stands.

The applicants and SS Eric Khuzwayo testified that the provisions of the Secondment and Transfer of Employees Policy was not followed when these deployments were made. It was contended that there was inadequate consultation with the employees and that the requisite one month's notice was not given. SS Eric Khuzwayo was of the view that the Secondment

[21] . Page 5 of Bundle B

and Transfer of Employees Policy was applicable to the deployments that was effected through the e-mail of the 22nd of August 2017. Other witnesses such as SS Mthetwa who testified on behalf of the applicants also supported the contention that these deployments were not in line with the policy. Director Dove was also of the view that the Policy applied and had not been complied with in the instance of the applicants.

The respondent was of the view that the Secondment and Transfer of Employees Policy did not apply. That was the view of the Head of Legal Services. Ms Thembi Sihiya, Senior manager, HR was also of a similar view as was DH Mchunu. Senior Superintendent Sewpersad was also of the view that the policy was not applicable as this was a deployment. There was thus a serious difference between the parties as to whether the Secondment and Transfer Policy had any applicability to the deployment/ transfer of employees that had occurred in this matter. I was informed that a grievance had been lodged with the Bargaining Council regarding whether or not the Secondment and Transfer Policy was applicable.

It is not necessary for me to determine whether the policy was applicable to the deployments/transfers that occurred in this case. The issue before me is a narrower issue. The question is whether the applicants were legally entitled not to act in accordance with the directive issued because they were of the view that the policy was not followed when it ought to have been. SS Eric Khuzwayo suggested that these sorts of issues ought to have been discussed with the unions representing the applicants. DH Mchunu was emphatic that orders of this nature had to be followed or else a police force which is premised on discipline and on the chain of command would falter and fail to deliver on its core mandate. SS Sewpersad was also of the view that policing functions would be seriously undermined if instructions were not followed because subordinates questioned whether a particular policy applied or not. Director Dove indicated that in his opinion the Secondment and Transfer Policy applied and had not been complied with. However he was of the view that the applicants ought to have 'complied and then complained.'

**Conclusion on the substantive fairness of the suspension.**

I find that once the applicants were aware that the respondent was of the view that the policy was not applicable, they ought to have obeyed the instructions and if necessary subsequently challenged the decision on the basis that the policy has not been followed. It was not open to

them to defy the directive concerning deployment on the basis that in their view the policy ought to have been followed. This is not an instance of them being required to engage in illegal conduct. There was a disagreement on the interpretation and application of a policy. The applicants, as police officers, were obliged to comply and later in an appropriate forum have this issue properly determined.

In *Mashego v Mpumalanga Provincial Legislature*,[22] the Labour Court held:

> The case of the applicant in the present matter seems to be that he was denied a fair hearing because he was not given a full hearing similar to that applicable in a disciplinary hearing. In other words, the case of the applicant is that he was not afforded a fair hearing because the applicant did not deal in the suspension process with the merits of the alleged misconduct. I do not agree with that proposition as a suspension process by its nature is intended to afford the employer the opportunity to investigate the merits and also the demerits of the alleged misconduct. The key aspect in determining the fairness of the suspension is whether the employer had, based on the nature of the allegations, formed a view that the allegations are so serious as to warrant a suspension.

In order to have a disciplined and effective police force, the applicants were obliged to abide by the directive and subsequently challenge the process that preceded their redeployment. Section 64C of the South African Police Services Act [23]states that the executive head of a municipal police service shall, amongst other responsibilities, be responsible for maintaining an impartial, accountable, transparent and efficient municipal police service and be responsible for the discipline of the municipal service. Efficiency and discipline would be seriously undermined if members of the service chose not to carry out instructions because they took the view that a policy was not properly followed even when they were told that their superiors were of the view that the policy had no application. The applicants chose to report to areas of their choice as opposed to following the instructions of DH Mchunu. After the e-mail of the 22nd of August 2017 containing the instructions, the applicants were removed from the Duty Schedule of Albert Park on the 29th of August 2017. By 1st September 2017, they were informed by the head of legal services of the respondent that the policy on which they relied upon was not applicable to their deployment. They chose not to abide the instructions and the notice of suspension was issued on the 7th of September 2017[24].

[22] Mashego v Mpumalanga Provincial Legislature (2015) 36 ILJ 458 (LC) at 12.
[23] . Section 64C of the South African Police Services Act 68 of 1995
[24] . Page 16 of Bundle B.

I am satisfied that the refusal to follow the instructions contained in the e-mail of the 22nd of August 2017 amounted to fair reason for the suspension. There is also an adequate and reasonable basis for the conclusion that the respondent had formed the view that the allegations were serious enough to warrant the suspension. I therefore conclude that the suspension of all four applicants on the 11th of September 2017 was substantively fair.

**Analysis of the evidence on the issue of whether the suspensions were procedurally fair?**

I now turn to the argument that the applicants were not treated in a procedurally fair fashion when they were suspended on the 11th of September 2017. There are no material factual disputes in this regard and much of what follows is common cause and is drawn from the evidence of Constables Mabitsela and Shandu and DH Mchunu. All the suspension hearings were conducted by SS Singh. At the time the suspension hearings were conducted, SS Singh held the substantive post of senior superintendent but was acting as director. The issue was whether she was entitled to sit as a presiding officer in the suspension hearings. It was also accepted by both parties that as the Disciplinary Procedure Collective Agreement was not operative at the time, the Standard Operating Procedure Guidelines 9 (SOPG) ; Procedure No: 9 was applicable. [25] The document is entitled ' Disciplinary Action for Individual Employees.'

Step 3 of the sequence of steps states:

> In the event that the alleged misconduct is so serious that consideration needs to be given to suspending the employee on full pay pending the finalization of any investigation and/or any disciplinary action arising out of the investigation, convene a suspension enquiry with a Chairperson at the level of Deputy Head or higher, using Annexure 3.

The applicants contended that there was no compliance with Step 3 because the suspension hearing was not convened and presided over by a chairperson at the level of Deputy Head or higher. This argument is premised on SS Singh being an acting director at the time. The position of director is subordinate to that of Deputy Head. Their submission was that the officer presiding at the suspension hearing was therefore not qualified to preside at the suspension hearing. Other than this, there was no other evidence before me to suggest that

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the procedure leading to the suspensions was flawed. For the reasons stated earlier, the suspension was substantively fair.

The respondent countered by pointing out that these SOPG were guidelines and was thus not prescriptive. DH Mchunu testified that the SOPG allowed the leadership of Metro Police to exercise their judgment and discretion in deciding who should preside over suspension hearings. He testified that in the past, directors were permitted to hear suspension hearings as they were regarded as senior managers. In his view, reference to 'deputy head' in step 3 of the SOPG should include directors as well. He also stated that guidelines as the name suggested were guidelines and that the contents were not cast in stone. He also stated that Deputy Head Zama was involved in the matter and that the other Deputy Heads were busy with their own responsibilities. However there is no evidence before me that no other Deputy Head was available to chair the enquiry. The fact that other deputy heads were busy does not mean that they would all have declined if requested to chair the enquiry thus making it necessary for SS Singh to preside.

I am satisfied that even though SS Singh was acting as a director, she had the necessary authority to discharge the responsibilities of a director. I am not convinced that the SOPG allowed the respondent to depart from the specific wording of step 3. The objective of the SOPG is 'to outline the broad steps to be taken to carry out the individual disciplinary procedure in a manner that is both procedurally and substantively fair,…'[26] It is clear that the term guideline was used because 'every step or eventuality in a disciplinary procedure cannot be included and judgment and discretion will be required, based on the particular circumstances.' The idea is that this document is not definitive of all the circumstances that may arise when dealing with disciplinary proceedings and judgment and discretion must be exercised in this context.

However this does not mean when a specific requirement is laid down, it can be ignored on the basis that the document is titled 'guidelines'. Such an approach would make the SOPG meaningless as parties would be able to depart from the specific detailed provisions at will. Step 3 is specific and states unequivocally that the chairperson is to be at the level of Deputy Head or higher. I am of the view that this was a requirement with which there had to be

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compliance. There is no evidence before me that the other Deputy Heads or persons holding higher rank were approached and were simply not able to sit as chairpersons. It was incorrect to assume that a discretion existed to allow an acting director to preside as chairperson when Step 3 of the SOPG clearly stated that the chairperson had to be of the level of Deputy Head or higher. The specificity of this clause clearly indicated that the chairperson had to be of the rank of Deputy Head or higher. It would not make sense for the clause which requires the chairperson to be of the rank of Deputy Head or higher to preside to be interpreted to mean that a senior manager holding a rank lower than that of Deputy Head is permitted to preside. Step 3 of SOPG makes reference to the alleged misconduct 'being so serious' that consideration needs to be given to suspending employees on full pay. Suspension has implications for the employee and it was for this reason that a decision was made that the presiding officer should be of the rank of Deputy Head or higher. The respondent was obliged to comply with this requirement.

During the hearing of the matter, I drew the parties' attention to the Constitutional Court judgment in *Allan Long v South African Breweries and others*[27] where the court held that:

> Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

I am satisfied from the notices of the suspension enquiry, from the letters and from the notices of suspension that this was a precautionary suspension 'pending the finalisation of the investigation regarding allegations of misconduct.'[28]

However I am of the view that the facts before me are materially different from the facts before the Constitutional Court in *Allan Long*. There is no evidence that there was anything in the nature of the SOPG applicable in the *Allan Long* case. The SOPG is an agreement between the parties which includes the requirement for a suspension enquiry prior to employees being suspended which is to be presided over by a chairperson at the level of Deputy Head or higher. This specific clause in the SOPG affords procedural rights to employees which must be respected. I am satisfied that the presiding officer, SS Singh, did not hold the rank of deputy head or higher at the time that she presided at the suspension enquiry. As she did not hold this rank, she ought not, in terms of Step 3 of the SOPG, to have presided over the suspension

[27] . *Allan Long v South African Breweries and Others* CCT 61/18
[28] . These letters can be found on pages 16 to 30 of Bundle B.

enquiry. While the suspension of the applicants was substantively fair, it was not procedurally fair for the reason that the presiding officer was not of the rank of Deputy Head of higher.

I indicated at the last hearing, that after I hand down the award, I will give the parties 7 days to submit written submissions to the Bargaining Council on the appropriate remedy. In the circumstances the following order is made:

**Order:**

1) **The suspension of all four applicants which occurred on the 11th of September 2017 was substantively fair.**
2) **The suspension of the applicants was not procedurally fair for the reason that the presiding officer at the suspension hearing was not of the rank of Deputy Head or higher as required by the Standard Operating Procedure Guidelines.**
3) **The parties are given 7 days to submit written representations on the appropriate remedy given the findings and decisions in this award.**

Dated at Durban on the 4th of October 2019.

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K Govender

Senior Arbitrator