REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 2/2016

In the matter between:

BARTHO VEJONA MATUZEE **APPELLANT**

and

KYLIKKI SIHLAHLA **FIRST RESPONDENT**

METHEALTH NAMIBIA ADMINISTRATORS (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Matuzee v Sihlahla* (LCA 2/2016) [2018] NALCMD 3 (15 March 2018)

Coram: ANGULA DJP

Heard: **15 September 2017**

Delivered: **15 March 2018**

Flynote: Labour Law – Labour Appeal – Appellant appealing against the arbitrator's award – Appellant contending that he was unfairly dismissed – Dismissal for operational reasons – Redundancy and Retrenchment – Second respondent failed to comply with the provisions of section 34 of the Labour Act, 2007 (the Act) – Dismissal for operational requirements must be substantively and procedurally fair – Second respondent failed to discharge the *onus* that the appellant's dismissal was both procedurally and substantively fair – Appeal upheld.

Summary: The appellant appealed against an arbitrator's award confirming second respondent's dismissal of the appellant due to restructuring reason – The respondent declared the appellant's position redundant due to operational or restructuring reasons – The second respondent then delivered a notice of retrenchment to the appellant in terms section 34 of the Act – The notice ordered the appellant to immediately leave the respondent's premises because, according to the respondent, the atmosphere was not conducive for the appellant to remain on the premises, pending consultations and negotiations for alternatives to dismissal as envisaged by section 34.

The appellant, thereafter filed a complaint for unlawful dismissal with the Office of the Labour Commissioner claiming re-instatement and compensation for loss of income. The appellant contended that his dismissal was a sham and that the real reason for his dismissal was his involvement in labour activities which the respondent's management disapproved. He contended further that, after the notice in terms of section 34 was served on him, the respondent refused to furnish him and the Union with necessary documentary information to enable him to make proposals for alternatives to dismissals; that he made proposals for alternatives to dismissals which were ignored by the respondent. The respondent denied that the retrenchment was a sham. Furthermore, that after the appellant was served with the notice of dismissal, he failed to revert to the respondent with alternatives to dismissal, and accordingly the respondent had no alternative other than to dismiss the appellant.

On appeal, court held: The *onus* was on the employer to prove that the appellant's dismissal was both procedurally and substantively fair.

Held further: In respect of procedural fairness, the court held that the fact that the respondent failed to furnish the appellant with the necessary documentary information to enable him to understand the business case upon which redundancy was premised and hence retrenchment, was procedurally unfair and rejected the respondent's claim that the documents requested by the appellant were privileged. The court held further that the respondent's failure to consult and engage the

appellant in order to meaningfully discuss alternatives to dismissal, constituted procedural unfairness.

Held further: In respect of substantive fairness, the court held that the respondent failed to lead any evidence to show that the retrenchment of the appellant was an act of last resort; that there were no other alternatives but to retrench the appellant. On the contrary, the evidence established that there were alternatives to dismissal. The respondent therefore failed to discharge the *onus* that retrenchment was substantive fair. Accordingly the appeal was upheld.

ORDER

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1. The appeal is upheld.

2. The second respondent is ordered to reinstate the applicant in a position comparably equal or better to the position he held before he was dismissed.

3. The second respondent is ordered to pay compensation to the appellant equal to the monthly remuneration he would have received had he not been dismissed.

4. The remuneration in para 3 above is to be calculated from July 2014, that is the month following his dismissal, to the date of this judgment.

5. There shall be no order as to costs.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is an appeal against an award made by an arbitrator on 14 December 2015. At the end of the arbitration proceedings the arbitrator made an order confirming the dismissal of the appellant and dismissing the appellant's claim for reinstatement.

[2] The appeal is opposed by the second respondent, Methealth Namibia Administrators ('the respondent' or 'the company'). In view of the fact that the first respondent did oppose the appeal, in this judgment I shall only refer to the second respondent as 'the respondent'.

Brief Background

[3] The appellant was appointed by the respondent as a supervisor for NMC Claims Department during 2006. On 24 February 2014, the appellant was informed through his trade union that his position had become redundant because of operational reasons. He were informed that the respondent decided to do away with the position of supervisors as the position did not make operational sense to have so many layers in management, ie manager, supervisor and controllers. Therefore the supervisor's positions were declared redundant.

[4] The appellant was then presented with a document titled 'Business Case – realignment of supervisors: NMC and Bankmed Namibia Claims'. In this plan, the objective of the new structure was said to address and realign the specific departmental objectives. The reasons for the realignment were said to be that the existing structure had limitations that was detrimental to the effective and efficient delivery of claims services of the company as a whole and it had increasingly became clear that the company was running risk in its operations. As a result of the re-alignment the proposed new structure was no longer able to accommodate the position of a supervisor and as such position had become redundant.

[5] The business case document set out a schedule for the proposed consultation process: It proposed that the communication of the business case to the affected employees would take place on 24 February 2014; it set the deadline for final written

comments by the employees as 24 February 2014; and it proposed a deadline for final review and evaluation of all comments received and communication of final business case to the employees as 26 February 2014.

[6] The document specifically recorded that no final decision would be made before all comments, suggestions and inputs of the affected staff member(s) had been evaluated and taken into account.

[7] On 24th of February 2014, the Union representative for the appellant, Mr Vries addressed an email to the General Manager: Group Services of Methealth, Ms Ekandjo in which he informed the respondent of the challenges the Union was experiencing with regard to the case presented to them. He pointed out the difficulty they had in an attempt to reply to the business case presented due to the complexity of the case and the fact that they were not afforded sufficient time to study the document presented to them and thereafter to make submissions on behalf of the appellant. In addition he requested that certain documents be made available to them to enable them to understand of the business case. The documents requested were:

1. Minutes of the Management Strategic Session;
2. A breakdown on turnaround times, increase in re-submissions and stale claims;
3. Business plan of the claim department;
4. List of limitations which the existing structure had that was detrimental and how the position negatively impacted the structure;
5. Affirmative Action plan of the department;
6. Clarification on the problems that arose on the succession plan and operational inefficiencies for the department;
7. Organogram of the company with each position's job grades;
8. Succession plan of the department;
9. Specification of the risk factors with the exiting position as referred to in the business case and clarification on the existing inefficiency which were in contrast with efficiency; and

10. With reference to the factors in the business case, to specify the exiting shortcomings to the quality and standards of claims administration; and what comprehensive training would be provided to staff.

[8] On 17 March 2014, Ms Ekandjo replied to Mr Vries' abovementioned email in which she purported to provide the information requested. The answer consisted of an extract from minutes of the management strategic session; from the business case document and from the business plan of the department. In response to the question regarding the limitations in the existing structure that were detrimental and how it negatively impacted on the position of the appellant, she explained that when the claim manager is on leave some critical responsibilities are distributed between the supervisor and the claims controllers; that the existing structure did not support what was termed 'stand-in'; that the gap between the claim controllers and the managers was too wide; that there was no succession planning in the existing structure as everyone was reporting directly to the supervisor; and that with the proposed structure the claim controllers will have a certain degree of control over the stall which will support the succession planning.

[9] As regard to the request for a copy for the affirmative action plan, Ms Ekandjo responded that same could be 'obtained from the ECC'. Regarding the request for a copy of the succession plan for the department, she responded that the there was no departmental succession plan but that there was an organizational succession plan which could be 'obtained from the AA report'. In response to the request to specify the risk factors as well as the inefficiency in the existing structure, she pointed out that the claims were not paid on time and that there was a long turnaround time of claims payments, increased re-submissions of claims and stale claims. According to her this answer also addressed the question about the shortcomings to the quality and standards of claims administration.

[10] Finally and in response to the question, as to what comprehensive training would be provided to staff, Ms Ekandjo responded that it was the company's specific comprehensive training. Furthermore, the proposed structure will give the claims controllers responsibility and recognition to do comprehensive training to the staff members assigned to them.

[11] On 1 April 2014, Mr Vries addressed a further letter to Ms Ekandjo with regard to the redundant positions. He pointed out that the positions of supervisors had already been declared redundant, therefore there was no point to consult with the company management after they had already made such decision. He further reminded her that CEO Consultant had recommended that the position of the supervisor be upgraded to a C4 notch, which was equal to Head of Department but that recommendation was not followed through. Moreover, the two alternative positions which were available had already been filled by other two retrenched employees with no interviews conducted.

[12] On the same date, 1 April, Mr Vries addressed another letter to Mr Opperman, the managing director of the respondent. In that letter, Mr Vries complained that they had been sending emails and requesting information from Ms Ekandjo to enable them to submit their comments with regard to the redundancy however such requested documents were not furnished. He therefore requested Mr Opperman himself to furnish him with said documents as demanded before. In addition to the documents previously requested, Mr Vries requested Mr Opperman to furnish them with the '*Alexander Proud Food Report*'. Mr Vries expressed the opinion that in the Union's view, the declaration of the appellant position as redundant was a sham to get rid of the appellant.

[13] In an undated letter, the Union, again through Mr Vries responded to Ms Ekandjo's letter of 17 March 2014. He reiterated that they were waiting for the minutes of the management strategic session referred in the business case document; the documentation pertaining to the break down on turnaround times, increase in re-submission and stale claims and how it affected the position of the appellant as supervisor; the business plan of the claims department; and the instructions distributed by the claim manager to supervisors and claim controllers as alleged in the email by Ms Ekandjo. With regard to the provision of the documents requested, Mr Vries pointed out that it was the obligation of the company to furnish the Union with the documents requested and not for the company to send the Union to third parties, such as the EEC to obtain documents. He stressed that they were waiting for a copy of the organogram of the company with each position's job-grade.

He requested that they be provided with a copy of the organizational plan of the company in the absence of the succession plan of the department. Finally the letter recorded that the Union had requested the company to specify the risk factors associated with the existing structure and for the company to specify the existing inefficiency in the existing structure in contrast to the proposed structure. The letter recorded further that the company had failed to specify which claims were not paid out on time; that no breakdown of long turnaround claims processing was provided and no proof of re-submission and stale claims were provided. They demanded to be provided with this information.

[14] No response was received from the respondent in respect of the above letter from the Union.

[15] On 24 April 2014, the respondent sent a notice of retrenchment to the appellant. The notice stated *inter alia* that:

> 'Even though the redundancy of your position as supervisor, which is part of the realignment of supervisors as a result of the business decision to re-organize the business operation for economic reasons had been explained and elaborated, including the email communications on or about 7 April 2014, no alternative to dismissal is found, the company has no option than to issue this notification in terms of section 34 of the Labour Act, 2007.'

[16] The notice further stated that the termination date of the appellant's employment was 31 May 2014 and that the company would continue to negotiate with the appellant as envisaged in section 34(1)*(d)* of the Act and that the appellant was invited to make proposals in that regard. The notice instructed the appellant to hand over all the company's property and equipment issued to the appellant.

[17] On 13 May 2014 by Mr Vries, addressed a further letter to the respondent in response to the notice of retrenchment of the appellant. The letter decried that the respondent had failed to comply with the provisions of section 34(1)(*a*) of the Labour Act, 2007 (the Act) in that the respondent did not inform the Labour Commissioner and the Union, four weeks before the intended dismissal, took place. The letter further pointed out that instead of an intended dismissal the letter informed the Union of the dismissal which had already taken place. The letter further put in dispute of

any discussions that took place between the parties regarding termination of that appellant's employment based on 'economic reasons' and questioned how the respondent arrived at the conclusion that the appellant should be dismissed for economic reasons. It further recorded the respondent's failure to provide the union with the requested documentation. By way of explanation the letter mentioned economic reasons as a basis for the decision to re-organise the business operation.

[18] Thereafter on 30 May 2014, Mr Vries addressed a further letter to Mr Opperman, in which, he recorded the fact that they had not been furnished with the documents they had requested from management on several occasions. He stressed that the purpose of the request was to establish whether there had been procedural fairness and also to establish whether substantive grounds existed to justify the dismissal based on redundancy. In addition, he recorded that no discussion was ever held relating to economic reasons with the appellant and his representative and the only reasons that were communicated to the Union was redundancy based on restructuring. Furthermore, the letter highlighted the fact that respondent had failed to provide a breakdown of the turnaround time, increase in re-submissions, stale claims and proof of the operational inefficiencies referred to in the business case and how the company arrived at the decision to dismiss the appellant based on economic reasons.

[19] Following receipt of notice of dismissal the appellant filed a complaint of unfair dismissal with the Office of the Labour Commissioner on 26 May 2014. After the conciliation failed the dispute was referred to arbitration which commenced on 18 June 2015.

Arbitration proceedings

[20] At the arbitration proceedings, the appellant sought an order declaring that he had been unfairly dismissed. Secondly, he sought an order to reinstate him with payment of any loss of income the appellant had suffered as a consequence of the unfair dismissal. The appellant also contended that he had been subjected to unfair labour practice.

Evidence on behalf of the respondent

[21] Since the respondent had the onus to justify the appellant's dismissal, it had to start with the leading of evidence. The respondent called Ms Ekandjo who is the general manager: Group Services. She testified that the respondent decided on a restructuring process in respect of all supervisors positions. The appellant occupied a supervisor's position in the respondent's claims department; that the respondent decided to do away with the supervisors positions. She testified that the rationale behind the decision was that it did not make sense to have so many layers in the management structure. Accordingly the supervisors' positions were declared redundant.

[22] She further testified that the appellant was notified that his position had been declared redundant. He was handed a document referred to as 'the business case'. The Union to whom the appellant belonged was notified as well as the Office of the Labour Commissioner. A meeting was held between the appellant and the Union representatives. At that meeting the appellant and the Union were informed about the restructuring process and that two lower positions would become available and that the retrenched employees would receive first preference in respect of those positions should they meet the requirements. Thereafter two of the retrenched employees reverted to the respondent and accepted the positions and were re-employed with full retention of their previous salaries. The respondent's human resource manager Ms Tjongarero, was then assigned to deal with the appellant. It was Ms Ekandjo evidence that the appellant never reverted to the respondent with an alternative proposal for a position within the company.

[23] She testified further that in view of the fact that the appellant never reverted to the respondent with an alternative proposal, the appellant was issued with a notice of retrenchment on 24 April 2014. In the said notice the appellant was informed that his last day of work would be 31st May 2014, but he would not be required to report for duty in the meantime. Furthermore, he was advised to seek for alternative employment within the wider Group and if vacancies were available and if he met the requirements, he would receive preference.

[24] Under cross examination, Ms Ekandjo testified that when the appellant was given the notice of retrenchment he was instructed to take his properties; he was further ordered to return the company's properties and leave the company's premises immediately because the environment was not conducive for him to stay. She testified further that at the meeting held with the Union on 24 February 2014, the Union and the appellant requested the respondent to provide them with further documents in support of the business case. She confirmed further that on 23 April 2014, the respondent was informed about an adverse arbitration award made against it in favour of the appellant.

[25] She further confirmed under cross-examination that the appellant made a proposal on 21 July 2014, that instead of being retrenched he should be appointed into the position of head of department: premium administration, because the position was available and the appellant possessed the necessary qualifications and experience.

[26] Ms Ekandjo testified that she could not recall that a proposal was made by the applicant as an alternative to dismissal that his position be upgraded to that of head of department. She testified further that she was not aware that a position of a supervisor became available at the coastal area when an employee, a certain Mr Dausab resigned.

[27] She was questioned about the reason why she did not provide the requested documents to the appellant and the Union. Initially she responded that she was not aware that the documents had not been made available to the Union but later she claimed that the documents requested were confidential that was the reason why she could not provide them to the appellant and the Union.

The appellant's case

[28] The appellant testified that he was appointed as supervisor in the respondent's claims department during 2006.

[29] He testified further that during 2009, he submitted a grievance complaint to the company. At that stage he was the Union representative and was also the chairman of shop stewards. He was informed by management that, because he was a supervisor, he should not be a member of the Union for the reason that he was outside the bargaining unit. In 2004 he raised his concern with the company's board of directors regarding the fact that the company had a Namibian person with qualifications of becoming a manager but management preferred a foreigner in that position. Thereafter he met Ms Ekandjo, who mentioned to him that she was aware that he had informed the board about the situation of the foreigner occupying a management position in the company.

[30] He testified further that during September or October 2013, he led an industrial strike until the Deputy Minister of Labour intervened and resolved the problem. After the strike he was told that the labour force of the company did not belong to a Union organization and that he was forcing the Union, meaning NAFINU, to come into the company. He testified further because of his Union activities his relationship with the company's management became strained.

[31] He confirmed what was testified to by Ms Ekandjo namely that on 24 February 2016, he was informed that his position as supervisor had been declared redundant; that a copy of the business case was handed to him; that he was informed that two lower vacant positions were available. He could however not accept a position while he was busy considering the business case otherwise his action of accepting a position would be contradictory. He testified further that the business case was complicated without any supporting document and that he and the Union requested for more information in order to study and understand the business case and to concede making alternative proposals to the company. He testified further that the business case document set out steps that the respondent would be taken, namely to advertise the positions available to the affected staff; that counselling would be given to the affected staff and their family members; that the respondent would set up a redundancy centre for three months while the respondent would look at vacant positions available in the company and for the affected employees to apply for such positions.

[32] He went on to say that the respondent failed to furnish them with the requested documents despite various requests. He testified further that Ms Ekandjo informed him that she was not his direct line manager and it was therefore not her responsibility to give him the information requested. In this regard, she informed him further that she would request other members of management for the required information and would thereafter forward such information to him and the Union.

[33] He testified further that he did not receive any counselling as the business case document stipulated; that the notice in terms of section 34 of the Labour Act, 2007 was handed to him on 24 April 2014 and he was there and then requested to leave the respondent's premises immediately. He pointed out that the notice mentioned economic reasons as the reason for restructuring, however in prior meetings, he had held with the management, prior to the notice, he was informed that the retrenchment was due to restructuring reasons. He testified further that no consultation took place between them and the respondent's management after the notice of retrenchment was handed to him. Furthermore, that the management did not respond to letters addressed to them by the Union requesting for information.

[34] Under cross-examination the appellant testified that he was only informed that two positions were available but he was not informed when he should apply for those positions. He testified further that the two vacancies were taken up by the two retrenched employees without creating a selection criteria. He testified that he proposed alternatives to dismissal but the respondent did not react to his proposals.

[35] Ms Asnath Namoya testified on behalf of the appellant. She testified that she is the General Secretary of NAFINU. She testified further that she represented the appellant at a meeting held on 24 February 2014, at which the business case document was given to the Union. She testified that at that meeting, the Union was informed that the appellant's position together with other two employees would become redundant. She testified that they were taken through the business case document and informed about management's plans in respect of the business case. She concluded that after that meeting she did not deal with the appellant's case. Mr Vires dealt with the appellant's case henceforth.

[36] Mr Gerson Dausab also testified for the appellant. He testified that he was employed by the respondent at its regional office at Walvis Bay as a supervisor. At the Union level he holds the position of Deputy National Secretary of NAFINU. He used to be the secretary of the appellant at the shop stewards' level. He testified further that he also represented the workers during the industrial strike that took place at the company in 2013. After the strike he resigned due to pressure from management because management did not want its employee outside the bargaining unit to represent the workers. After he resigned he was assigned by the Union to deal with the applicant's present case together with the Deputy Secretary-General, Mr Vries.

[37] He testified further that he had also a dispute with the company's management because after the strike, the management deducted money from his salary, the appellant's and Ms Zenobia Forbes who were all involved in the strike as workers' representatives. They then filed a complaint with the Office of the Labour Commissioner. At the end of arbitration proceedings, an award was made in their favour which ordered the respondent to refund the money deducted from their salaries. He testified that since then they have been victimized by the company's management.

[38] Mr Dausab further corroborated the evidence of the appellant with regard to the process followed from the time he was given the business case document; that when they studied the document they realized that it was complicated; that the Union requested for more information; that the respondent failed to furnish the Union and the appellant with the requested information; that Ms Ekandjo only gave an extract of the minutes of the strategy meeting to the Union. He testified further that the purported extract from the minutes did not make sense because there was no reference from what document the extract were taken or quoted. He testified further that they went to EEC to which they were referred by Ms Ekandjo and obtained a copy of the affirmative action plan. He explained the reason why they requested the Alexander Proud Food report (was necessary for them to study) because it was explained in the business case document that the decision to declare positions redundant was based or emanated from that report. He explained that the reason why the Union requested the additional information was to try to understand how the

respondent arrived at the decision to declare the positions redundant; that they wanted to verify the claims made by the company and to substantiate their decision. According to him, the onus was on the company to prove that redundancy was justified. He testified further that that the information which was requested was necessary to determine whether or not retrenchment was necessary. Furthermore, that the Union wanted to understand the business case so that they would be able to give alternative suggestions or proposals to what was in the business case.

[39] He testified that he was involved in the retrenchment which took place at Metropolitan (which is a part of the Group) when the Union had requested disclosure of the relevant documents, Metropolitan complied. He testified that in that instance, initially about 20 employees' positions were declared redundant and were due to be retrenched however after a further consultation process was undertaken between the Union and the company, in the end, only three positions remained redundant. Furthermore, with Metropolitan retrenchment a redundancy centre was established.

[40] Mr Dausab testified further that the appellant requested that the respondent should upgrade the appellant's position from C3 to C4 notch based on the CO Holdings recommendations. He was of the opinion that as a result of the respondent's insistence on his position being upgraded, a friction arose between the appellant and Mr Opperman.

[41] He further testified that the respondent was supposed to create a redundancy centre to assist the retrenched employees to apply for employment but no such centre was created. He explained the purpose of the centre namely, is amongst other things, to assist employees' whose positions have been declared redundant, for instance with the compilations of CVs; looking for alternative employment for them and giving the employee psychological counselling. He further criticised the fact that the respondent did not apply the principle of 'last-in-first-out'. He explained the principle to mean that the employee who has the shortest employment duration with the company must be retrenched first while the person with the longest span would remain. Furthermore, that that the respondent did not comply with its own business case plan as regard to advertising and selection process; and that no consultation took place.

[42] He concluded by expressing the view that there was a link between the monetary award made in their favour by the arbitration tribunal on 23 April 2014, and the sudden dismissal of the appellant on 24 April 2014. He pointed out that it was a final decision to terminate the appellant's employment, prior to the alternatives to dismissal being negotiated. Furthermore, in his view the process was not fair and it was targeting the appellant.

The arbitrator's findings

[43] At the end of the arbitration hearing, the arbitrator made a number of findings which are challenged in this appeal. As regard to the appellant's contention that the retrenchment was a sham and that it was aimed at getting rid of him, the arbitrator rejected that contention, holding that the appellant's position was not the only one that was declared redundant.

[44] The arbitrator found that the appellant gave a proposal to the respondent on alternative redeployment in the company, however, in her view, the proposal could only be accepted at the respondent's discretion.

[45] As regard to the appellant's contention that the respondent refused to provide the Union with documentary information which prejudice him on the ground that such information was confidential, the arbitrator held that the respondent was justified in its refusal, based on the provisions of section 34(1)*(c)* of the Act, which provides that an employer is not required to disclose information if the disclosure might cause substantial harm to the employer.

[46] The arbitrator further held that there was nothing wrong in the respondent changing the reason for the retrenchment by initially stating that the retrenchment was realignment due to operational reasons to retrenchment due to economic reasons. The arbitrator found that the differentiation was 'purely academic and did not materially change the basis advanced by the respondent to retrench'.

[47] The arbitrator therefore concluded that the respondent had a valid and fair reason to retrench the appellant due to operational reasons.

The notice of appeal

[48] The appeal was noted one day late. The appellant then filed an application for condonation for the late filing of the appeal. In the affidavit filed in support of the condonation application, the appellant mentioned that he drafted the notice of appeal himself as he did not have a lawyer to assist him at that stage. After the appellant was granted legal aid by the Director of Legal Aid, Mr Coetzee was instructed by the Director for Legal Aid to act on behalf of the appellant. Somewhere along the way the appeal had lapsed but an application by the appellant for condonation and reinstatement was launched and was granted and the appeal was reinstated on application on 14 May 2016.

[49] The notice of appeal lists five questions of law appealed against, being:

> ‘1. Whether the arbitrator’s finding that the appellant was fairly dismissed is not justified based on law.
>
> 2. Whether the arbitrator gives proper and adequate consideration to the evidence as to the reasons for the appellant’s dismissal from the respondent’s employ.
>
> 3. Whether the arbitrator dealt with the enquiry in three stages and the burden of proof in the case of an alleged unfair dismissal and unfair labour practice.
>
> 4. Whether the record and findings contain any facts which the arbitrator could have come to the conclusion that the appellant’s dismissal was fair.
>
> 5. Whether the arbitrator was correct in law in law not to deal with the unfair labour practice dispute in the arbitration award.’

[50] Given the fact that the notice of appeal was drafted by the appellant himself as a lay person, it is to be expected that questions of law as formulated are not a model of clarity and in compliance with the provisions of section 89 of the Act. The

defects are severely attacked in the heads of argument filed on the respondent's behalf.

[51] The grounds of appeal are set out as follows:

'1. The arbitrator appears to have impermissibly disregarded, alternatively had inadequate regard for, the evidence submitted on behalf of appellant and did not consider submissions of appellant in the arbitration award.

2. The arbitrator appears to have impermissibly disregarded, alternatively had inadequate regard for the uncontested evidence of the appellant that the reasons to declare position of Supervisor: NMC/Bankmed Claims.

3. The arbitrator did not deal with the three-stage enquiry and incidence of the burden of proof in the case of unfair dismissal at all.

4. The arbitrator failed to consider or apply her mind to appellant's case that the retrenchment was unjustified and did not deal with the issue of whether retrenchment was justified or not in the arbitration award.

5. The arbitrator did not deal with the unfair labour practice dispute in the arbitration award.

6. There are no facts on which the arbitrator could have reasonably have come to the conclusion that the award was justified.

7. The appellant reserves his rights to supplement or vary this notice of appeal on receiving the record of proceedings appealed against.'

Submission on behalf of the appellant

[52] Mr Coetzee, for the appellant, in his heads of argument, submitted that in order for the dismissal for operational reasons to be procedurally fair, the employer is expected to comply with the provisions of section 34 of the Act. In relation to procedural fairness, based on operational reasons, the employer is in terms of section 34(1)*(d)* of the Act, required to consult with the employees. Counsel pointed

out that the uncontested evidence is that, after the appellant was handed the notice of retrenchment on 24 April 2014, no discussion or consultation took place between the appellant and the respondent's representatives with respect to the intended termination of the appellant's employment.

[53] As regard the issue of substantive fairness, Mr Coetzee argued that the *onus* was on the respondent to prove that the retrenchment was necessary. In addition, so counsel submitted, substantive fairness requires the employer to show that retrenchment was the last act of resort. In other words, the employer has to show that no other alternatives to retrenchment were available. Counsel submitted that no evidence was led at the hearing by the respondent that the retrenchment was properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances. Counsel further submitted that the only evidence presented at the arbitration hearing was about the redundancy of the appellant's position; that the redundancy might have been justified but retrenchment is a different matter from redundancy, and accordingly the respondent had failed to discharge the *onus* and therefor the dismissal was substantively unfair.

Submissions on behalf of the second respondent

[54] Mr De Beer, who appeared for the respondent, submitted that the notice of appeal did not comply with the provisions of section 89(1) of the Act in that the questions of law reflected in the notice of appeal are not questions of law alone and for that reason alone, the appeal should be dismissed. Counsel submitted further that the first to fifth grounds of appeal deal more with defects in the proceedings or factual errors and not with questions of law against the arbitration award. Furthermore the content of the seventh ground was irrelevant.

[55] In support of the arbitrator's findings, counsel submitted that the conclusions reached by the arbitrator were not contrary to the evidence placed before her. As regard the first question of law namely: 'whether the arbitrator's finding that the appellant was fairly dismissed was not justified based on law? Counsel submitted that that the alleged incorrect application of the legal principles must be based on factual conclusions by the arbitrator. Counsel submitted further that the error based

on incorrect appreciation of facts by the arbitrator was to be addressed by review proceedings and not by the appeal.

[56] As regard the second question of law namely: ‘whether the arbitrator gave proper and adequate consideration to the evidence as to the reasons for appellant’s dismissal’? Mr De Beer submitted that this was not a question of law but rather an allegation of defects in the proceedings and therefore the appellant should have launched review proceedings.

[57] In respect of the fourth ground, namely ‘whether the record and findings contained any facts which the arbitrator could have come to the conclusion that the appellant’s dismissal was fair’? Counsel submitted that the evidence placed before the arbitrator by the parties did not amount to a situation where the arbitrator’s conclusion could not have been reached by any reasonable arbitrator.

[58] As regard the third question of law or critic namely that ‘the arbitrator did not deal with the three-stage enquiry and incidence of the burden of proof in the case of unfair dismissal at all’, counsel submitted that this matter of procedural defect and that review process in terms of section 89(4) should have been followed.

[59] Finally with regard to the fifth question law namely: ‘whether the arbitrator was correct not to deal with the unfair labour practice dispute in the arbitration award’, counsel pointed out that the appellant, in his notice of referral of the dispute to the Office of the Labour Commissioner, indicated that he was referring the matter for unfair dismissal as well as ‘unfair labour practice’ but the appellant did not refer to section 50 of the Act which deals with unfair labour practice. Accordingly, the appellant was precluded from raising the issue of unfair labour practice at the appeal stage.

Applicable laws and legal principles

[60] Section 34 of the Act regulates dismissals arising from collective termination or redundancy. It reads:

'Dismissal arising from collective termination or redundancy 34.

(1) If the reason for an intended dismissal is the reduction of the workforce arising from the re-organisation or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons, an employer must –

(a) at least four weeks before the intended dismissals are to take place, inform the Labour Commissioner and any trade union which the employer has recognised as the exclusive bargaining agent in respect of the employees, of –

(i) the intended dismissals;
(ii) the reasons for the reduction in the workforce;
(iii) the number and categories of employees affected; and (iv) the date of the dismissals;

(b) . . .

(c) subject to subsection (3), disclose all relevant information necessary for the trade union or workplace representatives to engage effectively in the negotiations over the intended dismissals;

(d) negotiate in good faith with the trade union or workplace union representatives on –

(i) alternatives to dismissals;
(ii) the criteria for selecting the employees for dismissal; 42 Government Gazette 31 December 2007 No. 3971 Act No. 11, 2007 LABOUR ACT, 2007;
(iii) how to minimise the dismissals;
(iv) the conditions on which the dismissals are to take place; and
(v) how to avert the adverse effects of the dismissals; and

(e) select the employees according to selection criteria that are either agreed or fair and objective'. (Underlining supplied for emphasis).

(2) Despite subsection (1)*(a)* and *(b)*, an employer may inform the trade union or workplace representative of the intended dismissals in less than four weeks if it is not practicable to do so within the period of four weeks.

(3) When disclosing information in terms of subsection (1)*(c)*, an employer is not required to disclose information if –

(a) it is legally privileged;
(b) any law or court order prohibits the employer from disclosing it; or
(c) it is confidential and, if disclosed, might cause substantial harm to the employer. (Underling supplied for emphasis)

[61] In *Novanam Ltd v Percival Ringuest*[1] Justice Ueitele explained the provisions of section 34 in the following words:

'[14] The procedures set out in s 34 are detailed. They provide that when an employer contemplates dismissing employees for operational reasons it is required to consult with them or their representatives over a range of issues. During the course of such consultations, the employer must disclose relevant information to make the consultation effective. The purpose of such consultation is to enable affected employees to make representations as to whether retrenchment is necessary, whether it can be avoided or minimised, and if retrenchment is unavoidable, the methods by which employees will be selected and the severance pay they will receive. It follows, therefore, that if a joint consensus-seeking process, envisaged by s 34 of the Labour Act, 2007, is not achieved the dismissal of an employee for operational reason will be procedurally unfair.'

[62] Parker[2] explains the purpose of informing the Labour Commissioner in terms section 34 as follows:

'The purpose of informing the Labour Commissioner, the exclusive bargaining agent, workplace representative and the affected employees, about the intended dismissals is not to require the employer to have prior consultation with them before a decision to terminate owing to redundancy is taken.'

[1] (LCA65/2012) [2014] NALCMD 35 (22 August 2014).
[2] Labour Law in Namibia at page 161.

[63] It is generally accepted in the labour law environment that the question whether an employee was dismissed due to redundancy, because of economic and technological grounds, the issue at stake is whether the dismissal was fair. The court in *Viljoen v Johannesburg Stock Exchange Ltd* (JS398/15) [2016] ZALCJHB 361; (2017) 38 ILJ 671[3], formulated two questions that need to be asked when considering whether a dismissal for operational was substantively fair:

'[52] The issue of whether a dismissal for operational requirements is substantively fair is decided by way of answering what is called a general question and a specific question. As said in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*:

> "Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place." (Underlining suppled for emphasis)

[53] Therefore, there exists a proper business rationale in this instance. As said *Kotze v Rebel Discount Liquor Group (Pty) Ltd*:

> "…What we have to do is to decide whether the respondent's decision to retrench was informed and is justified by a proper and valid commercial or business rationale. If it is, then that is the end of the enquiry even if it might not have been the best under the circumstances…" '

[64] I now proceed to consider the facts of the present matter against the background of the statutory provisions and the legal principles referred to in the preceding paragraphs. But before doing so I have to deal with the point raised by Mr

[3] (LC) (23 September 2016).

De Beer that the questions of law raised by the appellant are not questions of law alone as contemplated by section 89(1) of the Act.

[65] The court in *Novanam Ltd* (supra) expounded the provisions of section 89 as follows:

'[10] In terms of s 89(1)*(a)* of the Labour Act, 2007 a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 '*on any question of law alone*'. This Court has in a line of cases set out the guidelines to determine whether an appeal is on a question of law alone as follows; whether on the material placed before the arbitrator during the arbitration proceedings, there was no evidence which could reasonably have supported such findings or whether on a proper evaluation the evidence placed before the arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings. Hoff, J[4] put it as follows:

> "The question is therefore whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances." '

[66] I did mention earlier in this judgment that the appellant drafted the notice of appeal himself as a lay litigant before legal aid was granted to him. Given the fact that the questions of laws were drafted by a lay person, it is, in my view, to be expected that questions of law would not be a model of clarity and in strict compliance with the provisions section 89. This court is, under the circumstances of this case, duty bound to adopt the approach which was recommended by the Supreme Court in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Other*[5] where the court said the following at para [8] –

'[8] Notwithstanding the apparent inadmissibility of the review application and the significant irregularities in its form, it nevertheless disclosed alleged irregularities in the proceedings of the High Court which this court had to take note of. The applicant is a lay litigant and, as M T Steyn J (as he then was) remarked in *Van Rooyen v Commercial Union Assurance Company of SA Ltd* 'it would certainly be manifestly unjust to treat lay litigants as

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[4] *House and Home v Majiedt and Others* (LCA 46/2011) [2012] NALC 31 (22 August 2012) at para [7].
[5] 2008 (2) NR 753 (SC).

though they were legally trained . . .'. They are unlikely to 'fully appreciate the finer nuances of litigation' and, I should add, to completely appreciate the principles bearing on the court's jurisdiction. Bearing in mind that lay litigants face significant hurdles due to their lack of knowledge and experience in matters of law and procedure and, more often than not, financial and other constraints in their quests to address real or perceived injustices, the interests of justice and fairness demand that courts should consider the substance of their pleadings and submissions rather than the form in which they have been presented. The applicant might have articulated his grievances ineptly; might have overreached the ambits of his rights; might have adopted the incorrect procedure, but the substance of his complaint – which this court had to take note of – remained the same, ie that the order made against him was vitiated by irregularities in the application proceedings before the High Court and should be reviewed.'

[67] This court is satisfied that the appellant has articulated the substance of complaint against the findings of the arbitrator and the court is in possession to evaluate whether or not the conclusions and findings made by the arbitrator and challenged by the appellant, viewed collectively and applying the legal principles relevant to the evaluation of evidence, are such that no reasonable arbitrator could have arrived at such findings or conclusions. Accordingly, the submission by counsel for the respondent that the appeal be dismissed cannot be entertained. I proceed to consider the arbitrator's findings and conclusions below.

Was the dismissal of the appellant procedurally fair?

[68] The arbitrator concluded that the respondent had a valid and fair reason to retrench the appellant. The arbitrator did not make a finding whether the dismissal of the appellant was procedurally fair. The legal requirement is that in order to pass the hurdle, the dismissal must be both procedurally and substantively fair. I will proceed to consider first, whether the dismissal was procedurally fair and second whether the dismissal was substantively fair.

[69] In order to consider whether the dismissal was procedurally fair, I think that the starting point is the meeting of 24 February 2014, held between the appellant and the Union, on the one hand, and the members of the respondent's management, on the other hand, at which meeting the management informed the appellant that his

position had been declared redundant. He was given a copy of the business case. It is common cause that the purpose of giving the document to the appellant and the Union was for appellant, as an affected employee, to make comments, suggestions and inputs. It is common cause that the notification of 24 February 2014, was not the formal notice as required by section 34 of the Act. It is clear from the evidence that notwithstanding the absence of a formal statutory notice, the Union and the appellant immediately commenced to engage the respondent by requesting to be provided with certain documentation. The respondent only provided the Union and the appellant with an extract from the minutes of management strategy meeting where it appeared the decision to declare the appellant's position redundant, was taken. No complete minutes were furnished and no reason was given why the complete minutes were not furnished. In respect of some of the documents requested by the Union and the appellant were referred to some other third parties to obtain such documents. Follow-up emails and letters addressed to Ms Ekandjo and Mr Opperman went unanswered.

[70] The crucial period for the purpose of the section 34 notice, is however between 24 April 2014 and 31 May 2014. The only two activities that happened during that period, according to the evidence on record, were from the Union's side: the first was on 13 May 2014 when Mr Vries, from the Union, wrote a further letter to the respondent recording that the respondent had failed to comply with the provision of section 34(1)*(a)* in that the respondent had failed to notify the Labour Commissioner about the intended dismissal. The second activity took place on 30 May 2014, when Mr Vries again wrote a letter to Mr Opperman concerning the respondent's failure to provide the Union with the necessary documents. During the said notice period no discussion or consultation took place between the respondent on the one hand and the Union and the appellant on the other hand. Furthermore, the respondent failed to disclose to the appellant relevant information to enable the appellant to make representations as to alternatives to dismissal.

[71] As regard to the belated reason advanced by Ms Ekandjo at the arbitration hearing while under cross-examination as to why the respondent did not furnish the requested documents to the appellant, namely that same was confidential, it is clear that the said excuse was an afterthought. Neither Ms Ekandjo nor Mr Opperman

replied to the Union's letters and emails to say that they could not furnish the information because it was confidential, as later belatedly claimed. Furthermore, the issue of confidentiality was not mentioned by Ms Ekandjo during her evidence-in-chief, neither did she mention it while she was under cross-examination on the first day. Ms Ekandjo came up with the excuse of confidentiality when the matter resumed, after it was adjourned for two weeks. It stands to reason that during the two weeks of adjournment Ms Ekandjo had sufficient time to think of an excuse.

[72] If the excuse was genuine, she would have, at best, stated it in her letter of 17 March 2014 to the Union, and at worst, should have mentioned it in her evidence-in-chief or during cross-examination on the first day. It is for those reasons, I hold the view that the respondent's explanation is an afterthought and is not credible and is liable to be reject. In any event, I find it difficult to accept that a document such as organogram of the management of the respondent can be claimed to be confidential.

[73] Unfortunately the arbitrator did not make a credibility finding about any of the witnesses evidence, neither did the arbitrator undertook a thorough analysis of the evidence before her. She rejected the evidence of the appellant and his witness Mr Dausab, that the retrenchment was aimed at getting rid of the appellant. She accepted the evidence of Ms Ekandjo that the reason for the retrenchment of the appellant was as a result of restructuring. In my opinion, in view of these conflicting versions, it was necessary for the arbitrator to have embarked upon a critical evaluation of the evidence from both side around this aspect in order to determine which one is more credible.

[74] It has been held that an appeal court has greater liberty disturb the findings of credibility where the finding of fact does not essentially depend on the personal impression made by a witness' demeanor but predominantly upon inference from other facts and upon probabilities. Furthermore, that a court of appeal with the benefit of overall conceptus of the full record may often be in a better position to draw inferences, especially with regard to secondary facts[6]. In the present matter, no

[6] *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 at para 24;Cited with approval by the Supreme Court in *BV Investment Six Hundred and Nine CC v Letty Kamati & Another* Case No 48/2015 delivered on 19 July 2017.

credibility finding has been made, accordingly the court is at large to make credibility findings where necessary.

[75] When I read the evidence of Ms Ekandjo, I form the distinct impression that she was unhelpful as a witness. Instead of assisting the arbitration tribunal to resolve the dispute, she was rather obstructive. For instance, she refused to answer questions which were pertinent to the issues in dispute. She unnecessarily argued with the representative for the appellant when he cross-examined her. She argued with the arbitrator, at times challenging the arbitrator's ruling that she was bound to answer a question contending that she was not bound to answer the question because it was about a 'new matter' which was not covered by her evidence-in-chief. Furthermore, she resorted to unpalatable language alleging that the representative for the appellant was 'bullshitting' when he asserted that she was being untruthful. It was clear from the reading of the record that Ms Ekandjo was biased and was there to defend her position and that of the company even to the degree that was unreasonable. It is for this additional reason that I found her belated explanation not credible that the information requested was confidential and therefore she could not furnish it to the Union and the appellant.

[76] It is to be remembered that business case document was authored by Mr Opperman, the managing director of the respondent and not by Ms Ekandjo. He was not called to testify about the rationale regarding the restructuring. No reason was given why he was not called to testify. He had made an undertaking in the business case document that no final decision would be made before all comments, suggestions and inputs from the affected employees had been received and taken into account. In my view his evidence would have carried more weight than the secondary evidence tendered by Ms Ekandjo. It is further to membered that Ms Ekandjo testified that Mrs Tjongarero the Humans Resource Manager was assigned to consult and deal with the appellant. Mrs Tjongarero was equally not called to testify. Similarly, no explanation was given why she was not called to testify at the arbitration hearing.

[77] In my view, the absence of an explanation why these two crucial witnesses were not called to testify constitutes an important consideration to justify an adverse

inference that the appellant's claim that the restructuring exercise was a sham to get rid of him might be reasonable probable true.

[78] In any event, the further uncontested evidence is that when the appellant was handed the letter of dismissal, he was instructed to leave the respondent's premises immediately. After he left, the respondent did not engage the appellant in any way whatsoever. In this connection, Ms Ekandjo testified that Ms Tjongarero was assigned to consult and deal with the appellant. She testified further that she did not know whether Ms Tjongarero consulted with the appellant. As observed earlier, Ms Tjongarero did not testify at the arbitration hearing. The evidence of the appellant on this point is that Ms Tjongarero did not contact or consult him after he had left. There is nothing to gainsay this, accordingly a finding that the appellant was not consulted, in compliance with the provisions of section 34 of the Act is inescapable.

[79] What further demonstrates that the dismissal or retrenchment of the appellant was not procedurally fair is the fact that the respondent failed to follow its own predetermined retrenchment process which, on paper, appeared to be fair. For instance, it failed to provide counselling to the respondent and his immediate family members or to set up a redundancy centre.

[80] During her testimony Ms Ekandjo defended the idea of not setting up a redundancy centre, arguing that it was too expensive, but she failed to testify what other alternative measures were put in place to enable the respondent to maintain an effective and meaningful contact with the appellant in order to consult and discuss alternatives to dismissal and other measures aimed at minimising the adverse impact of dismissal. My finding on this point is that Ms Ekandjo's reasons are unconvincing and should not be accepted.

[81] Taking into account all these considerations, it is my considered view that the respondent failed to discharge the *onus* that the dismissal of the appellant was procedurally fair.

Arbitrator's findings and conclusions considered

[82] Before I proceed to consider whether the appellant's dismissal was substantively fair, I consider it appropriate, at this juncture, first to deal with some of the arbitrator's findings.

[83] The arbitrator rejected the appellant's contention that the declaration of his position as redundant was a sham and that management of the respondent wanted to get rid of him because of his involvement in Union activities. The arbitrator reasoned that if the company wanted to get rid of him because of the grievance that took place in 2004 and 2009 it could have done so during those years.

[84] I dealt with this aspect earlier in this judgment and found that the appellant's claim in this regard appear to be reasonable true. In any event, it would appear to me that the arbitrator did not give adequate consideration to the evidence as narrated by the appellant relating to his Union activities and how such activities was perceived by the company's management, particularly the strike which took place during 2013. Ms Ekandjo, was asked whether she was aware that the management did not want the appellant to be the workplace's Union representative. She confirmed that she was aware but argued that the position the appellant was occupying in the company, at the time, was not part of a bargaining unit, therefore management considered it as a problem for him to be part of the Union and being the workplace representative. It was then put to Ms Ekandjo that the appellant was entitled in terms of section 67 of the Act, to be elected as a workplace representative. She did not dispute the statement.

[85] Ms Ekandjo further confirmed during her testimony, that there was a strike at the company during September or October 2013, and further that she was aware that the appellant led the strike. On a further question from the appellant's representative she confirmed that after the strike the company deducted money from the appellant's remuneration during October 2013, in connection with the strike which the appellant led.

[86] Furthermore, Ms Ekandjo confirmed under cross-examination that an arbitration tribunal made an award in favour of the appellant against the company as well as the fact that both the arbitration tribunal and the Labour Court made separate

findings to the effect the company was avenging its anger and frustration over the strike, on the appellant. It need mentioning in this connection, that it a matter of public record that the respondent had filed an appeal in the High Court against the arbitrator's award made in favour of the appellant and his co-employees. The case is reported as *Methealth Namibia Administrators (Pty) Ltd v Matuzee (LCA/22014) [2015] NALCMD 5 (18 March 2015).* The court dismissed the appeal and upheld the arbitrator's award holding that the respondent did not have the right to deduct money from the appellant and his co-employees' salaries.

[87] It was further put to Ms Ekandjo that it was not a coincidence that the arbitration award was delivered to the company late afternoon on 23 April 2014, and that the following day 24 April 2014, the appellant was served with the letter of retrenchment and ordered to vacate his office, to hand over the access card and to leave the premises immediately. Ms Ekandjo confirmed that the appellant was requested to leave the premises 'because the environment was not conducive'. Basically Ms Ekandjo's evidence in broad confirmed the evidence by the appellant and his witness on important aspects affecting the issues to be decided.

[88] Having regard to the foregoing evidence the remarks by the learned author, Collins Parker, with regard the question of substantive fairness in dismissal due to redundancy is appropriate under the circumstance of this case. He says the following[7]:

'Nevertheless, even with dismissal due to redundancy or arising from collective termination, a court or tribunal must be satisfied that there are valid and fair reasons for it, not reasons based on extraneous motives, such as the desire to victimize an employee or employees, or irrelevant grounds, such as anti-union reprisal. Thus as far as redundancy is concerned, what is at issue is not simply whether the employer's decision to dismiss is correct. 'What is at stake here' the South African Labour Court stated, 'is not the correctness or otherwise of the decision to retrench, but the fairness thereof.'

[89] Having regard to all these considerations it would appear to me that there is merit in the appellant's contention that somewhere along the process there was a deliberate intention on the part of the company to get rid of the appellant. It is my

[7] Collins Parker (2012). Labour Law in Namibia. John Meinert Printers, Windhoek, p 159.

considered view, on the available evidence as set out above, that the arbitrator's finding under consideration, was not reasonable under the circumstances. There was sufficient evidence to warrant a reasonable inference that there was an ulterior motive on the part of the company to get rid of the appellant. In my view, this finding is fortified by the unfair and unjust manner in which the appellant was treated, after he was served with the notice of retrenchment. One cannot help but wonder that, even accepting that there was a valid reason to declare the appellant's position redundant, if the allegations of victimisation are no true, how was it possible that a huge corporation such as MMI, could not find a single vacancy for one of its long serving and experienced senior managers. There is no iota of evidence that any attempt or effort was made to find him an alternative position within the wider Group. On the contrary the evidence is that the appellant made proposal for alternatives to dismissal. Furthermore, there is uncontested evidence that a position of a supervisor became available at the coast when Mr Dausab resigned but was not offered to the appellant.

[90] The arbitrator rejected the appellant's contention that he was targeted for dismissal holding that the appellant's position was not the only that was declared redundant.

[91] It is correct that the appellant was not the only one whose position was declared redundant. In my view, the difference came in how the other retrenched employees were treated in comparison to the appellant. One employee who was senior to the appellant was offered a retrenchment package which he took and left. But that was because according, to Ms Ekandjo, he indicated that he was not interested in any other position in the company. The appellant on the other hand did not indicate that he wanted to leave, on the contrary he was busy considering alternatives to dismissal.

[92] It is common cause that Ms Ekandjo mentioned to the appellant that there were two lower positions available. It is further common cause that the other two retrenched employees opted to take up the lower positions. They were offered such position with the full retention of their previous salary. No such or other alternative position was offered to the appellant. No voluntary separation package was offered

to the appellant. He was only paid his June 2014 salary as prescribed by the Act. He left with nothing after service of about 8 years. No counselling was offered to the appellant. In my view, these factors are yet further indications that the appellant's retrenchment was not procedurally fair.

[93] The arbitrator made a finding that the appellant gave a proposal to the respondent on alternative redeployment, however, the proposal could only be accepted at respondent's discretion. I doubt the correctness of the arbitrator reasoning on this point. It has been held that the question is whether or not there was a fair reason for dismissal[8]. I subscribe further to the view that the decision to retrench must be informed and justified by proper and valid commercial or business rationale[9]. This means that the decision not to accept the employee's proposal must be based a 'on proper and valid business rationale'. In any event in making this finding the arbitrator, by implication rejected the evidence by Ms Ekandjo that the appellant did not come up with alternative proposal and accepted the evidence by the appellant that the Union had made a proposal in a letter dated 21July 2014, to the effect that instead of being retrenched he should be appointed to the position as Head of Department: premium administration, which was available for which the appellant possessed the necessary qualifications and experience.

[94] As regard the proposal, Ms Ekandjo attempted to argue that the proposal was made long after the appellant had already been retrenched. It was pointed out to her that the business case document authored by Mr Oppermann, stated that no final decision would be made before all comments, suggestion and inputs of the affected employees had been evaluated and taken proper cognizance of. Ms Ekandjo further denied that at a meeting in February 2014, it was agreed that time for making an alternative offer was extended indefinitely. It was further the appellant's case that a recommendation was made by CEO Holding of Christiaan Oppermann, that the appellant's position should be upgraded to a C4. Ms Ekandjo testified that she was not aware of such a recommendation. It was also put to Ms Ekandjo that during the same time, a positon of a supervisor became available at the coastal town when Mr Dausab resigned but the position was not offered to the appellant. She responded that she was not aware of this fact. In my considered view, all these factors clearly

[8] Chemical Workers Union and Others (supra)
[9] *Kotze v Rebel Discount Liquor Group* (supra)

demonstrate and reinforce my earlier finding that Ms Ekandjo's evidence is dangerously unreliable and that it display a degree of biasness. It further demonstrate that she did not have intimate knowledge about the appellant's case which she was honestly and sufficiently qualified to testify under oath.

[95] The arbitrator held that the second respondent was justified in its refusal to provide the documentary information requested by the appellant and the Union. The arbitrator reasoned that the respondent was entitled to refuse based on the provisions of section 34(3) of the Act, which provides that an employer is not required to disclose information if the disclosure might cause substantial harm to the employer. This finding is not in all respect supported by the evidence. It was the appellant's case that the business case was complicated and that they required additional information and time in order to study and understand the business case, to enable the appellant to make alternative proposals to dismissal with regard to his employment in the company.

[96] The written request was first addressed to Ms Ekandjo and when she did not respond, the Union addressed the request to the managing director, Mr Opperman. No response was received. Ms Ekandjo was questioned at length during cross-examination, about the requested information. Initially she responded that she did not know. Later she asked for an adjournment to check her email correspondence. Later she objected to the question, because according to her it was a new matter not covered by her evidence-in-chief. The arbitrator informed her that she was under obligation to answer all questions put to her under cross-examination.

[97] Ms Ekandjo was asked whether she provided the affirmative action plan to the appellant and to the Union. She responded in the negative. She was pressed further whether she could remember that the affirmative action for NMC Bankmed claims department was requested. She responded: 'I am not answering those questions I am sorry'. Later on she asserted that certain information was provided to the Union but she was uncertain which information of the requested information.

[98] In my view the behavior and/conduct by Ms Ekandjo outlined above further demonstrate the fact that she was poor witness; that she was not on top of the facts

with regard to the appellant's case; that she was inconsistent in her evidence. She was an outright recalcitrant witness. The last straw which finally broke the camel's back, so to speak, was when Ms Ekandjo refused to answer a relevant and pertinent question regarding the question why discovery of relevant document was not done. The arbitrator should have subjected her to severe sanction for her refusal to answer questions, which happened on more than one occasion. I have already found that her subsequent answer, claiming confidentiality, was an afterthought. Her behavior was inexcusable and destroyed any basis for any court to rely on her evidence to make a finding. It is for this additional reason that I have already rejected her evidence on this point.

[99] By agreement between the parties and with the approval by the arbitrator, the matter was adjourned for about two weeks, to allow Ms Ekandjo to retrieve copies of her emails. When the matter resumed she was asked about a report which was compiled by Alexander Proud Food pertaining to the second respondent which was requested by the appellant. She responded that she did not know that it had been requested by the appellant. It was put to her that they agreed that she would disclose the Alexander Proud Food Report, the turnaround time and other supporting documents. She responded that she requested information by an email from other managers and that once she had received it, she would forward it to the Union. However this she did not do. This in my view further demonstrates that Ms Ekandjo, was either not truthful or that she did not know the facts of the case. It makes her an unreliable witness.

[100] Regarding the turnaround times documents, Ms Ekandjo testified that such information was confidential; that it was 'clients information' and could therefore not be shared with the Union. However the appellant was privy to the information.

[101] In respect of the requested copy of the minute for strategic meeting, Ms Ekandjo explained that the reference to strategic management meeting was not in reference to supervisors' position but to the claim process and that was why the Union requested the minutes whether the meeting was indeed about supervisors. Finally, Ms Ekandjo was asked what the sensitivity about the company structure and grading was. She responded that because the file was confidential. It was pointed

out to her for the first time that the defense of confidentiality has been raised. This was clearly a product of an afterthought and is devoid of any credibility.

[102] In summary, on the issue whether the appellant's dismissal was procedurally fair, my conclusion is that there was no compliance with section 34(1)*(a)* of the Act in that the notice given to the appellant was not of 'intended dismissal' but it was a notice of dismissal. For the notice to be in compliance with section 34(1)*(a)* it must be conditional. By this I mean that it should inform the employee that the employer intends to dismiss the employee, for a valid reason, like in the present matter due to restructuring, however, over the next weeks the parties will negotiate in good faith about alternatives to dismissal; that in the event no alternatives to dismissal are found, the date of dismissal of the employee shall be on a stated date. In the present matter the notice was not couched in a conditional language but it was final and decisive.

[103] Furthermore, the respondent failed to comply with section 34(1)*(c)* in that it failed and/or refused to disclose all the relevant information necessary to the Union and for the appellant to enable them to effectively negotiate over the intended dismissal.

[104] My finding is further that the respondent failed to comply with the provisions of section 34(1)*(d)* in that it failed to negotiate at all, let alone in good faith, with the Union or the appellant in respect of the alternatives to dismissal.

[105] It is my finding that the respondent generally failed to comply with the provisions of section 34 in that it failed to set up criteria for selecting the retrenched employees for filling available vacancies as per its business case. The respondent further failed to set up measures to minimise dismissal or the effect thereof. The respondent further failed to determine conditions on which dismissal was to take place and how to avert adverse effects of the dismissal, such as offering a voluntary retrenchment package to the appellant, instead of paying him only his June 2014 salary. It failed to offer counselling to the appellant and his immediate family members.

[106] The arbitrator found, that the confusion in the respondent's correspondence with respect to the reason for retrenchment namely whether the retrenchment was due to operational or for economic reasons, was purely academic and did not materially change the basis or reason advanced by the respondent to retrench namely restructuring. This aspect was argued by the Union in their correspondence with the respondent and was persisted with during the arbitration hearing. In my view, the finding by the arbitrator in this regard is correct. It would appear to me from the literature on labour law, that it is generally accepted that redundancy involves the reduction of position or scraping of positions in the staff complement of an organization due to a number of factors, including restructuring due to reorganization or due to economic factors or technological reasons.

[107] The court is satisfied that, viewed in its totality, the evidence in the present matter, shows that the redundancy was due to restructuring of the management structure of the respondent. It would further appear to me that the reference to economic consideration as a reason for the retrenchment of the appellant was purely due to mistake or clerical error. What is not clear from the arbitrator's finding that the respondent had a valid reason to retrench the appellant due to restructuring reason, is the reason(s) which justified that retrenchment of the appellant, was necessary and the only last resort under the circumstance. In other words whether retrenchment of the appellant in particular was substantively fair. I proceed to consider this issue below.

Was the appellant's retrenchment substantively fair?

[108] The courts in South Africa have held with regard to the test for substantive fairness in dismissal based on operational reason as follows:

'The test for substantive fairness in dismissal for operational reasons has traditionally been described by the Labour appeal Court as being whether there retrenchment is *"properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances*[10]*.*'

[10] *Survey International (Pty) Limited v Dlaminna* (2002) ZACC 27, (1999) 5 BLLR.

[109] In *SACTWU v Discretio Division of Trump & Springbok Holdings* para 8[11] the court expressed itself on the matter in the following words:

'As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not. For the employee, fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essential a formal or procedural one, but, as in the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of court in scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in different settings, every day) the matter in which the court judges they latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rationale grounds, having regard to what emerged from the consultation process.'

[110] This court accepts the foregoing pronouncements as good law and having persuasive force and adopts it for the purpose of this judgment.

[111] Mr Coetzee for the appellant referred the court to the case of *CWIU and Others v Algorax (Pty) Ltd*[12] in which the court held that the onus is on the employer to prove that the retrenchment of an employee was necessary; that the employer has a duty to point out the basis upon which an employee is to be retrenched. In addition that, substantive fairness requires the employer to show that the retrenchment of the employee was an act of last resort. Furthermore, that the employer has to show that there were no other alternatives but to retrench the employee. Counsel submitted in this connection that the respondent had failed to discharge the onus and to present any evidence that after the notice was presented to the appellant, there were any negotiations as required by s 34(1)*(d)* of the Act.

[11] (1998) 19 ILJ 1451 (LCA).
[12] 2003 11 BLLR 1081 (LAC).

[112] I agree with Mr Coetzee's submission that no consultation or negotiations took place after the notice to retrench was delivered to the appellant. I have already made a finding in this regard when I considered the question whether the retrenchment was procedurally fair. In my view, the discussions that took place before notice of retrenchment was served on the appellant on 24 April 2014 were discussions about the redundancy of the appellant's position and not about his retrenchment. Therefore those discussions were not consultations envisaged by s 34(1)*(d)* of the Act. I have also earlier found that the notice delivered to the appellant on 24 April 2014 was not to notify the appellant of the intended retrenchment but it advised him that he had been retrenched. This finding is supported by the fact that when the appellant was handed the notice, he was instructed to take his property and return the company's property and leave the premises immediately. The evidence is further that no consultation or any type of contact took place between the parties after he left the respondents premises.

[113] Not only that there is no evidence to show that consultation took place between the appellant and the respondent after the appellant was served with the notice of retrenchment. But more importantly that no evidence was placed by the respondent before the arbitrator to prove that the appellant's retrenchment was 'properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances[13]'. Instead from the reading the record of the arbitration proceedings, one gets the distinct impression that the respondent expected the appellant to justify why he should not be retrenched. That was wrong: the *onus* was on the respondent to justify retrenchment of the appellant and not the other way round.

[114] Mr Coetzee, correctly in my view, submitted that the arbitrator's finding that the parties were involved in discussions pertaining to the retrenchment process is not borne out by the evidence before her, as at no stage did the respondent's witness, Ms Ekandjo, testified that the discussions between the parties was about the retrenchment. To the contrary Ms Ekandjo specifically testified that the discussion was not about retrenchment of the appellant but was 'about his position at the time which was declared redundant in the new structure going forward'. Ms

[13] *CWIU and Others* (supra)

Ekandjo further testified that the issue of retrenchment only arose after the appellant failed to revert to them with any proposal. Furthermore, counsel submitted that the arbitrator's finding that 'the appellant was aware of lower positions and did not express interest in these position' this finding is equally not borne out by the facts, as no evidence was presented before the arbitrator to show that, at the time the notice of retrenchment was delivered to the appellant, the positions were still available. The evidence is that, the vacancies were immediately taken up by the two retrenched employees.

[115] The uncontested evidence is that the appellant, through the Union, made proposals to the respondent for alternatives to dismissals such as upgrading the appellant's position to that of Head of Department. Furthermore, that a position of a supervisor became available at the coast when Mr Dausab resigned however the respondent did not offer such vacancy or position to the appellant. There was absolute no consultation or engagement of the appellant by the respondent to discuss alternatives to dismissal. Furthermore, the respondent failed to respond to the appellant's proposal. My finding on the question whether the retrenchment was substantive fair, is that the respondent failed to discharge the *onus* on it and to show that there were no other alternatives but to retrench the appellant.

[116] Taking everything into account, I am of the considered view that the arbitrator's conclusion that the respondent had a valid and fair reason to retrench the appellant cannot be sustained. It is a conclusion to which no reasonable arbitrator, applying the relevant legal principles to the facts in the present matter, would have arrived at. Had the arbitrator properly evaluated the evidence before her and correctly applied the applicable legal principles, she would have found that the respondent failed to discharge the *onus* that the appellant's dismissal was both procedurally and substantively fair.

[117] In the result I make the followed order:

1. The appeal is upheld.

2. The second respondent is ordered to reinstate the applicant in a position comparably equal or better to the position he held before he was dismissed.

3. The second respondent is ordered to pay compensation to the appellant equal to the monthly remuneration he would have received had he not been dismissed.

4. The remuneration in para 3 above is to be calculated from July 2014, that is the month following his dismissal, to the date of this judgment.

5. There shall be no order as to costs.

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H Angula

Deputy-Judge President

APPEARANCES

APPELLANT:	E E COETZEE Of Tjitemisa & Associates, Windhoek
FIRST RESPONDENT:	No appearance Of Government Attorney, Windhoek
SECOND RESPONDENT:	J DE BEER Of de Beer Law Chambers, Windhoek