REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no. PA 8/12

In the matter between:

GENERAL MOTORS (PTY) LIMITED **Appellant**

(Third Respondent in the Court *a quo*)

~~and~~And

NUMSA obo RUITERS **Respondent**

(Applicant in the Court *a quo*)

Heard: **25 March 2014**

Delivered: **22 January 2015**

Summary: Review: Dismissal on ground of incapacity – *Onus* - Duty of employer to investigate all possible alternatives short of dismissal, accords with *onus*, on employer, of proving fairness of dismissal - *In casu*, issue of specific alternative placement of employee raised both at incapacity inquiry and arbitration, but not pursued and properly investigated by employer. Appeal against LC's judgment remitting the matter for fresh arbitration, dismissed with costs.

Coram: **Ndlovu JA, Molemela ~~et~~ET Sutherland AJJA**

JUDGMENT

NDLOVU JA

Introduction

[1] This is an appeal against part of the judgment and order of the Labour Court (Lagrange J) handed down on 11 May 2012. The Court *a quo* granted the appellant leave to appeal.

[2] The appellant, General Motors (Pty) Limited, carries on business of car manufacturing and has its principal place of business in Port Elizabeth. On 6 October 2003, the appellant and the respondent trade union, the National Union of Metalworkers of South Africa (NUMSA or the union) concluded a collective agreement, known as the "Sick Absence Control Procedures" (the SACP),[1] which came into effect on 7 October 2003. The SACP was the culmination of deliberations between the appellant and the union following upon the employees' industrial action that had carried on for some time, having been occasioned by the dispute over the appellant's 'sick absence' policy.

[3] NUMSA instituted this litigation on behalf of two of its members, namely, Mr Ruiters and Ms Chantel Charmaine Piet. However, given the fact that the appellant succeeded in its review application in relation to Piet's matter, this appeal was lodged only in respect of Ruiters.

Factual background

[4] Ruiters was employed by the appellant as a team leader in the general assembly/manufacturing department. As part of his duties, he worked as a "stand-in" or relief in the place of an employee, within his team, who was absent. His department involved the actual building stages of vehicles and, thus, required some degree of physical capability on the part of any worker in that department. In the meantime, Ruiters sustained an injury on his left wrist or

[1] Record , vol 5, at 457- 461.

hand, an incident which occurred outside of the workplace, reportedly during a rugby training. The injury affected his work performance as a team leader, in that he could no longer be able to stand in for a team member who was absent. He also suffered from hypertension.

[5] On the recommendation of Dr Franzt Struwig, the appellant's medical officer, Ruiters was moved to another work area within the same department, but where there was less employee absenteeism. In other words, it was an area where Ruiters would not be required to perform "stand-in" duties more often. However, soon after being moved to the new work area, Ruiters complained that his right hand had also been affected and that he could no longer use it as well. According to the appellant, all possible alternative placements were considered to accommodate Ruiters, but without success.

[6] Consequently, on 3 December 2007, the inquiry, as envisaged in clause 5.5 of the SACP (the incapacity inquiry), was held against Ruiters. On or about 12 December 2007, he was found to be permanently incapacitated to perform his duties. He was accordingly dismissed on the ground of incapacity.

[7] Ruiters was not satisfied with his dismissal, which he alleged was both procedurally and substantively unfair. Thus, he referred an unfair dismissal dispute to the CCMA (the first respondent in the Court *a quo*) for conciliation.

The arbitration

[8] The conciliation process failed and a certificate to that effect was issued. The matter then went to arbitration before the CCMA commissioner, Mr Luvuyo Bono, who was cited in the Court *a quo* as the second respondent (the commissioner).

[9] Relevant to the matter of Ruiters, the appellant called, at the arbitration hearing, three witnesses, who were all its employees at the time, namely, Mr Benjamin Fouche; Mr Fredericks, Mr Billy Felix and Dr Franzt Struwig. The import of the evidence for the appellant was that everything possible had been done to accommodate Ruiters' physical indisposition within the workplace, but unsuccessfully.

[10] Felix was the only witness for the appellant whose testimony suggested that at some point he played some direct role in attempting to find Ruiters some alternative placement. According to his evidence, he was a human resources (HR) representative, although it did appear that he had some kind of supervisory capacity over Ruiters. As a matter of fact, it was not clear from the evidence generally as to who exactly was Ruiters' immediate supervisor, that is, whom he reported to. For instance, at different places of the record there was mention of body shop managers, Mr Suthamen Naidoo[2] and Mr Des van der Berg,[3] as possibly having had some degree of supervision over Ruiters. However, for the present purpose, nothing turns on that aspect.

[11] According to Felix, Ruiters was referred to Dr Struwig who, after examining him, addressed a note to the HR department, recommending that Ruiters be allocated to another area where the use of his left injured hand would not be required most of the time. As a result, Ruiters was allocated to another area within the general assembly department and with less regular absenteeism, which meant that he would not be required to stand in for absent employees more often. However, in due course, Felix received a report that Ruiters' right hand had also been affected and that he could not use it as well. Bearing in mind that Ruiters had some quality control experience, Felix said he then liaised with the quality control manager, Mr Desmond Malussi, for assistance. However, there was no available position in that section because, at the time, it was also undergoing some restructuring. In the meantime, Felix was moved to another area or section and, thus, could not deal with Ruiters' matter anymore.

[12] During cross-examination, it was put to Felix by the union's representative that a certain document was produced at Ruiters' incapacity inquiry to the effect that Ruiters could drive and further that one of the witnesses at the inquiry, Mr S Naidoo, the body shop manager, had said that if the issue of Ruiters' driving ability could be cleared with the appellant's doctor (presumably Dr Struwig) then Ruiters could be accommodated in the position of a driver. However, Felix hastened to deny any knowledge of Ruiters having been offered a driving

[2] Record, vol 5, at 389 lines 12 – 29. Note: It was accepted that initials SN stood for S Naidoo, the full correct name being Suthamen Naidoo (see email correspondence in volume 5, at 381 - and NOT Sudama or Sadama Naidoo as appearing in volume 2, at 77 line 1 and at 82 line 17, respectively).
[3] Record, vol 2, at 75 lines line 8.

position, or even that issue being discussed at all in his presence. According to him, Ruiters had never performed any driving duties. He insisted that Ruiters was only a team leader in the general assembly department, which had nothing to do with driving duties. It was put to him that, according to Ruiters he had, from time to time assisted with driving duties and further that, in any event, there was no evidence from the appellant to show that it had properly inquired about this issue.

[13] The medical notes compiled by Dr Struwig and submitted with the arbitration record reflected that Dr Struwig saw Ruiters as early as on 20 April 2006, in connection with the left hand/arm/wrist problem. He saw him again on 1 February 2007. He further confirmed that on 15 May 2007 Ruiters was re-evaluated by a private specialist orthopaedic surgeon, Dr Ngcelwane, who at that stage suggested that alternative duties be considered for Ruiters.[4]

[14] Dr Struwig testified that another meeting was held on 7 June 2007 at which the following persons were present: Dr Struwig, Mr Fredericks, Mr Ingmar Heynsen, Mr Mark Human (the union representative) and Mr Ruiters. He referred to an entry that he made in his medical notes, in relation to that meeting of 7 June 2007, which read as follows[5]:

> 'Discussion regarding present condition and possible alternative placement. Ingmar is at present accommodating Ruiters as best he can regarding job placement. Ingmar will speak to Andre for alternative placement. Further communication will take place via e-mail.'

[15] Dr Struwig continued with his evidence before the commissioner:

> 'In my opinion, we pursued all the avenues open, we consulted with the patient, with management, and also with his treating specialist on more than one occasion. And at the end the recommendation regarding his fitness of whether he can continue work, came actually from the specialist stating that he feels that his condition is of such a nature that he cannot perform his normal duties[6]. …

[4] Record, Medical notes, vol 5 at 367.
[5] Record, vol 5, at 367.
[6] Record, vol 3, at 189 lines 3-9.

> I think we must be guided by Dr Makwane [Ngcelwane?] who actually stated that the wrist that was operated on (sic), developed osteoarthritic changes, meaning that there is a premature ageing of the wrist, and then we also X-rayed the so-called normal wrist, which is the right wrist and that showed signs of osteopenia, which just means decalcification of that joint. He also showed symptoms and signs of repetitive strain injury on the right side, because he was compensating with the right wrist, trying to do more of the work with the right wrist.'[7].

[16] According to Dr Struwig, he last examined Ruiters on 18 October 2007 and issued his final report on that day.[8] In that report, he commented on Ruiters' condition, *inter alia*, as follows:

> 'Known with chronic permanent condition of L wrist – no improvement. R wrist also problematic now with swelling and pain. Unable to fulfil all the requirements expected of the team leader – able to do supervisory duties, but not the "stand-in" production activities.'

[17] Following on his report of 18 October 2007, referred to above, Dr Struwig sent an email to Ms Wilson, on 23 October 2007, in which he confirmed the following:

> 'I evaluated this gentleman [Ruiters] on the 18/10/2007 again and came to the following conclusion:
>
> - Job title: Team Leader
> - Patient utilized Trim1 Station1
> - Known with previous surgery to R wrist with secondary limitation of movement and osteo-arthritic and osteoporotic changes
> - Employee able to fulfil supervisory work, but not the production activities, as required from a team leader
> - His condition is unlikely to improve, but may deteriorate, due to further osteoarthritis that may set in
> - <u>Alternative placement should thus be sought</u>

[7] Record, vol 3, at 190 lines 1-10.
[8] Record, vol 5, at 385.

- Patient consulted with his specialist on 22/10/07
- He will have to get input from the specialist whether medical boarding is an option or not

Please let us know if we can assist further with the management of this case.'

(Underlined for emphasis)

[18] Ruiters testified that it was initially his injured left hand that caused him trouble at work. It was swollen and he could not properly handle anything. When he started using his right hand, it also ended up getting swollen. He further said he had explained to the appellant's doctor that he could drive and that the doctor had cleared him as being fit to perform driving duties. However, the appellant did not offer him a driving position as an alternative placement in order to accommodate his situation. He further pointed out that he had approached at least five officials within the appellant,[9] asking for assistance to his problem. All these officials simply promised to do something, yet they did nothing to assist him.

[19] At the conclusion of the hearing, the commissioner stated as follows:

> 'It is common cause that Ruiters had numerous consultations with Dr Struwig, and while his illness started off with the left wrist which Dr Ngcelwane, the employee's private orthopaedic surgeon found to be permanently incapacitated, Ruiters' right arm had also been affected, which meant that Ruiters would struggle to work with any of his arms. The fact that the employee testified that he is well cannot carry much weight as he had no medical evidence to back up his case. It is common cause that the employer accommodated Ruiters. Consequently it is my view that the [employer] acted reasonably in the matter of Ruiters.'

[20] On this basis, the commissioner declared that the dismissal of Ruiters was both procedurally and substantively fair. Hence his claim was dismissed.

[9] He specifically named them in his evidence.

The Labour Court

[21] Thereupon the union, on behalf of Ruiters, took the matter up on review with the Labour Court in terms of section 145 of the Labour Relations Act[10] (the LRA), complaining that the commissioner *"committed a gross irregularity in the proceedings by failing to apply his mind properly to the procedural and substantive fairness of the dismissal."* However, as indicated earlier, the main ground of review (subsequently dubbed as *'the fourth ground of review')* was that the commissioner committed a gross irregularity in the conduct of arbitration proceedings in that he failed to take into account that the appellant had not made any effort to accommodate Ruiters in the alternative position of a driver, despite the fact that Ruiters' and Piet's *"supervisors were of the view that [Ruiters and Piet] could be accommodated in different work areas."*

[22] In response, it was submitted on behalf of the appellant that the evidence before the commissioner supported the conclusion that Ruiters' incapacity rendered him unfit to perform his duties in terms of his contractual obligations with the appellant. It was further submitted that there was no evidence before the commissioner which established that there existed an alternative position to which Ruiters could be deployed. Further, that during the evidence no such alternative position was specifically identified by Ruiters or on his behalf, nor was any suggestion to that effect put to the appellant's representative for his comment.

[23] In his analysis and evaluation of evidence, the learned Judge *a quo* stated the following:

> '[18] … For the purposes of evaluating the fourth ground, I am satisfied that [this] ground of review narrowly construed, did not concern evidence given by the employees' supervisors at the arbitration. However, the evidence given by Ruiters' supervisor at the internal inquiry was canvassed directly with Mr Felix at the arbitration hearing. In the circumstances that evidence is sufficiently close to the issue described in the stated ground of review to warrant consideration. The consideration of whether another alternative job for Ruiters was explored would

[10] Act 66 of 1995.

have had implications for the arbitrator's conclusion that [the appellant] had acted reasonably towards him. …

[21] There was evidence that Felix was questioned quite extensively on the question of whether an alternative position as a driver was considered. This was done in the context of asking him about the evidence of Ruiters' supervisor in the original enquiry about a position as a driver. What is apparent is that the issue of a possible driving position was discussed, but once Ruiters had provided a certificate from his doctor to the effect that he could drive, the matter was not taken further by the company, which is a point the arbitrator pertinently noted when this evidence was being given.

[22] Thus, whatever the true condition of Ruiters was in relation to his ability to perform his original duties on the supposedly easier trim line, there was a basis laid in evidence that an alternative position as a driver was canvassed but there was no follow through to investigate this as an alternative. The arbitrator, who was obviously aware of this issue, does not seem to have evaluated this when he evaluated the reasonableness of the employer's consideration of alternatives. …

[26] On balance, I believe that there is some merit in relation to the criticism that the arbitrator appears to have failed to give any consideration to evidence about a possible alternative placement for Ruiters as a driver and that this was a material issue he ought to have taken into account, as it had a direct bearing on his conclusion that the employer acted reasonably in relation to Ruiters. In the circumstances, I think this had the effect of depriving Ruiters of a fair hearing.'

[24] Hence, the Court *a quo* reviewed and set aside the commissioner's finding that Ruiters' dismissal was procedurally and substantively unfair. The Court directed that the CCMA *"must convene a fresh arbitration hearing before a commissioner other than [Luvuyo Bono], to determine whether or not Mr Ruiters was fairly dismissed for incapacity."* It is against this decision of the Court *a quo* that the appellant now appeals to this Court.

The appeal

[25] The appellant submitted a comprehensive catalogue of grounds of appeal, which can be summarised as follows:

25.1 That the Court *a quo* erred in holding that the *fourth review* ground had to be considered in the context of the evidence given by Felix at the arbitration hearing, on the issue of whether Ruiters was offered the alternative position of a driver.

25.2 That the Court *a quo* erred in failing to hold that "the minute" of Ruiters' internal incapacity enquiry was inadmissible, given the fact that it was not admitted by the appellant nor properly authenticated in evidence by or on behalf of Ruiters.

25.3 That the Court *a quo* erred in failing to recognise that there was no reliable medical evidence that Ruiters was indeed capable of taking up any driving position, given the condition of both his hands.

25.4 That the Court *a quo* erred in reviewing and setting aside the commissioner's finding that Ruiters' dismissal was substantively and procedurally fair.

[26] Mr *Partington*, for the appellant, submitted that the Court *a quo* was wrong in declaring that[11] *"the evidence given by Ruiters' supervisor [presumably Naidoo] at the internal enquiry was canvassed directly with Mr Felix at the arbitration hearing. [And that] [i]n the circumstances, that evidence is sufficiently close to the issue described in the [fourth] ground of review to warrant consideration."* He submitted that as the factual basis of the fourth review ground was that Ruiters' supervisor(s) were of the view that Ruiters could be accommodated in another area, it followed that this was the review ground that the appellant was called upon to meet.

[27] Counsel contended that the important issue was not about what questions were put to Felix at the arbitration hearing concerning whether Ruiters was offered the position of driving, but rather what responses Felix gave to those questions. In his evidence, Felix made it clear that he knew nothing about what happened at the incapacity inquiry as he was not there. It was during the inquiry proceedings that certain questions were raised and answered about the possibility of offering

[11] Paragraph 18 of the judgment of the Court *a quo.*

Ruiters the alternative position of driving. The questions were raised with, and answered by, Sadam Naidoo,[12] who was one of appellant's witnesses at the inquiry, but who did not testify at the arbitration hearing. Instead, at the arbitration hearing, the issue was raised with Felix who knew nothing about it. Counsel submitted that since Ruiters sought to rely on a statement that was allegedly made by Naidoo, then it was incumbent on Ruiters to have called Naidoo as his witness at the arbitration hearing. Therefore, the commissioner was entitled to have disregarded any reference to statements allegedly made by Naidoo at the incapacity inquiry, which counsel termed as "*second-hand hearsay"*.

[28] Mr *Partington* further submitted that in the event of the Court not being satisfied as to the reasonableness of the commissioner's award, the appropriate remedy would be to remit the matter for a fresh inquiry on the question of whether any alternative position was available in which to accommodate Ruiters. This is basically what the Court *a quo* decided.

[29] Mr *Grogan*, appearing for the union and Ruiters, pointed out that this appeal sought to reverse a judgment which did not find Ruiters' dismissal to be substantively unfair and ordered his reinstatement, but a judgment which only remitted the matter to the CCMA for reconsideration. He submitted that the commissioner based his conclusion on the incorrect premise when the commissioner stated: *"It is common cause that the employer accommodated Ruiters. Consequently it is my view that the Respondent acted reasonably in the matter of Ruiters."* This statement was obviously incorrect because the question of whether Ruiters was accommodated was in dispute and, therefore, not common cause.

[30] Counsel further submitted that the Court *a quo* was entitled not to confine itself strictly to the "fourth review ground" but to consider the matter more broadly, in terms of the relevant provisions of the code of good practice on dismissal for incapacity.

[12] This is presumably a typographical error, meant for Suthamen Naidoo.

Evaluation

[31] In terms of the *Sidumo* review test, in order to pass muster of judicial review for reasonableness under section 145 of the LRA, an arbitration award must be one falling within the range of decisions which a reasonable decision-maker could have made in the circumstances.[13] The Supreme Court of Appeal, in *Herholdt v Nedbank (Cosatu as amicus curiae),*[14] restated the test in the following terms:

> 'While the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness" in setting aside administrative decisions that do not coincide with the judge's own opinions. ...A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[32] The Code of Good Practice: Dismissal for Incapacity arising from ill health or injury provides, *inter alia*, as follows:

> '**10 Incapacity: Ill health or injury**
>
> (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment,, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

[13] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.
[14] 2013 (6) SA 224 (SCA) at para 13.

(2) In the process of the investigation referred to in subsection (1) the employee should be allowed to state a case in response and to be assistance by a trade union representative or fellow employee.

11 Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a *dismissal* arising from ill health or injury is unfair should consider –

(a) whether or not the *employee* is capable of performing the work;

(b) if the *employee* is not capable –

(i) the extent to which the *employee* is able to perform the work;

(ii) the extent to which the ***employee's*** work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the ***employee's*** duties might be adapted; and

(iii) the availability of any suitable alternative work.'

[33] To the extent relevant, the SACP provided as follows:

'1. PREAMBLE

The contracts applicable to all Delta employees provide that regular attendance remains a contractual obligation, and that a failure to observe this obligation will reflect upon an employee's capacity, entitling Delta to terminate the employee's services.

2. OBJECTIVE

The Company shall implement a counselling system in order:

2.1 To identify difficulties encountered in regard to poor attendance caused by sick absence.

2.2 To offer meaningful support and assistance where reasonably possible.

2.3 To advise employees of the impact which continuing sick absence will have upon their capacity to perform the functions for which they are employed.

2.4 To address sick absence in a manner which is both procedurally and substantively fair, within a control procedure that is consistent with the provisions of the Code of Good Practice – Schedule 8 of the Labour Relations Act, with specific reference to clauses 10 and 11. (Underlined for emphasis)

4. SICK ABSENCE THRESHOLD

4.1 The extent to which Delta will accommodate an employee's sick absence will correspond with the limits set by the Basic Conditions of Employment Act.

4.2 The threshold thus set, will be one of 30 days' sick absence within a 3 year cycle.

4.3 The 3 year cycle will coincide with that provided for in the BCEA i.e. the first cycle will be deemed to commence on the employee's date of engagement with the Company, with subsequent cycles commencing upon the expiry of the preceding one.

5. COUNSELLING & INQUIRY PROCEDURES

Counselling will be conducted in accordance with Schedule 2 – "Keys to Success in Counselling".

5.1 10 DAYS SICK ABSENCE OR MORE

Any employee who accumulates 10 days sick absence within any 3 year cycle will be counselled for the purpose of identifying difficulties encountered in regard to his/her attendance and with a view to offering meaningful support and assistance where possible.

The obligation to identify to the Company at the earliest opportunity issues which may be capable of being addressed by such support and assistance, remains with the employee.

In addition, the employee will be advised of the consequences of continuing or extended sick absence.

5.2 20 DAYS SICK ABSENCE OR MORE

Any employee who accumulates 20 days sick absence within any 3 year cycle will be counselled for the purposes set out above, and will be advised of the consequences of continuing or extended absence.

5.3 REACHING THE LIMIT OF 30 DAYS

Any employee who during any period of sick absence, reaches the limit of 30 days of sick absence within any 3 year cycle, will be counselled for the purposes set out above, and will be advised of the consequences of continuing or extended sick absence.

5.4 EXCEEDING THE LIMIT OF 30 DAYS

Any employee who during any period of sick absence, exceeds the limit of 30 days of sick absence within any 3 year cycle, will be counselled for the purposes set out above. Furthermore, the employee will be advised that, in the event of one further incident of sick absence, he/she will be called upon to attend a capacity inquiry. The employee will also be advised that his/her services may be terminated in the event of such an inquiry.

5.5 CAPACITY INQUIRY

Any employee who has received a counselling in terms of 5.4 above, and who accumulates one further incident of sick absence within the 3 year cycle, will be called upon to attend an inquiry for the purposes referred to above. Such inquiry will be consistent with the provisions of the Code of Good Practice – Schedule 8 of the Labour Relations Act'.

[34] It is significant to note that the underlying objective of the SACP appears to be its compliance with the provisions of items 10 and 11 of the Code of Good Practice. In other words, the appellant recognised the risk that non-compliance with those provisions would potentially render termination of an employee's employment on the ground of incapacity, both procedurally and substantively unfair. In *IMATU obo Strydom v Witzenberg Municipality,*[15] this Court (per Molemela AJA, as she then was) stated[16]:

[15] [2012] 7 BLLR 660 (LAC).
[16] Ibid, at paras 8 and 9.

'[7] I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognised as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would, under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.

[8] The afore-mentioned obligations of the employer as set out in items 10 and 11 of Schedule 8 to the LRA are inter-related with similar obligations in the Employment Equity Act 55 of 1998. In their work *Employment Equity Law* 2001: 7–3 to 7–4, JL Pretorius *et al* submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but "is a duty that is implied in the concept of unfair discrimination in a general sense" and "is one of the judicial and legislative tools for realising substantive equality". I agree with this submission. Surely non-compliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?

[9] I am of the view that the provisions of items 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair…'

[35] It was common cause that as at 11 May 2007 (in a three year sick leave cycle commencing 3 June 2005 and ending 3 June 2008) Ruiters had absented himself from work on sick leave for a period in excess of 30 days' limit, in contravention of the SACP. Prior to that stage, he had been issued with warning letters when he reached the 10 days' and 20 days' mark, respectively, and had further been invited to complete the Request for Assistance form, in case he sought any assistance from the appellant toward resolving his sick absence problem. It was also common cause that at no stage did he request for any assistance from the appellant in this regard.

[36] It is trite that the *onus* was on the appellant to prove to the commissioner that Ruiters' dismissal was fair.[17] Now, the question is whether there was any evidence adduced in the arbitration to the effect that Ruiters could be accommodated elsewhere within the appellant. It seems to me that this aspect only appears in the evidence of Felix. In his evidence-in-chief, on this issue, he stated as follows[18]:

> 'In the case of Mr Ruiters, he had an injury to his left arm and he went to see our medical practitioner, Dr Struwig, who then subsequently wrote a note through to myself as the HR representative, as well as his shop manager, Mr Des van der Berg, to request that we accommodate [Ruiters] in another capacity, within the manufacturing environment. From my side, I basically had several interactions with [Ruiters] as well as his representative at the time. If I can recall, it was Mr Mark Human, asking them to come up with suggestions in terms of where exactly I can accommodate Mr Ruiters. We, within the shop, that is the general assembly, then decided with (sic) in consultation with the shop manager, that we were going to move him from the one area to another area, where there is basically stable attendance within the team, which did not require him to be on-line physically that often. Whilst he was there, it was again brought under my attention that [Ruiters] cannot do all the functions in that team, due to his injury to his left arm. I then again set up a session with him and the shop steward, as well as the medical practitioner, to basically discuss again, what other alternatives we have in his case. Out of that meeting I then basically went back and I confronted the quality manager, Mr Desmond Malussi, and asked him whether or not he could accommodate Mr Ruiters within the quality division, knowing that Mr Ruiters had a quality background. Mr Malussi could not really accommodate him and at the time, we were also basically going through some form of restructuring within the organisation, and the only area that we could then accommodate him, was in the Hummer area. The problem with the Hummer area was that we would require Mr Ruiters then to be able to perform the functions of the team members within the team. Because of the fact that he could not really perform all of those functions, we then scheduled another meeting and it was more or less in July of that year, if my memory serves me

[17] Section 192(2) of the LRA.
[18] Record, vol 2 at 75-76.

correct, I moved out of the plant into a different role and one of my colleagues then took over from me.'

[37] Under cross-examination, the following exchanges appear in the arbitration record, between the union representative and Felix:[19]

'REP FOR APPLICANTS: The version that applicant will present here [is] that he was able to drive, which was his function.

MR FELIX: His function was not to drive.

REP FOR APPLICANTS: What was his function?

MR FELIX: It was not to drive.

REP FOR APPLICANTS: What was it?

MR FELIX: His function was that of a team leader, on the moving assembly line. At no stage was he required to drive a vehicle. He was still building the vehicle in his role as a team leader on the line. …. I am telling you at no stage was driving part of Gavin Ruiters' functions. He was a team leader, on the assembly line.

REP FOR APPLICANTS: You said as a team leader he will do the function of team members.

MR FELIX: Correct, yes.

REP FOR APPLICANTS: The issue of driving cars in that department was also part of the team members.

MR FELIX: No, let me explain to you, Ronnie. The vehicle basically comes down the line, okay, and at every single station, a different part is being put onto the vehicle. Okay, it is only at the final, that the vehicle is driven. Okay. Now Gavin was part of the area where they were still building the vehicle. There is no driving involved there at all. That is why I am saying to you at no stage was he driving or his team members driving. If he was to stand in for the team members, it would be in their function as assemblers. Not as drivers. …

[19] Record, vol 2 at 84-87.

REP FOR APPLICANTS: But the applicant's version will be from time to time he as assisting with that. … The manager of the department [Mr Naidoo] says if that is cleared, that [Ruiters] can drive a vehicle, it is clear that he can be accommodated. Now the question is, was that process initiated, do you have any evidence that process was indeed initiated? …

MR FELIX: Like I said to you, I basically handed over to Shalane Wilson at the time who took over from me. So I was not involved in this process. What I can tell you, is that as I said earlier on, at no stage was it part and parcel of his team, neither function as to drive (sic), nor was it that of his team members'. (Underlined for emphasis)

[38] Towards the conclusion of Felix's evidence, the commissioner canvassed with him the issue of whether the position of a driver was ever offered to Ruiters:[20]

'COMMISSIONER: Okay. Just one issue that I wanted to address. I do not know if you are going to be able to respond to it, is whether the issue of Mr Ruiters being accommodated or being offered a position of a driver. I do not know what is this, whether that was a driver at (indistinct), or whether it was a driver elsewhere; it just says driver. … The issue had been explored in coming to the decision, to dismiss. But perhaps before I get to that. The minutes reflect that the issue was raised during the HR meetings. Are you aware of the issue?

MR FELIX: No, Mr Commissioner. The driving issue?

COMMISSIONER: Yes, the driving issue.

MR FELIX: Being raised during that meeting?

COMMISSIONER: Yes.

MR FELIX: Not with my involvement.

COMMISSIONER: Not with your involvement. Okay. Do you know if it was ever dealt with at the enquiry?

MR FELIX: No, Mr Commissioner.'

[20] Record, vol 2, at 106-107.

[39] As pointed out, the above-quoted excerpts of Felix's evidence comprised the only evidence adduced in the arbitration pertaining to whether Ruiters was considered for an alternative position of driving. Whether Felix was Ruiters' supervisor or one of his supervisors, it is not clear from the arbitration record. What is clear is that nowhere in his evidence did Felix ever say that he was of the view that Ruiters could be accommodated in other different work areas within the appellant, as alleged by Ruiters in the fourth review ground. However, it is also clear that during the arbitration hearing, it was put to Felix that at Ruiters' incapacity inquiry, the issue of *driving* as an alternative was discussed but not pursued by the appellant. To that question, Felix could neither admit nor deny, since he was personally not involved at the incapacity inquiry. Of course, this question was raised with reference to some excerpts from a document purporting to be minutes of the incapacity inquiry which formed part of the material presented to the commissioner.

[40] Mr Partington submitted that since the inquiry minutes were not admitted as evidence at the arbitration, evidence given by Naidoo in the inquiry constituted inadmissible hearsay. However, it is common cause that no objection was raised by the appellant, at the arbitration hearing, against Ruiters' representative referring to and relying on the contents of the inquiry minutes. Ironically, the appellant also relied on the contents of several documents in the arbitration bundle, such as letters and emails written by the appellant's non-witnesses, without the same having been formally admitted in the arbitration.

[41] Therefore, it seems to me that the objection, at this stage, against reference to the contents of the inquiry minutes, which after all formed part of the material presented to, and considered by, the commissioner, is disingenuous and opportunistic on the part of the appellant. Hence, the Court *a quo* was correct, in my view, to hold that *"the evidence given by Ruiters' supervisor [presumably Mr S Naidoo] at the internal [capacity] inquiry was canvassed directly with Mr Felix at the arbitration hearing [and that] in the circumstances, that evidence is sufficiently close to the issue described in the stated [fourth] ground of review to warrant consideration."*

[42] I do not agree with counsel's submission that it was necessarily incumbent on Ruiters to call, as his witnesses, employees of the appellant such as Naidoo and others, to testify at the arbitration and rebut the appellant's claim that the appellant had exhausted all reasonable options to accommodate Ruiters. Indeed, if the appellant did not adduce any positive evidence in support of its claim, as it did not, there was nothing for Ruiters to rebut. After all, the *onus* always remained on the appellant, as the employer, to satisfy the commissioner on a balance of probabilities that the dismissal of Ruiters for the reason of incapacity was fair. This was besides the fact that, given the existing working relationship of the appellant *vis-à-vis* those potential witnesses, it would have been more convenient and effective of the appellant to have called them to come and testify at the arbitration. Furthermore, in situations such as the present, an employer should always bear in mind that it has a duty to investigate all possible alternatives short of dismissal, before resorting to dismissing an employee.[21] This duty accords with the *onus*, on the employer, of proving the fairness of dismissal, already alluded to.

[43] In any event, it was part of Ruiters' testimony that there was talk about him being offered an alternative position of driving, but that the issue was not pursued. In other words, this was not only something gathered from the inquiry minutes. That being the case, there was nothing wrong with this allegation being raised during cross-examination of any of the appellant's witnesses, regardless of whether the witness concerned knew about the issue or not, in order to apprise the appellant of Ruiters' case. So, the allegation was not raised for the first time, and as a surprise, during Ruiters' evidence. In the circumstances, it was incumbent on the appellant to call a witness who would testify and refute the allegation, which the appellant failed to do.

[44] It seems clear, in my view, that, by the word *'driving',* in the present context, was not meant only the ordinary driving of a vehicle in terms of any road traffic legislation, but it essentially referred to "*shunting"* driveable vehicles "*under construction"* from one work station to another within the appellant's car

[21] Item 10(1) of the Code of Good Practice.

assembly workshop. According to Ruiters, he was capable and fit to undertake such driving duties. In his evidence he stated, in this regard:

> 'What happened, in short, I was wearing a brace in my left-hand, working regularly, but it started not (sic) swelling, my left hand and then my right hand also starts swelling and it goes up and then I reported this that my arm is swollen up and I could not grab properly. Then it is thereby [that] they started coming up with this idea of I must get someone to work in my position, to swop with someone but I went to my doctor and then explained this to him, and that he told me that I can drive, whether I do have a licence of a company licence, but he cleared me that I am fit to drive any vehicle. …
>
> The doctors, they sent it (sic) to my specialist, Dr Malwani [Ngcelwane ?] Then Malwani gave me the report and I bring the report to the company. On my report Malwani stated that there are still more years that I can offer to the company.'
>
> (Underlined for emphasis)

[45] Ruiters' evidence, to the effect that his specialist certified that he could still offer more years to the company, was also not contradicted. Indeed, the medical report dated 19 July 2007, under the letterhead of Dr Ngcelwane, a specialist orthopaedic surgeon,[22] certified as follows:

> 'RE: MR GAVIN RUITERS
>
> The above named has post traumatic osteoarthritis of the left distal radio-ulna joint following a distal radius fracture.
>
> His problem is that of endurance, he gets pain on the left wrist when he is doing his job, which apparently involves a lot of handling with the hand. He is not really disabled, but apparently gets a lot of discomfort midway through his working day.
>
> It would benefit this workman a lot if he were to be moved.
>
> His fear, rightly so, is that he may be dismissed as a non-performer, if he continues in his present job. (I feel that he has many more years to come)

[22] Record, vol 5, at 475.

> I write on his behalf asking if a suitable job could be found for him in the company.
>
> Yours faithfully
>
> M.V. NGCELWANE (Signed)'
>
> (Underlined for emphasis)

[46] Clearly, at the time Dr Ngcelwane issued the certificate, above, it was still only the left hand that gave Ruiters the problem. Despite the doctor's suggestion that Ruiters be moved *"to an area in the factory which does not demand a lot on his left wrist",* nothing seems to have been done about it, until Ruiters' right hand was also affected. Indeed, on 24 August 2007, the appellant's senior production co-ordinator, Mr Ingamar Heynsen, addressed an email to the senior HR business partner, Ms Charlaine Wilson, which recorded the following:

> 'We currently have a situation where Gavin Ruiters co:no 22615 is no longer able to perform the physical aspects of his job because of the condition of his right arm and hand. We tried to look at suitable placement within our area but in each area there is some measure of physical activity. Could you please assist in this regard in finding a solution to this problem.'

[47] Mr Heynsen's email of 24 August 2007, pleading for assistance, was also apparently not taken up urgently by the HR department, until only on 9 October 2007 when Wilson circulated an email to various recipients, namely: Naidoo Suthamen, Abrahams Saadick, Milisi Desmond, Liebenberg Stan, Dickens Ronnie and Moller Wynand. The copy of the email was sent to: Clark Angus, de Beer Hamilton, Ah Chong Claudina, Van Der Mercht Margery, Loggie Luaneta and Heynsen Ingamar. To my mind, all these recipients were presumably managers or supervisors in the general assembly department. Wilson's letter read as follows[23]:

> 'A General Assembly employee (G. Ruiters 22615 – Team Leader) is no longer able to perform the physical aspects of his job because of the condition of his right arm and hand, his left hand has also started paining as he tries to use his

[23] Record, vol 5, at 381.

> right hand as little as possible. According to an examination done by Dr Struwig on 15 May 2007 Mr Ruiters is unable to perform his normal duties and we need to investigate alternative placement for him.
>
> Your assistance in this matter will be greatly appreciated.'

[48] It would appear that of all the recipients referred to above, only two of them responded (both on 10 October 2007), that is, Abrahams Saadick (from material handling department) who only said (at 09h54):[24] *"Sorry I cannot help"*; and Hamilton de Beer, who wrote (at 07h31):[25]

> 'As a Team Leader in the Body Shop it will be required to work on line from time to time because of absenteeism. The work as you know is very physical and therefore it would be difficult to accommodate Mr. Ruiters.'

[49] *Ex facie* the record, on the same day, i.e. 10 October 2007, at 13h15, (after receiving responses to her email from Saadick and de Beer) Wilson addressed an email to Dr Struwig in which she reminded Dr Struwig that he examined Ruiters on 15 May 2007. She further stated in the email: *"I have requested that his co-ordinator schedule another appointment with you in order to ascertain if the gentleman is fit to safely return to work in his current position or not."*[26]

[50] The record further shows that on 11 October 2007, Wilson addressed another email to Dr Struwig stating:

> 'I know you had an appointment to examine Gavin Ruiters at 09h30 this morning, as per my previous email, (sic) if Gavin cannot be boarded or cannot return to his job and safely perform his duties and we don't have any alternative accommodation then we would have to proceed with an incapacity inquiry.'

[51] There was no indication whether any of the other recipients of Wilson's email ever responded thereto and that, if they did, what their responses were. In the appellant's heads of argument, the following submission is made: *"No positive responses were received by Wilson in response to this request."* Nor were there negative responses, *ex facie* the record, from the majority of the email recipients.

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[24] Record, vol 5, at 381.
[25] Record, vol 5, at 383.
[26] Record, vol 5, at 382.

Ruiters' complaint is that his matter was not properly investigated by the appellant. Ms Wilson's email of 9 October 2007 was ostensibly and purportedly part of that investigation. Yet, after only receiving two responses on the following day, she apparently decided, in a matter of hours, to "*move on"* and write two emails to Dr Struwig. In the latter she appeared to suggest the route of holding a capacity inquiry against Ruiters. It did not appear that the majority of recipients were accorded any reasonable opportunity to consider the matter and respond accordingly. In my view, such attitude and behaviour justify an inference of a lack of *bona fides* on the part of the appellant.

[52] On the facts of this case, I am inclined to subscribe to the conclusion reached by the Court *a quo* that the commissioner *"appears to have failed to give any consideration to evidence about a possible alternative placement for Ruiters as a driver and that this was a material issue [the commissioner] ought to have taken into account, as it had a direct bearing on [the commissioner's] conclusion that the employer acted reasonably in relation to Ruiters.."* The issue of the possibility of available alternative placement for Ruiters was indeed raised, both at the incapacity inquiry and arbitration hearing, in a manner which, in my view, warranted and obligated the appellant to have investigated the matter further, which the appellant failed to do. Felix testified that at some point he was moved to another area and that, as a result, he handed his responsibility over Ruiters' affair to Wilson.[27] It is common cause that Wilson did not testify at the arbitration hearing. Thus, in my view, the appellant did not adequately and properly investigate the issue of Ruiters' possible alternative placement as a driver, which was in contravention not only of items 10 and 11 of the Code of Good Practice, but also clause 2.4 of the SACP. To the extent that the commissioner ignored or failed to take account of these material issues, the commissioner, in my view, acted unreasonably and, thus, committed an irregularity in the conduct of the arbitration proceedings.

[53] Besides, the available medical evidence (from both Dr Struwig and Dr Ngcelwane) did not support the conclusion that Ruiters could not, at least, be considered for accommodation in an alternative working capacity within the

[27] Record, vol 2, at 86 lines 23-25.

appellant, such as driving. In his final assessment report dated 18 October 2007, Dr Struwig stated, *inter alia*, that Ruiters (who was, after all, a designated team leader) was still *"able to do supervisory duties";* whilst the specialist orthopaedic surgeon, Dr Ngcelwane, certified that Ruiters was *"not really disabled"* and he still *"has many more years to come"* and, for that reason, recommended that *"a suitable job…be found for him in the company."* Seemingly, the commissioner ignored this medical evidence. In doing so, the commissioner committed an irregularity in the conduct of the arbitration proceedings.

[54] In the circumstances, it cannot, in my view, be said that the commissioner's award fell within the range of decisions which a reasonable decision-maker could have made, given the material presented to the commissioner. I am, therefore, unable to fault the judgment of the Court *a quo* remitting the matter for a fresh arbitration before another commissioner. Hence, the appeal falls to be dismissed.

[55] Concerning the issue of costs: It is noted that the judgment appealed against is not a judgment declaring Ruiters' dismissal to be unfair. It is an appeal against a judgment which only found that sufficient information was not presented at the arbitration hearing to enable the commissioner to make an informed decision on the issue of *"whether or not Mr Ruiters was fairly dismissed for incapacity".* Had the appellant allowed that process to take its normal course, this matter would not have reached this level and taken so long to finalise. I hardly fathom any substantial prejudice that the appellant would have possibly suffered. Accordingly, in consideration of the requirements of law and fairness, I determine that the appellant must be ordered to pay the costs of the appeal.

[56] In the result, the appeal is dismissed with costs.

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Ndlovu JA

Molemela and Sutherlannd AJJA concur in the judgment of Ndlovu JA

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