



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2670/19

In the matter between:

**SOUTH AFRICAN BROADCASTING
CORPORATION (SOC) LTD**

Applicant

and

THE CCMA

First Respondent

COMMISSIONER ERIC MYHILL

Second Respondent

THERESA VICTORIA GELDENHUYS

Third Respondent

Heard: 27 January 2022

Edited: 04 February 2022

Revised: 05 February 2026

Summary: Opposed review – dismissal related to capacity – reason for the dismissal and the justification thereof. Incapacity is not only to be confined to conventional poor work performance and ill-health. Intermittent and persistent absence – form of poor performance - entitles an employer to dismiss for reasons of incapacity. Where an employer dismisses for reasons related to capacity such constitutes a fair reason to terminate. The employer is thus

entitled to justify the dismissal using the reason that led to the dismissal. A commissioner who rejects the reason advanced by an employer to justify a dismissal is a commissioner not performing his or her statutory duty to determine the fairness of a dismissal in a fair manner.

Failure to exercise a discretion to allow legal representation does not *per se* render a dismissal that ensues thereafter to be procedurally unfair. The rules of natural justice allow flexibility. The GCEO was entitled to investigate the extent of the incapacity. A finding that the dismissal of the applicant is procedurally unfair is not one that a reasonable decision-maker will reach.

In interpreting the Labour Relations Act, No. 66 of 1995, this Court is obligated to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law. The provisions of the ILO conventions considered for the purpose of interpreting the term *capacity*.

A commissioner is bound to follow decisions of the Labour Court and the Labour Appeal Court or other higher Courts. Failure to do so amounts to a reviewable irregularity.

Having failed to consider alternatives short of dismissal, the dismissal was not a measure of last resort and or appropriate. The finding that the dismissal is substantively unfair remains justifiable and falls within the bands of reasonableness. The compensation awarded is just and equitable and there is therefore no basis to interfere with the exercise of discretion.

Held: (1) The award issued by the commissioner is to a limited extent reviewed and set aside and it is replaced with an order that the dismissal was procedurally fair. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an application seeking to review and set aside an arbitration award issued by Commissioner Eric Myhill (Myhill) in terms of which, he found that the dismissal of Ms Theresa Victoria Geldenhuys (Geldenhuys) effected by the South African Broadcasting Corporation SOC (Ltd) (SABC) was both substantively and procedurally unfair. Myhill ordered the SABC to pay Geldenhuys an amount equivalent to R1 790 023 as compensation. Further he ordered the SABC to pay an amount of R16 400 in respect of costs. The application is duly opposed by Geldenhuys. There is no challenge for the wasted costs order.

Background facts

- [2] To a large degree, this dispute turns on what form of incapacity justifies the dismissal effected by the SABC. For that reason, it shall not be necessary to detail all the facts in this dispute. It suffices to state that the arbitration proceedings were conducted over a period of about six days. The record is voluminous. It comprises of five lever-arch files. The pronounced facts of this matter are that Geldenhuys was employed by the SABC as the Group Executive: Governance and Assurance. It is common cause that Geldenhuys was intermittently absent from work for an extended period of time. It is also common cause that the reason for the intermittent absence was her ill-health.
- [3] On or about 03 September 2018, Geldenhuys returned to work and indicated to the SABC that she is fit to continue with her work. However, on 3 December 2018 up to and including 10 December 2018, Geldenhuys was certified unfit for work due to ill-health. Nevertheless, on 1 October 2018, the Group Executive Officer of the SABC, Mr Madoda Mxakwe (Mxakwe), notified

Geldenhuys to attend an incapacity investigation. The said notice read as follows:

“NOTICE TO ATTEND AN INCAPACITY INVESTIGATION

- 1 Kindly take note that the South African Broadcasting Corporation (SABC) Ltd has concerns with your work attendance and the impact your ill-health has had on the fulfilment of your contractual obligations. As such the company hereby invites you to an incapacity investigation to explore the extent of your ill-health and possible alternatives if any...”

[4] Geldenhuys was informed in the notification that she has a right to be represented by a fellow employee within the SABC. That notwithstanding, Geldenhuys sought to be legally represented during the investigation. She launched a formal application for legal representation as assisted by her attorneys of record. The request was declined by Mxakwe. Inasmuch as the contents of the minutes of the investigation meeting were and are still hotly contested, it remained common cause that an investigation meeting took place on 8 October 2018.

[5] After the investigation meeting, Geldenhuys continued with her work and cleared backlogs that emerged during her prolonged absence. As indicated above, Geldenhuys was again absent due to ill-health for a few days in December 2018. On 18 December 2018, Geldenhuys received a notice of termination. It is not necessary to quote the termination letter in full. Suffice to mention that Mxakwe made reference to the Schedule 8 of the Labour Relations Act¹ (LRA) as well as the investigation hearing that was held on 8 October 2018. He then recorded that the SABC has resolved to terminate the services of Geldenhuys and set out the following:

- “4 Owing to your seniority, your role and responsibilities as well as taking into account the operational requirements of the company and also owing to your continued absence which renders you unable to fulfil

¹ No. 66 of 1995, as amended.

your contractual obligation, it is not reasonably practical to accommodate you anywhere else within the company and as such there are no possible alternatives that may be considered to suit your medical condition, which has a continual negative impact on the expected deliverables due to continued absence from work.”

- [6] Aggrieved by her dismissal, Geldenhuys, duly assisted by her attorneys of record, referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged unfair dismissal. In the referral form completed by Geldenhuys on 8 January 2019, she alleged that the unfair dismissal she was referring to the CCMA related to capacity. In alleging that the dismissal was substantively unfair, she stated that *there was no medical related reason to dismiss her*. With regard to procedural fairness, she alleged that *the internal procedure was chaired by her supervisor, who also made the decision to dismiss*².
- [7] Commissioner T Boyce failed to resolve the unfair dismissal dispute and certified on 25 November 2019 that the dispute outlined above remained unresolved. On 04 February 2019, Geldenhuys’ attorney requested the CCMA, on her behalf, to resolve the dispute through arbitration. The CCMA, as requested, appointed Myhill to resolve the dispute through arbitration.
- [8] On 8 April 2019, the arbitration proceedings commenced. Myhill confirmed that it was common cause that there was a dismissal relating to incapacity. Both the SABC and Geldenhuys were legally represented at the arbitration proceedings. In outlining her case, Geldenhuys’ attorney stated the following:

“Therefore, the applicant disputes that she was medically unfit to render services to the SABC under her contract, which was signed by the SABC and herself, which is valid...”

² Effectively, she was alleging that Mxakwe was a referee and a player at the same time. Supposedly, this being in breach of the maxim *nemo in propria causa iudex esse debet*.

[9] Notably, no procedural defects were alleged and outlined at this point. The meeting of 8 October 2018 where the allegations and concerns were laid out was admitted as having taken place. In justifying the fairness of the dismissal, the SABC presented the testimony of Mxakwe and Mr Vanara. Geldenhuys testified in her own case.

[10] On 28 October 2019, Myhill published the impugned arbitration award.

Grounds for review

[11] The SABC contended that Myhill ignored material and relevant evidence, thereby failing to apply his mind. It further contended that Myhill ignored case law emanating from the Labour and Labour Appeal Courts which clarified the applicable legal principles. Myhill failed to properly analyse the evidence and the facts presented before him. The decision of Myhill is not one that a reasonable decision-maker may reach. The award of compensation is not one that is just and equitable and Myhill exceeded his powers in awarding the compensation.

Evaluation

[12] Before this Court can assess whether the impugned award meets the constitutional standard or not, certain legal principles require clarification and confirmation. The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ cautioned Labour Court judges about judicial overzealousness. It is not the duty of a judge to be idiosyncratic when dealing with arbitration awards. As held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁴ and confirmed in *Sidumo*, there must be a measure of deference to the expertise of administrative bodies. The CCMA through its commissioners is a body that is statutorily empowered to resolve unfair dismissal disputes of certain categories. The

³ (2007) 28 ILJ 2405 (CC).

⁴ 2004 (7) BCLR 687 (CC).

legislature commanded that no appeal lies against the decisions of commissioners. Thus, a line between an appeal and a review must be maintained and not to be blurred. Just to recap, the grounds set out in section 145 of the LRA are suffused into the constitutional standard of reasonableness. The ultimate crucial question for the Court of review is whether the decision is so unreasonable that no other reasonable decision-maker may reach it. By its own standards this is a stringent test to be applied by a Court of review. It requires consideration of the bands of reasonableness. Thus, if a decision falls within the bands of reasonableness, this Court even if it could have reached a different conclusion is not empowered to interfere. A simple reason for that, is that, in terms of section 143(1) of the LRA, commissioners are authorised to issue arbitration awards that are final and binding on the parties. Additionally, one of the purposes of the LRA spelled out in section 1 (d) (iv) is to promote effective resolution of labour disputes. Thus, finality in labour disputes is pivotal and fundamental.

- [13] Having said that, a further imperative which commands itself to the rule of law is that everyone has the right to an administrative action that is lawful, reasonable and procedurally fair as required by section 33 (1) of the Constitution of the Republic of South Africa, 1996. Additionally, section 138 (1) of the LRA impels a commissioner to determine the dispute fairly. A commissioner who commits misconduct in relation to his or her duties as an arbitrator; who commits a gross irregularity in the conduct of the arbitration proceedings; or exceeds his or her powers, cannot be said to be acting fairly, and above all, lawfully and reasonably.

Applicable legal principles

- [14] It is by now trite what the review standard is. As an opening gambit, the statutory duty of a commissioner appointed to arbitrate is to only arbitrate the dispute. Section 191 (1) (a) of the LRA provides that if there is a dispute about the fairness of a dismissal the employee may refer the dispute to the Commission. In *casu*, Geldenhuys did exactly that. Section 191 (5) (a) of the

LRA obligates the Commission to arbitrate at the request of an employee, where an employee has alleged that the reason for dismissal is related to the employee's capacity. I pause to mention that the section uses the phrase '*has alleged*'. In other words by the time the referral reaches the Commission, an employee would have alleged the reason to which his or her dismissal relates. The Commission seized with a referral alleging unfair dismissal related to the reason alleged by an employee is obliged to appoint an arbitrator, who must determine the dispute about an unfair dismissal related to the reasons alleged by the employee fairly and quickly.

- [15] The implications of the above statutory provisions is that if an employee alleges that his or her dismissal is related to capacity, an arbitrator cannot determine a dismissal related to misconduct. In due course, this Court shall deal with the issue of what the word *capacity*, as employed in section 188 of the LRA, means. In the referral form, Geldenhuys alleged that her dismissal is related to capacity. She expressly stated that *there was no medical related reason to dismiss her*. Stripped to its essential bareness, this allegation means that in so far as she was concerned, there was no medical related reason – ill health, which would justify her dismissal.
- [16] Section 192 of the LRA places an *onus* on an employee to establish a dismissal and an *onus* on the employer to prove that the established dismissal is fair. Therefore, it becomes the duty of an employer to prove that the reason for dismissal is a fair reason related to the employee's capacity. In referring the dispute, Geldenhuys has expressly discounted medical reasons to relate to her dismissal. One thing is certain, both Geldenhuys and the SABC were *ad idem* that the dismissal is related to capacity. In order to justify the dismissal, the SABC had to prove capacity, lack thereof, in whatever form. The key question in this judgment is what the word *capacity* means. This question is akin to the one of what the true reason for a dismissal is? During argument, Ms Steenkamp, appearing for Geldenhuys acceded to the proposition from the bench that the parties to the dispute suggested different forms of incapacity and Myhill accepted the one of Geldenhuys and rejected

that of the SABC. On proper consideration of this matter, Geldenhuys did not suggest any form of incapacity. As far as she was concerned she was capacitated and therefore, the SABC had no fair reason to dismiss her. On the other hand, the SABC suggested that continued and intermittent absence due to ill-health is a performance issue which impacted on her capacity.

- [17] The journey for Geldenhuys with regard to the incidence of *onus* terminated once dismissal as defined in section 186 of the LRA was established. From that point on, the SABC took over the driver's seat. Therefore, consistent with section 34 of the Constitution of the Republic of South Africa, 1996 – which decrees that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent and impartial tribunal or forum – the SABC needed to show by way of evidence that the undisputed prolonged and intermittent performance impacted on the capacity of Geldenhuys to justify her dismissal. Additionally, the SABC needed to not only allege but also prove that dismissal was a measure of last resort and appropriate.
- [18] Section 188 (1) of the LRA provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that (a) the reason for dismissal is a fair reason related to the employee's capacity; and that (b) the dismissal was effected in accordance with a fair procedure. In some respects, capacity shares similarities with operational requirements. Both are based on a no-fault fulcrum. However, the LRA only defines what operational requirements means and does not afford the terms capacity and misconduct any special meaning. Mr July for the SABC, forcefully submitted that there is no need for the legislature to define capacity, since it is the duty of the Courts and the CCMA as well as other dispute resolution *fora* to give meaning to the term *capacity*. I have a fundamental difficulty with that submission. When one considers the definition of operational requirements, one observes forms of operational requirements as opposed to a definition of the term “*operational requirements*” and those are economic, technological, structural or similar needs of an employer. It would have been helpful, in my view, for the legislature to provide

forms of lack of capacity in order to give the much needed guidance to the Courts and labour dispute resolution forums. Withal, I now turn to an attempt to give meaning to the term *capacity*.

What does capacity mean?

[19] The dictionary meaning of the word *capacity* is the ability or power to do or understand something⁵. *Incapacity* is defined to mean physical or mental inability to do something. In line with the constitutional imperatives outlined in section 233 (1) of the Constitution, the word must be given an interpretation that is consistent with international law. Section 3 (1) (c) of the LRA commands that a person applying the LRA must interpret its provisions in compliance with the public international law obligations. South Africa is a member of the International Labour Organisations (ILO) and has ratified its Conventions. Section 188 owes its origin from the ILO Conventions. In terms of article 4 of the *Termination of Employment Convention*, 158 of 1982 (Convention 158), the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Based on article 4, any dismissal that is connected to *capacity* is a valid one. Article 4 employs '*connected*' whilst section 188 of the LRA employs '*related*'. These are synonyms or rather two sides of the same coin, which means brought together or into contact.

[20] Based on the above, if there is a connection or relation between a dismissal and *capacity*, a valid reason to dismiss does exist. Section 188 of the LRA refers to a fair reason instead. In the notes of the Committee of Experts on the application of the Conventions and Recommendations (November – December 2008), the following was stated:

“(i) **Reasons connected with the capacity of the worker**

⁵ Oxford Dictionary of English.

A lack of capacity, or aptitude, on the part of the worker can take two forms, (a) it can result from a lack of skills or qualities necessary to perform certain tasks, leading to unsatisfactory performance; and (b) poor work performance not caused by intentional misconduct, as well as various degrees of incapacity to perform work as a result of illness or injury.

- [21] Poor work performance occurs when an employee's performance falls below the required standard. Persistent absenteeism is a form of poor work performance. It follows axiomatically that persistent absenteeism affects the aptitude or the inherent ability of an employee to deliver his or her contractual obligations. That is nothing but lack of capacity – incapacity.
- [22] In short, capacity means amongst others an inherent inability to deliver on the contractual obligations. Once that inability is shown to exist, which inability manifests itself through persistent absenteeism, be it for genuine reasons – ill-health or unauthentic reasons – malingering, then a valid and/or fair reason to dismiss exists.

Schedule 8 of the LRA and its application.

- [23] Mr July submitted that Schedule 8 of the LRA is a mere guideline. In item 1 of Schedule 8, it is stated that it is intentionally general and departure from the norms established by it may be justified in proper circumstances. Item 8 deals with poor work performance as a form of lack of capacity. Recommendation 166 of Convention 158 provides that (a) the employment of a worker should not be terminated for unsatisfactory performance unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has lapsed; and (b) that a worker should be entitled to be assisted by another person when defending himself, in accordance with article 7 of the Termination of Employment Convention, 1982, against allegations regarding performance liable to result in the termination of his employment. Article 7 of the Convention 158 provides that the employment of

a worker shall not be terminated for reasons related to the worker's performance before he is provided an opportunity to defend himself against the allegations made. The Committee of experts stated that the purpose of article 7 is to ensure that any decision to terminate employment is preceded by dialogue and reflection between the parties.

- [24] Against this background, section 188 (2) of the LRA provides that any person considering whether or not the reason for the dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of the LRA. This simply means that when considering the fairness (both legs of substantive and procedural fairness) of a dismissal, a commissioner or a judge is obligated to take into account Schedule 8 for instance. Does take into account mean slavish following of the Code? Definitely not. Take into account means considering something when one thinks about a situation or deciding what to do. In other words, Schedule 8 becomes more like an *aide memoire*. What section 188 (2) obligates is to seek aid from Schedule 8. Ultimately, the question is one of fairness. If fairness can be achieved without the *aide memoire* so be it. The Schedule places premium on both employment justice and the efficient operation of business. It recognises that employers are entitled to satisfactory work performance from their employees. It seeks to foster mutual respect between the employee and employer.
- [25] Regard being had to the form of incapacity the SABC chose to employ to justify the dismissal of Geldenhuys, reference must be made to item 10 (1) of Schedule 8. The item provides that if an employee is temporarily unable to work, in these circumstances, the employer should investigate the extent of the incapacity. 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. In considering alternatives short of dismissal, an employer might consider; (a) the nature of the job; (b) the period of absence; (c) the seriousness of the illness; (d) the possibility of securing a temporary replacement of the ill employee.

What does consider alternatives short of dismissal mean?

- [26] Properly considered, one of the default position to elect when an employer is faced with unreasonably long absence is dismissal. This is consistent with the common law contractual position – faced with a breach, the aggrieved party may elect to cancel the agreement. Where an employer is directed to a situation of considering alternatives short of dismissal, it means that an employer must demonstrate through evidence that dismissal is a measure of last resort or appropriate. In a misconduct situation, item 7 (b) (iv) of Schedule 8 requires a determination of whether dismissal was an appropriate sanction for the contravention of the rule or standard. To my mind, consideration of alternatives is akin to showing the appropriateness of a dismissal for the incapacity.
- [27] Item 10 (1) employs the phrase, *‘the employer should investigate all’*. This suggest that it is peremptory for an employer to investigate. Thus, an employer must provide evidence that dismissal is a measure of last resort or appropriate. The same situation arise in a dismissal based on operational requirements.⁶ There must be evidence and not unsupported allegations that all alternatives were investigated and not only some. Accordingly, in my view, the phrase means that an employer like the SABC need to demonstrate that dismissal for the incapacity – absence for an unreasonably long time – is a measure of last resort or appropriate. Failure to demonstrate that suggests that a dismissal is without a fair reason and substantively unfair.

Case law on persistent and intermittent absence from duty – a form of incapacity.

⁶ *Oosthuizen v Telkom SA Ltd* (2007) 28 ILJ 2531 (LAC), where the LAC stated: “[8] *In my view an employer has an obligation not to dismiss an employee for operational requirements if that employer has work which such an employee can perform either without additional training or minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee’s dismissal for operational requirements...In such a case the dismissal is a dismissal that could have been avoided. A dismissal that could have been avoided but was not avoided is a dismissal without a fair reason.*” (Own emphasis)

[28] Mr July persisted with an argument that the authorities have it that an employer is entitled to dismiss an employee who is persistently and intermittently absent from work. A brief survey of the case law is imperative for the purposes of this judgment.

[29] In *NUM and another v Samancor Ltd (Tubatse Ferrochrome) and others*⁷, the Supreme Court of Appeal (SCA), per Nugent JA, stated the law as follows:

“[12] ...While ordinary principles of contract permit a contracting party to terminate the contract if the other party is unable to perform that is not the end of the matter in case of employment. The question that still remains in such cases is whether it was fair in the circumstances for the employer to exercise that election.

[30] To my mind the fairness alluded to by the SCA relates also to the question whether dismissal is a measure of last resort or not. Nugent JA accepted the following reasoning of the commissioner.

“[12] ...Another consideration that he took account of – and it was clearly decisive of his decision – was that there was ‘no evidence that [Mr Maloma] was occupying such a key position in the company that necessitated his dismissal after ten days of absence’. He added that he had not been persuaded that the employment relationship had become intolerable. In those circumstances I cannot see that the error that he made was material to the outcome. His reasoning shows that he would have reached the same conclusion however the dismissal was categorized. Least of all does it follow from his error that the award was so unreasonable that it fell to be set aside,”

[31] In *AECI Explosives Ltd v Mambalo*⁸, the Labour Appeal Court (LAC) accepted that an employer is entitled to dismiss for incapacity to perform a job where the incapacity was due to persistent absence from work due to genuine ill-health. With regard to the test for substantive fairness, the LAC approved the

⁷ (2011) 32 ILJ 1618 (SCA).

⁸ [1995] 9 BLLR 1 (LAC).

test that was suggested by Tibbutt J⁹. Such a test is (a) can an employer fairly be expected to continue the employment relation bearing in mind the (i) interest of the employer; (ii) the interest of the employee; and (iii) the equities of the case. With regard to the equities of the case, the relevant factors are *inter alia*; (a) the nature of the incapacity; (b) the cause of the incapacity; (c) the likelihood of recovery; (d) improvement or recovery likelihood; (e) the period of absence and its effect on the employer's operations; (f) the effect of the employee's disability on other employees; (g) employee's work record; and (h) employee's length of service.

[32] In *General Motors SA (Pty) Ltd v NUM*¹⁰, it was affirmed that dismissal is in principle permissible in a case of habitual absenteeism, even if it is for medical reasons. The Court found that the arbitrator's failure or refusal to recognise a category of dismissal that permits an employer to dismiss an employee for persistent or habitual intermittent absence on account of ill-health constituted a reviewable error of law. The Court in no uncertain terms confirmed the principle that it was permissible in law for an employer to dismiss an employee on account of excessive intermittent absence on account of ill-health. The Court further confirmed that such relates to incapacity as opposed to misconduct¹¹.

[33] In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and others*¹², the SCA stated that an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill-health. It further stated that, the prolonged absence may, if it is fair in the circumstances, allow an employer to exercise an election to end the employment relationship.

⁹ In *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC).

¹⁰ (2018) 39 ILJ 1316 (LC).

¹¹ La grange J in *Atlantis Foundries (Pty) Ltd v NUMSA and others* C867/2017 (4 June 2018) stated that: "This case affirms the principle that frequent absenteeism for illness is a justifiable reason for absenteeism and that the cause for the incapacity and likelihood of improvement are factors to be considered in determining substantive fairness of the dismissal".

¹² (2014) 35 ILJ 406 (SCA).

- [34] In *Parexel International (Pty) Ltd v Chakane and others*¹³, the LAC accepted the principle enunciated in *Mambalo* and accepted in *Mmoledi*. Additionally, the Court stated that an employer was not required to hold the employee's position open for an employee.
- [35] In summary, a survey of the above authorities suggests that on application of the principles of the common law of contract blended with the fairness and equity principles, persistent and intermittent absence constitutes a category of incapacity. That being so, an arbitrator ought to accept as a matter of law that an employer is entitled to dismiss an employee if such an employee has been intermittently absent for a prolonged period.
- [36] Once it is established that the incapacity takes or took a form of persistent absence, the provisions of item 10 (1) of Schedule 8 must be engaged in determining the fairness of a dismissal justified by that form of incapacity. In order to deal with substantive fairness, the test suggested by Tibbutt J must be applied. Some of the equity factors suggested by Tibbutt J has been incorporated in item 10 (1) of Schedule 8. Those factors are to be taken into account when alternatives are considered. Item 10 (1) is couched in futuristic and speculative terms. It states that '*if the employee is likely to be absent for a time that is unreasonably long in the circumstances*'. The item does not suggest what ought to happen when the absence is historical. In other words, would an employer be entitled to employ historical absence due to ill-health in order to justify the dismissal? The LAC in *Parexel* per Savage AJA had the following to say:

“[20] It is self-evident that whether an employee is willing and able to work and when she may be in a position to do so are material consideration to which regard must be had when considering an employee's incapacity, whether she has been absent from work for an unreasonably long period of time and whether alternatives to dismissal exists...”

¹³ [2019] 11 BLLR 1245 (LAC).

[37] In *casu*, there can be no dispute that a period of absence involved herein was in the circumstances of this case unreasonably long. That being the case, it was incumbent on the SABC to investigate all the possible alternatives short of dismissal. To my mind, as indicated above, this simply entails that dismissal should be a measure of last resort. There is clear and uncontested evidence that Geldenhuys was willing and able to work when she returned on 3 September 2018. From 3 September 2018 up to and including December 2018, there was no evidence of unwillingness or inability to work. In fact, according to Geldenhuys, she was dismissed because she stood up against the GCEO. Of course this was inadmissible evidence given the allegation she made in the referral forms – her dismissal related to capacity and not some form of discrimination and or harassment. Withal, in *Parexel*, the Court stated the following:

“[20] The employee’s extended absence from work was not explained by way of properly detailed medical report the different medical certificates provided to the appellant did not explain why the extended absence from work had been necessary or why her continued absence was justified. On her own version, the employee was unable to return to work and was unable to indicate when she will be able to do so.”

[38] In *casu*, Geldenhuys testified in clear terms that her prolonged absence was due to ill-health. The SABC did not take issue with that and continued not to take issue with that when the current application was argued. To be exact, Mr July submitted that the SABC accepted the justification for her absence as being ill-health. It was never doubted that for the period of her absence she was indisposed. She testified in no uncertain terms that when she returned, she was in a position to work and she was not in any form, manner or shape incapacitated. Indeed this assertion was never disputed by the SABC. The issue of her dismissal on 18 December 2018, descended like manna from heaven. Perhaps the SABC should have made an election to terminate in the midst of the undisputed prolonged absence.

[39] Savage AJA continued to say:

“[21] ... The clear evidence was that the employee was incapable of returning to work and the employee accepted as much.”

[40] Unlike the employee in *Parexel*, Geldenhuys was capable to return and she did return on 3 September 2018. The employee in *Parexel* was absent for nine months. Geldenhuys was absent for a period of about three months or so. During her absence a temporary replacement was secured. Above all, the equities suggested by Tibbutt J confirms that dismissal was not an appropriate sanction. SABC ought to have considered other alternatives short of dismissal.

[41] The strange feature of this case is that after being absent for three months or so, Geldenhuys continued with her work after the investigation meeting of 8 October 2018 up to and including 18 December 2018 when she was dismissed for the past incapacity. Based on the minutes signed by Mxakwe on 17 October 2018, the following was the parting shot of the investigation meeting held on 8 October 2018:

“**MM**¹⁴ then closed off the discussion by saying that he has made his points and TG¹⁵ has made hers. He will be looking into all the facts and comments that formed part of the hearing and provide his findings.”

TG finally stated that she was not incapacitated and not mentally disturbed and that she had a lot to contribute to the organisation.

[42] It is observed that nowhere does he mention that alternatives short of dismissal will be investigated. Such investigation was key and ought to have been communicated to Geldenhuys in clear terms, particularly after her representative stated the following during the hearing:

¹⁴ Denotes Mr Madoda Mxakwe.

¹⁵ Denotes Ms Theresa Geldenhuys.

“SP¹⁶ ... He said there was no recorded evidence that she has missed work since her return from 17 September 2018. She has been back at work and has performed. Her health has also been restored and she can continue to work productively...”

[43] It was only at arbitration that Mxakwe exposed the fact that for a period of about two months, the SABC was looking for alternatives. At arbitration he testified that:

“MR MXAKWE: We were looking at alternative options within the organisation, considering the seniority of the role, and the impact it was having on the execution of the duties. The idea was to look at a role that would be more suitable to her continued absence from the office. The Group Executive HR was looking at other alternatives within the organisation...”

MR MXAKWE: The HR head was helping us with this process, to see what alternatives, which would not have the same impact as the Group Executive for Governance would have. Unfortunately, there were not, and that is the reason why there was a delay.”

[44] This process is undertaken in the circumstances where Geldenhuys stated in no uncertain terms that she was not incapacitated. It is perplexing to note that Geldenhuys was not involved in this “*wild goose chase*” – looking for alternatives for a capacitated employee. Regard being had to the parting note of the meeting of 8 October 2018, it does not beggar belief to conclude that the above testimony was an afterthought to attempt compliance with the provisions of item 10 of Schedule 8.

The arbitration award of Myhill

[45] Inasmuch as arbitrators are entitled to render detailed arbitration awards, regurgitation of submissions by parties does not serve a useful purpose other

¹⁶ Denotes Mr S Paradza.

than to elongate the arbitration award. The arbitration award comprises of 49 pages. This is an unnecessarily long arbitration award. In terms of section 138 (7) (a) of the LRA, a commissioner is obligated to issue an arbitration award with brief reasons. Thus, it is axiomatic that long and detailed arbitration awards are not anticipated. It remains important for an arbitrator to briefly reason the award in order not to leave a Court of review guessing what the justifications of the findings reached are. Regurgitation of witnesses' testimonies is actually not required, particularly where a proper transcript is kept. In about 32 pages, Myhill somewhat provided a transcript of the testimony of the witnesses. In the Court's view this was unnecessary. I take this opportunity to sternly warn arbitrators that a reviewing judge is not necessarily interested in the arbitrator's verbose writing style, but only the reasons for the decision he or she reaches. Long arbitration awards tend to obscure the issues for the reviewing judges, particularly when searching for the arbitrator's reasons to justify the conclusions reached. It probably may be so that commissioners are remunerated based on the longitude of the arbitration awards, however, unnecessarily prolonged arbitration awards does not assist the reviewing judge.

[46] In assessing the evidence, again the submissions made by the parties were repeated. The only place where this Court is able to discern the reasons why he found that the dismissal was substantively unfair was in paragraph 146 of the arbitration award, where he stated that:

“146 The applicant (Geldenhuys) testified that when she returned to duty on 03 September 2018, she was fit and able to perform all her duties. She had a lot of work to catch up. This was due to the AGE:GA not performing the duties during the time the applicant was on sick leave. The respondent did not dispute this testimony of the applicant. On this point alone the respondent's case should fail because proving that the applicant (Geldenhuys) was indeed incapacitated is an inherent substantive requirement of any incapacity dismissal.¹⁷

¹⁷ This finding commands itself to the leg of dismissal not being a measure of last resort or its appropriateness for the incapacity.

- [47] Regard being had to the principles enunciated above, it is perspicuous that Myhill missed the point by a proverbial mile with regard to a valid reason to dismiss (the other leg of substantive fairness). The applicant lamented that Myhill ignored the relevant evidence. Regard been had to the above finding, the lament is justified. Mr Mxakwe testified at length about the impact the prolonged absence of Geldenhuys had on the operations of the SABC as well as the contractual obligations of Geldenhuys. Myhill completely ignored the intermittent prolonged absence of Geldenhuys. Because Geldenhuys was fit and able to perform from 03 September 2018 that does not discount the admitted prolonged intermittent absence, which equates incapacity. As correctly found in *General Motors*, a failure to recognise this as a category of incapacity is a reviewable error of law.
- [48] With regard to procedural fairness, again, with respect, Myhill was found wanting. The procedural challenge mounted by Geldenhuys was that Mxakwe was a referee and a player at the same time. When it comes to procedural fairness, an employee is bound by the challenge raised in the referral documents. It is this challenge that an employer must contend with to prove procedural fairness. Often times, it is not uncommon for employees not to challenge procedural fairness in general terms where some form of a hearing has happened. In an instance where some form of a hearing has happened, as it was the case in this matter on 8 October 2018, employees tend to mount a specific challenge, as Geldenhuys did in this matter. Under those circumstances, it is irregular for an arbitrator to straddle into issues of procedural irregularities not brought for decision. Doing so will be to deny the employer a fair hearing. An employer must meet a case alleged in the referral forms regarding procedure. Procedural fairness covers a broad spectrum of issues. It is for that reason that an employee must be specific in a challenge. Once specified a commissioner is not at large to throw a dice, as it were, in order to find a procedural flaw. This becomes the case even in instances where an employee during his or her testimony alludes to some procedural defect. In outlining the case of Geldenhuys at the commencement of

arbitration, there was no suggestion that any other procedural defects other than the one exposed in the referral form would taint the procedural fairness of her dismissal.

- [49] At paragraph 164 of the arbitration award, Myhill, after dealing with various submissions made on behalf of Geldenhuys reached a conclusion that the SABC failed to prove that the dismissal was effected in accordance with a fair procedure. By reading the award, it is difficult to discern the basis upon which the finding of procedural unfairness is predicated. It was however common cause that on 8 October 2018, Geldenhuys was engaged on the issue of intermittent prolonged absence. Myhill was alive to the testimony of Mxakwe as recorded in the minutes of the incapacity hearing of 8 October 2018. Mxakwe's concerns were about Geldenhuys' poor work attendance and lack of productivity. Regard being had to the common cause evidence of an engagement with Geldenhuys over her prolonged intermittent absence, a finding that the dismissal is procedurally unfair is not one that a reasonable decision maker may reach.
- [50] During argument, Ms Steenkamp persisted with the issue of Geldenhuys being denied legal representation during the investigation meeting of 8 October 2018. This was not the basis upon which Geldenhuys impugned the procedural fairness. That notwithstanding, Myhill concluded that Mxakwe's refusal to consider the request for legal representation resulted in the entire incapacity investigation process being procedurally unfair. This finding falters on two bases. In the first instance, it is factually incorrect to suggest that Mxakwe did not consider the request. On 1 October 2018, Geldenhuys was notified of the hearing. On 5 October 2018, her attorneys of record intimated that they are in the process of drafting an application for legal representation which was to be served on the SABC before 14:00 on 8 October 2018. On 7 October 2018, Mxakwe decided that legal representation will not be allowed. Geldenhuys' attorneys of record challenged Mxakwe that he decided on the legal representation issue without having had sight of the formal application. On 9 October 2018, Mxakwe made it clear that the decision not to allow legal

representation was not only premised on the reasons articulated in the email response, but it was also premised on the reasons provided after consideration of Geldenhuys' affidavit in support of the formal application.

[51] In the second instance, Geldenhuys did not have a right to legal representation¹⁸. On the day in question one Mr S Paradza, a fellow employee assisted Geldenhuys. The notice of 1 October 2018, explicitly stated that Geldenhuys has a right to be represented by a fellow employee within the SABC. Regard being had to the ILO Conventions and recommendations, article 7 of the Convention envisages an opportunity to defend oneself, which as explained envisages a dialogue and reflection. Placing heavy reliance on *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani*¹⁹, Ms Steenkamp strenuously argued that not considering the legal representation request renders the dismissal procedurally unfair, thereby supporting the findings of Myhill.

[52] In my view, the reach of *Mahumani* is misunderstood. In the first instance, the case involved a review of the failure to exercise discretion. The case is not authority for the proposition that failure to exercise discretion to allow legal representation *per se* amounts to procedural unfairness. Patel AJA, writing for the majority stated the following:

“[13] It follows that, if, on a conspectus of all the circumstances it would be unfair not to allow legal representation the provisions of clause 7.3 (e) may in terms of clause 28 be departed from. The presiding officer erred in holding that he had no discretion to allow such departure. The court *a quo*, therefore, correctly reviewed his decision and set it aside.”

[53] The veritable issue in *Mahumani* was lack of exercise of discretion to allow departure from the provisions of a collective agreement, which on its reading

¹⁸ *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau and Others* (2009) 30 ILJ 269 (LAC). Item 10 (2) of schedule 8 specifically states that an employee should be assisted by a trade union representative or fellow employee.

¹⁹ (2004) 25 ILJ 2311 (SCA).

did not allow legal representation. In *casu*, Mxakwe exercised discretion and did not find reason to depart from the SABC processes of only allowing representation by a fellow employee. There is no evidence that the provisions of the SABC Codes were referenced at the arbitration proceedings. It has not been suggested that Mxakwe was faced with the similar provisions of clause 7.3 (e) of the collective agreement involved in *Mahumani*. Most importantly the SCA interpreted clause 2.8 of the collective agreement as allowing departure from the provisions of clause 7.3 (e) of the collective agreement, contrary to the view held by Wallis AJ, as he then was, in *Mosena and others v The Premier Northern Province and others*.²⁰

- [54] There was no suggestion in this matter that Mxakwe took a view that a specific clause in the SABC Codes did not allow him to depart from the Codes. By all account, the *Mahumani* judgment is distinguishable. I again reiterate that failure to exercise discretion *per se* does not morph into procedural unfairness. On this, I am fortified by the decision taken by the SCA at the end. It held that:

“[15] It will be for the presiding officer to apply his mind to the need for legal representation after considering the circumstances of the case. The matter will therefore of necessity have to be referred to the presiding officer for him to exercise his discretion.”

- [55] Returning to the facts of this case, if a finding was ever made that Mxakwe failed to exercise discretion, which finding would have been at odds with the objective evidence, such would not translate into any procedural unfairness. Besides, arbitration proceedings are proceedings *de novo* aimed at determining the fairness of a dismissal. It is not the duty of an arbitrator to review the decision of the employer. It cannot be said that a commissioner is empowered to enquire into the exercise of discretions by an employer. Assuming that the reach of *Mahumani* extends to reviewing the exercise of discretion in search of procedural unfairness, a commissioner would use the

²⁰ Case No 1401/2000 an unreported judgment of the Labour Court.

similar approach where a review of an exercise of discretion is involved, namely; presence of capriciousness, *mala fides* and application of wrong principles²¹. There is no evidence of capriciousness, *mala fides* and or application of wrong principles. Therefore, the discretion exercised by Mxakwe was not interferable.

The grounds of review considered.

[56] Regard being had to the above stated legal principles, it must be so that Myhill failed to appreciate that SABC is by law entitled to justify dismissal through the undisputed prolonged absence. All he was required to do and did not do was to determine the fairness of the dismissal on the reasons of incapacity as advanced by the SABC. Indeed, he ignored legal principles enunciated by binding authorities. However, substantive fairness comprise of two legs. The first, in relation to this matter is whether Geldenhuys was incapacitated or not? In answering this question, Myhill only focussed on the future; namely after 3 September 2018 and ignored the past undisputed absence. He seems to have placed reliance on *MTN Service Provider (Pty) Ltd v Matji NO*²² where the learned Acting Justice Ngalwana concluded that an employee's lengthy and persistent absence from work due to ill-health is, in itself, insufficient to justify dismissal for incapacity. *MTN* was overturned on appeal. Besides, *General Motors* was the latest available authority, which is clearly at odds with *MTN*. On application of the *stare decisis* principle, *General Motors* bound Myhill. When the past intermittent prolonged absence of Geldenhuys is taken into account, as the authorities suggest it, a valid reason to dismiss emerges. During that time, incapacity existed.

[57] The second leg is whether alternatives short of dismissal were considered. In other words, was dismissal a measure of last resort, and or an appropriate sanction to be meted out for the past intermittent absence of Geldenhuys. Regard being had to the binding authority of *Parexel* as discussed above and

²¹ *Kemp t/a Centralmed v Rawlins* (2009) 11 BLLR 1027 (LAC) para 3-23.

²² (2007) 28 ILJ 2279 (LC).

the equities suggested by Tibbutt J, dismissing Geldenhuys due to the historical persistent absence was not appropriate. Other alternatives short of dismissal should have been investigated. Failure to do so rendered the dismissal of Geldenhuys to be substantively unfair.

- [58] With regard to the issue of compensation, I do not agree that there was any excess of power as alleged by the SABC. Awarding a just and equitable compensation involves an exercise of discretion. As held in *Kemp t/a Centralmed v Rawlins*²³ a review Court must be loath to interfere with the exercise of discretion. Excess of power is an incident of the rule of law. Myhill is empowered by the LRA to order compensation equivalent to 12 months' salary. The compensation award of 8 months falls within the permitted period. Having used the remainder of the period of the fixed term of the contract of employment does not suggest that he awarded damages as submitted by Mr July. Owing to the fact that Geldenhuys ought not to have been dismissed, awarding her 8 months compensation was just and equitable. The judgment of the LAC in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*²⁴ remains instructive when it comes to determination of compensation²⁵.

What then?

- [59] Although Myhill committed errors of law in respect of the first leg of substantive fairness, his finding that the dismissal of Geldenhuys is substantively unfair remains one that falls within the band of reasonableness, regard being had to the second leg of substantive fairness²⁶. In other words, the outcome that the dismissal of Geldenhuys is substantively unfair is capable of justification. It is a decision that a reasonable decision maker would reach. The errors of law pointed out in this judgment does not vitiate

²³ [2009] 11 BLLR 1027 (LAC).

²⁴ [2015] 11 BLLR 1081 (LAC)

²⁵ Followed by the Labour Court in *SAPO Ltd v Soman and others* (JR1368/12) dated 25 November 2015.

²⁶ Van Niekerk J in *General Motors* stated that 'Given that this Court is required to determine whether the result of the proceedings under review can stand having regard to the evidence notwithstanding the error or misdirection by the arbitrator, I intend to consider briefly whether the arbitrator's findings on substantive fairness is capable of being upheld.'

the outcome reached. The outcome remains one that a reasonable decision maker may reach²⁷. There was no evidence, like in *General Motors* case to suggest that the absence will continue and there will be no marked improvement in the health of Geldenhuys. The SABC led no medical evidence, which would have suggested that Geldenhuys would continue to be excessively absent from work.

- [60] However same cannot be said with regard to the finding that the dismissal is procedurally unfair. That finding is not capable of justification for reasons set out in this judgment. The investigation meeting of 8 October 2018 constitute a dialogue which enabled the SABC and Geldenhuys to reflect. The issue of persistent absence was common cause. The fact that Mxakwe chaired the investigations does not suggest that he was a player and a referee at the same time. The rules of natural justice may, when appropriate and necessary be departed from. Mxakwe was the superior of Geldenhuys, the fact that Geldenhuys was absent for a prolonged period did not require any determination, it was common cause. As the superior of Geldenhuys, Mxakwe was qualified to enquire into the extent of the prolonged absence which undoubtedly had impacted on the performance of an organisation he heads. In any event clause 10 (1) commands that the purpose of investigation is to investigate the extent of the incapacity as opposed to passing judgment as to whether there was or there was no incapacity. What Mxakwe was required to do in the investigations was to firstly establish the extent of the incapacity and afford Geldenhuys an opportunity to state her case in response as assisted by a fellow employee. Accordingly, the dismissal was effected in accordance with a fair procedure.

Conclusion

²⁷ In *General Motors* it was said: 'The evidence also suggested that the fourth respondent presented with nine different diagnoses in the course of the sick leave cycle in question, that these illness were persistent and that there was little prospect of any marked improvement in his ability to attend work on a regular basis... The evidence suggests that the fifth respondent would more than likely continue to be absent from work excessively, and that he lacked capacity to ensure regular attendance at work.'

[61] In summary, even if Myhill committed an error of law his findings on substantive fairness falls within the bands of reasonableness. He did not exceed his powers with regard to an award of compensation. His findings that the dismissal is procedurally unfair is not capable of justification.

[62] In the result the following order is made:

Order

1. The arbitration award issued by Commissioner Eric Myhill dated 29 October 2019 under case number GAJB455-19 is to a limited extent – (procedural unfairness finding) reviewed and set aside. The findings on substantive unfairness and compensation are upheld.
2. To that limited extent, the arbitration award is replaced with an order that the dismissal of Geldenhuys is procedurally fair.
3. There is no order as to costs.

G. N. Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr S July of Werksmans Attorneys, Sandton

For the Third Respondent: Ms L Steenkamp

Instructed by: Welman and Bloem Inc, Pretoria.