NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-LAB-APP-AAA-2020/00025

In the matter between:

SWAKOP URANIUM **APPELLANT**

and

JACOBUS CALITZ **RESPONDENT**

Neutral citation *Swakop Uranium v Calitz* (HC-MD-LAB-APP-AAA-2020/00025) [2021] NALCMD 19 (30 April 2021)

Coram Schimming-Chase, AJ
Heard **15 December 2020**
Delivered **30 April 2021**

Flynote: **Labour law** – Appeal – Question of law – An enquiry into a factual finding of an arbitrator will only amount to a question of law where there is no evidence which could reasonably support the finding of fact. The test remains: did the arbitrator reach a decision that no reasonable decision maker could have reached?

Labour law – Appeal – An Appellate Court should also be assiduous to avoid interfering with the decision in the proceedings sought to be appealed against for a different reason on the record. That is not open to the Appellate Court.

Labour law – Unfair dismissal – Retrenchment – Where an employee is retrenched and the employer is unable to show that the dismissal was for a fair reason, reinstatement is the appropriate remedy, unless it is shown that reinstatement in the circumstances is inappropriate.

Labour law – Unfair dismissal – Compensation – Arbitrator has a discretion to award an amount of compensation that she considers fair and reasonable in the circumstances. Award should not be aimed at punishing employer or enriching employee. Factors to be considered include (but are not limited to) the reason for the dismissal, and the conduct of the parties during the currency of the dispute.

Labour law – Variation of compensation award – s 88(b) – An arbitrator who has made an award in terms of s 86(15) may vary the award if it contains an obvious error or omission, only to the extent of that omission.

Summary: The respondent was previously employed by the appellant (a mining company) as a deputy director, and later as deputy head of department in the appellant's project and planning department. Approximately a year after his employment (and while he served the appellant as acting head of department), the appellant appointed a foreign national with the same job title as that of the respondent, without any form of explanation.

The respondent later was advised that restructuring was taking place within the appellant, and that his role was one identified as no longer required in the company. The respondent was offered a voluntary separation package which he refused. Instead, the respondent identified three other positions within the appellant that he could occupy and continue to render a quality service to the appellant. The appellant refused to consider appointing the appellant to any of the suggested positions, on the basis that the respondent was not qualified for these positions. No proper explanation was provided for this view, given the respondent's clean record of service at the appellant.

The respondent was subsequently denied access to his duty station at the mine without forewarning and was thereafter instructed to report to the appellant's town office. Two days later, the respondent received formal notice of his retrenchment. The notice

advised him that the appellant had decided that his position had become redundant. Before the end of the notice period, the respondent was advised that he was no longer required to report for duty, and if he did, he would be charged with trespassing.

Less than one month after the respondent's dismissal the appellant appointed another employee with essentially the same roles and functions as those previously held by the respondent, and the same subordinates that previously reported to the respondent during his employment at the appellant.

At the end of the arbitration proceedings the arbitrator found that the appellant had failed to comply with s 34(1) of the Labour Act, 11 of 2007 and had failed to show that that it had a valid commercial business rationale for retrenching the respondent, resulting in the respondent's dismissal being both procedurally and substantially unfair. The arbitrator ordered that the respondent be reinstated together with compensation in his favour.

The arbitrator subsequently varied her award (on application by the respondent in terms of s 88 of the Labour Act), by increasing the compensation payable to the respondent by one month. The variation was attributed to a mere miscalculation of the initial compensation award by the arbitrator.

In the main appeal the court was tasked with determining whether the appellant's retrenchment procedures in relation to the respondent were undertaken in compliance with s 34 of the Labour Act; whether the compensation award was reasonably reached and whether the arbitrator was entitled to vary her compensation award. The court was also tasked with deciding whether the arbitrator had misdirected herself in not awarding the respondent with lost bonus earnings, as alleged in the respondent's cross appeal.

Held that unless the decision of an arbitrator is asserted to be perverse, an Appellate Court should be assiduous to avoid interfering with the decision for the reason that on the facts it (the Appellate Court) would have reached a different decision on the record.

Held further that that the onus to show that the retrenchment was for a valid and fair reason rests on the employer. Thus, it is incumbent on the appellant to show that the

decision to retrench was justified by a proper and valid commercial business rationale. The court found that the arbitrator was correct in finding that on the evidence, the appellant did not discharge the onus of proving that the retrenchment was in compliance with the provisions of s 34 of the Labour Act.

Held further that the purpose of s 34 is essentially to bring the employer and employee to the negotiating table. An employer is under an obligation to enter into genuine negotiations and to negotiate in good faith. The appellant on the facts did not negotiate in good faith.

Held further that the variation of the award was properly made in terms of s 88(b) of the Labour Act.

ORDER

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1. The appeal is dismissed.

2. The cross appeal is dismissed.

3. The Ruling of the arbitrator as varied is upheld.

4. There shall be no order as to costs.

JUDGMENT

SCHIMMING-CHASE, AJ

Introduction

[1] The question for determination in this appeal from an arbitrator's award, is

whether the appellant's retrenchment procedures in relation to the respondent (an erstwhile employee of the appellant) were undertaken in compliance with s 34 of the Labour Act, 11 of 2007 ("the Labour Act"). Also for determination is whether the compensation award was reasonably reached, and whether the arbitrator was entitled to vary her compensation award.

[2] The respondent also delivered a cross appeal, on the grounds that the arbitrator misdirected herself in not awarding lost bonus earnings.

[3] On 5 May 2020[1] and in an extensive written ruling, the arbitrator made the following findings against the appellant:

3.1. the appellant did not comply with s 34(1) of the Labour Act, resulting in the dismissal of the respondent being procedurally unfair;

3.2. the appellant did not have a valid commercial business rationale for retrenching the respondent, and the only reasonable conclusion was that the appellant wanted to get rid of the respondent, resulting in the dismissal being substantially unfair.

[4] The accompanying award was as follows:

4.1. that the respondent be reinstated in his previous position, or at a similar level with similar benefits as his previous position;

4.2. that the appellant pay compensation in the amount of N$3,464,314.71;

4.3. that the appellant pay interest on the above amount as prescribed by the Prescribed Rate of Interest Act 55 of 1975 calculated from date of award;

4.4. that the appellant report to work at his normal starting time on 5 June 2020.[2]

[1] The arbitration proceedings were conducted on 23-30 October, 15 November and 4-11 December 2019.

[2] This amount was calculated as follows:

salary from 1 August 2018 to 31 December 2018: N$156,614.59 x 5 months = N$783,072.95

[5] On 26 May 2020 the arbitrator varied the award (in terms of s 88(b))[3] by ordering compensation in the amount of N$3,631,892.32. This was in effect an increase of 1 month's compensation in favour of the respondent, from January 2019 to May 2020, as opposed to the initial calculation of January 2019 to April 2020.

The grounds of appeal

[6] The grounds of the appellant's appeal against the finding and award are the following:

6.1. the arbitrator misdirected herself on the facts and evidence when she found that the appellant utilised the provisions of s 34 (retrenchment) of the Labour Act as a ruse to get rid of the respondent;

6.2. she misdirected herself by ordering reinstatement when there was no evidence that reinstatement, particularly in "the same or similar position with similar benefits as his previous position" would be an appropriate remedy;

6.3. she misdirected herself by not accepting the appellant's evidence that the respondent's position no longer formed part of the appellant's structure;

6.4. she further misdirected herself when she varied the compensation award, as her initial award was *functus officio*, and in any event, the compensation was unreasonably calculated given the period of more than 20 months emanating from dismissal to date of ruling, resulting in compensation being unfairly calculated;

[7] The grounds of the appellant's cross appeal are that the arbitrator refused to award the respondent's claim for bonus pay, on the basis that the appellant awarded a special bonus to all employees during 2018.

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plus January 2019 to April 2020 with 7% increment: N$167,577.61 x 16 months = N$2,681,241.76 Total: N$3,464,314.71.

[3] On application by the respondent.

The evidence led

[8] The arbitration between the parties was held on 29 to 30 October 2019, 15 November 2019 and 4 to 11 December 2019.

[9] One witness testified for the appellant. The respondent testified himself, and also led evidence of three other witnesses who were previously in the employ of the appellant.

[10] For purposes of context, the evidence of the respondent is summarised first.

The respondent's evidence

[11] According to the evidence led by the respondent,[4] he was permanently employed by the appellant (a mining company) as Deputy Director: Projects at the Husab Mine from 1 February 2017, until his dismissal on 31 July 2018.

[12] Prior to his formal employment at the appellant, the respondent was involved in the appellant's Husab Mine Project in various capacities, specifically overseeing some initial construction activities.

[13] During October 2017, the appellant changed the job titles of all Directors to Heads of Department ("HOD"). The respondent was directly informed that his job title had changed from Deputy Director: Projects, to Deputy HOD: Projects.

[14] During March 2018, the respondent, in his capacity (at the time) as Acting HOD: Projects, took it upon himself to report a perceived risk to the appellant's Compliance and Risk Management Audit Department with regard to key identified talent, and requested more resources within the department.

[15] Thereafter, and still during March 2018, the appellant appointed Mr Gao Junli, as

[4] These facts are not materially in dispute.

Deputy HOD: Projects, and one Mr A van Wyk was appointed as HOD: Projects.

[16] The respondent expressed his concern in an email to the appellant's Vice President of Human Resources, Mr McCallum,[5] that both his appointed and acting roles had been unilaterally filled, without him being consulted on this before the changes were made. He requested a meeting in order for the situation to be clarified. Mr McCallum stated in response that the respondent's official title as Deputy HOD: Projects remained unchanged.

[17] The respondent sent a further email requesting clarification on how the two deputy positions (with the same title) would relate to each other and what the functions of his role entailed. The respondent also requested that the parties determine and finalise his performance indicators according to his function and job description and that he be included in an active performance management system. No formal response to these requests came from the appellant.

[18] On 26 March 2018 in an EXCO meeting which the respondent attended together with the appellant's CEO and other senior employees of the appellant, Mr McCallum communicated that the appellant had implemented the 2018 salary adjustments and that most of the employees in the non-bargaining bands (middle and senior management) would not receive any salary increases due to the appellant's poor performance.

[19] Shortly thereafter, three other employees were requested to meet with Mr McCallum. After this meeting, their employment was terminated subsequent to their acceptance of the voluntary separation packages.

[20] The respondent shared his concerns about the above-mentioned actions with the CEO of the appellant via email. Some of the affected employees then prepared a group grievance in line with the appellant's official grievance procedure. This grievance was signed by 72 employees (including the respondent) and was handed to the appellant.

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[5] Mr Percy McCallum, the main and only witness for the appellant. Hereinafter referred to as Mr McCallum.

[21] In this grievance, the management style of the executive management was criticised for not adhering to certain corporate values including safety, transparency and accountability. Two subsequent meetings took place, and these meetings were attended by a group of the aggrieved employees, as well as executive management.

[22] On 29 May 2018, the respondent applied for the vacant position of HOD: Engineering and Maintenance ("E & M").

[23] On 14 June 2018 the respondent arrived at a scheduled meeting and was informed by the appellant's Employee Relations Officer that he was mandated by the appellant to inform him that the appellant had decided that the respondent would not be part of the company's future leadership. The respondent was also informed that restructuring was taking place within the appellant, and the respondent's role was one identified to be restructured and no longer required in the company.

[24] For these reasons, the appellant proposed an amicable separation process. The respondent was assured that his performance was not the issue. He replied that there was no basis for a separation from the company, but the appellant insisted that the company had made a decision. It was proposed to the respondent that he accept a voluntary separation package. However the respondent refused to accept the package and indicated that he was being victimised due to his reporting of a risk that implicated the appellant's CEO, and also because it appeared that he was the most senior employee of the 72 employees that had signed the group grievance. The respondent also inquired on what basis a foreign national (Mr Gao Junli) had been appointed in his position. The respondent was advised reconsider the package being offered and the meeting was adjourned.

[25] On or about 19 June 2018, the respondent met with Mr McCallum. The respondent reiterated his objection to the process followed by the appellant. He indicated that he did not want to leave the employ of the appellant and wanted to work at the company until retirement. He further indicated that his job title as such was not of importance, and that he was willing and able to work. He pointed out that his qualifications and experience made him suitable for quite a number of positions and that he is a Namibian citizen. Mr McCallum however informed the respondent that the

appellant had already decided and the decision would not be changed. Mr McCallum specifically mentioned the clause in his employment contract that provided that both parties would have the right to give the other party at least three months' notice of termination. The respondent was also provided with a hardcopy of the appellant's voluntary separation agreement template, but he again indicated that he would not accept the voluntary separation offer.

[26] After this meeting, the respondent, through his legal practitioner, transmitted correspondence to the appellant, essentially advising that he would oppose any attempt to make him accept a voluntary separation package or any "unlawful" retrenchment.

[27] Shortly thereafter, when the respondent arrived at work, he noticed that his access card no longer functioned. He then drove to the main entrance and found that his access card was not functioning there either. After making enquiries at the security offices, the respondent was informed that an instruction had been received from the appellant's security manager to block his access card. The respondent immediately transmitted an email to Mr McCallum stating that his access card had been blocked without notice and without reasons. In the late afternoon on the same day, the respondent received a letter signed by Mr McCallum advising of a "change in workplace". The letter instructed the respondent to report for work at the Husab Tower in Swakopmund as from 20 June 2018.

[28] On 20 June 2018, as instructed, the respondent reported at the Husab Tower where he was allocated a shared office with another colleague on the first floor. In a follow up email, the respondent requested reasons for the change in office. No reasons were forthcoming. The respondent also informed Mr McCallum that he received the letter of "workplace change" after he had been locked out of the mine.

[29] A further meeting between the respondent and Mr McCallum was held at the behest of the appellant on 22 June 2018. At the meeting, Mr McCallum reiterated that the decision about the respondent's employment had been made and that his role would become redundant. He further advised that the appellant had decided to follow a formal retrenchment process. As such his employment would be terminated according to s 34 of the Labour Act. He then handed to the respondent a letter of retrenchment.

Mr McCallum indicated that the reason for following the formal retrenchment process was because there was a rejection of the voluntary separation offer. He however proposed that the respondent still consider the voluntary separation offer.

[30] In the retrenchment notice the respondent was *inter alia* informed that the decision had been taken to declare three positions in the Projects Department redundant. The respondent's position, of "Deputy Director: Projects Department" was one of the positions declared redundant. The reason given was the following:

> 'The Projects Department, due to the coming to an end of the Construction Project of the Husab Mine, has been restructured and re-organised, with a reduced staff structure.
>
> As you are employed in the position of Deputy Director, Projects with the primary focus on the Husab Construction close-out processes, such as settling disagreements with contracting companies in respect of disputes and reviewing appropriate technical structures how to deal with ongoing contractors on operational matters, the restructuring will make your position redundant, and the Company intends to terminate your services as a consequence of redundancy.'

[31] On 25 June 2018 the appellant transmitted correspondence to the respondent's legal practitioner.[6] The appellant denied that the respondent's termination was in any way linked to his reporting a risk or signing the grievance. It was explained that the appointment of Mr Gao in the position of Deputy HOD of Projects was because his functions and duties were considerably different, and that he performed three main functions, namely as company secretary to the appellant's Board of Directors, liaison on technical matters, and to ensure that the Group Company objectives were operationalised through the Project and Planning Department. Thus, Mr Gao's functions were not redundant within the organisational structure of the appellant. It was also pointed out that three other positions in the Projects Department were similarly declared redundant.

[32] On 28 June 2018 the respondent received a further request from Mr McCallum to meet in his office, which he accepted. At the meeting, Mr McCallum reiterated that the process of separation was in the formal stage. He then handed another letter to the

[6] In response to the letter dated 19 June 2018.

respondent. In this correspondence, the appellant advised that the respondent was not required to report for duty as of 1 July 2018. The respondent was also advised to hand over any company equipment that same day. Mr McCallum also stated that there was no need for the respondent to do any further work for the company.

[33] The respondent reiterated his proposal of three alternative positions within the appellant for which he could be considered, and restated his full co-operation to find an amicable way in avoiding the retrenchment process. These were also positions in which the respondent had previously acted. He explained that he did not take issue with being assigned a different role, even if the remuneration would be less, but impressed on Mr McCallum that his main concern was the purported retrenchment process that he perceived to be unfair, unreasonable and unethical. This was not accepted by Mr McCallum.

[34] Mr McCallum further informed him that the IT Department would cut the respondent off from communications and if he decided to go to the office from 1 July 2018, the police would be called to remove him and the appellant would open a legal case against him for trespassing. On 29 June 2018 the respondent's connection to the IT server was cut.

[35] Between 2 and 9 July 2018 the respondent transmitted further correspondence to the appellant, *inter alia* requesting additional information relating to and relevant to the retrenchment;[7] as well as reminding the appellant of its obligation to negotiate in good faith. Further emails were exchanged between the parties with regard to the respondent's right to receive the information requested, and whether or not such information had already been provided.

[36] By 13 July 2018 the appellant allowed the respondent to review only selected extracts of its 2017/2018 affirmative action report but the company denied his request to copy or photograph any of the relevant ss. On 16 July 2018 it would appear that the requested information was finally sent.

[37] The respondent then sought to obtain a response to his previous suggestion of

[7] In terms of s 34(3).

his availability for the three alternative positions. At another meeting between the respondent and Mr McCallum on 20 July 2018, the respondent was informed that after review of the suggested positions the appellant had decided to only offer him the role of engineer (with an 80% reduction in salary). Mr McCallum explained that due to restructuring the position of HOD E&M[8] would fall away and that the company had decided that the other two roles were not suitable. However, no reasons were provided for this decision.

[38] On 31 July 2018 the respondent's employment was terminated, and a labour dispute was registered.

[39] On 22 August 2018, less than one month after the respondent's dismissal, the appellant issued an internal memorandum about its revised organisational structure and appointment of management roles. As regards the Planning and Project department (where the respondent previously worked), the letter informed that:

'The Project sections will report to Mr Pieter Karsten in the capacity of Superintendent: Projects. Mr Bertus Boshoff Senior Engineer and Mr Mike Castelyn Project Engineer, will report directly to Mr Pieter Karsten.

The Section Heads will report to Mr Dengeinge in an acting capacity of HOD: PPD.'

[40] The respondent formed the view that Mr Karsten's role was to perform essentially the same functions that he had previously performed, and that Mr Karsten had the same subordinates and seniors that the respondent had when he was employed at the appellant as Deputy HOD: Projects & Planning.

[41] On 12 April 2019, less than nine months after the respondent's dismissal, the appellant advertised the vacancy of Senior Project Engineer in the local newspaper. The respondent compared the key performance areas of the advertised positon to the key tasks as per his job description for Deputy HOD of the project office. He was of the view that there were remarkable similarities between the advertised role and the role he previously occupied.

[8] For which the respondent had previously applied

The evidence of the appellant

[42] The evidence of the appellant, through McCallum, was to the effect that he was mandated by the appellant to officially inform the respondent of the termination of his services.

[43] Mr McCallum did not meaningfully deny the events that transpired leading to the termination of the respondent's employment. However, he denied that the retrenchment amounted to unfair dismissal. In support of his denial, he testified that the retrenchment procedures were substantially in compliance with s 34 of the Labour Act.

[44] Mr McCallum explained that the appellant had completed the construction phase and had transitioned to an operational phase. As a result, the respondent's position was declared redundant – hence the termination.

[45] He made it clear that the company was entitled to retrench its employees for operational reasons.

[46] Mr McCallum stated further that the respondent's termination was based on operational and organisational restructuring, and that the respondent was not retrenched for technological or economic reasons. The management structure of the appellant was too top heavy and not efficient, and some roles simply had to be removed.

[47] He confirmed that the respondent was given a proper notice period of three months in accordance with both s 34 of the Labour Act, as well as the respondent's contract of employment. Also, that the numerous meetings held were part of the appellant's compliance with the retrenchment procedures envisioned by s 34.

[48] Mr McCallum denied that the three retrenched employees who took voluntary retrenchment packages were retrenched because they had signed the group grievance referred to in paragraph 20 above (they were retrenched three months after signing the group grievance). According to Mr McCallum, their retrenchment was also related to the restructuring of the company.

[49] With regard to restructuring, Mr McCallum's evidence was to the effect that the restructuring was undertaken based on targets set by the appellant's board in accordance with the 20 year lifetime of the mine. The construction of the mine had taken approximately 4 to 5 years to complete, whereafter operations were commenced. The appellant thus needed to review its structure once or twice in a year and this was not only done relative to the respondent but throughout the company. The respondent's position was the interface between the construction company and production, and the respondent's position was therefore renamed so that it could be aligned to production. He specifically testified that the respondent's position was done away with and now replaced by project and planning.

[50] As regards Mr Gao being appointed to the position previously occupied by the respondent, Mr McCallum testified that Mr Gao was an interface between the appellant and the mother company based in China and was the company secretary. Mr Gao was appointed as Projects and Planning Department Head of Department and he had multiple tasks. He further did not think that the respondent would have the capacity to undertake that position based on the reason that he was never a company secretary and also because the respondent did not speak Chinese.

[51] Mr McCallum confirmed all the meetings that took place and mentioned that the voluntary separation package had been offered to other employees before, who had accepted it. He testified that he first informed the respondent on 18 June 2018 that the appellant already considered his role as redundant as a result of restructuring, however, because the respondent turned down the offer, the appellant invoked s 34. Mr McCallum admitted that the appellant did not inform the Labour Commissioner four weeks before they retrenched the respondent as required by s 34(1)(a).

[52] He testified that the appellant's duty was only to inform the Labour Commissioner that the company intended to retrench the respondent, but that they were not obliged to give the respondent a copy of the notice sent to the Labour Commissioner. He admitted that he did not negotiate with the respondent on criteria to dismiss him as per s 34(1)(d) of the Labour Act.

[53] He confirmed that 3 months before the respondent was retrenched, the appellant employed a Deputy Head of Department in the Projects Department. Mr McCallum stated that the respondent did not have the relevant skills to be appointed as one of the nine heads of department. However no specific reasons or explanation was given for the respondent's exclusion, in spite of the fact that the respondent had previously acted as HOD in the Projects Department.

[54] Mr McCallum also testified that when the appellant was busy with restructuring, it took the decision to put the position of engineering on hold, because they considered criteria that fit production targets. The company also looked at the role of the positions as opposed to the role of individuals and further that the appellant did not need the permission of employees to restructure the company.

[55] As regards the appointment of persons in similar positions after the retrenchment of the respondent, Mr McCallum admitted that the appellant had appointed Mr Karsten to the role of Superintendent in the Projects Department 22 days after the respondent was dismissed but that this was lower level position. Mr McCallum explained that the role of Mr Karsten was not available during the respondent's appointment, and that it was a new position that only became available after the respondent had left the employ of the appellant. Mr McCallum could apparently not remember that they had also appointed engineers (which the respondent is qualified as) after the respondent's termination.

[56] Mr McCallum confirmed that the respondent had a clean disciplinary record at the time of his termination. He admitted that the respondent's access card was blocked at the mine, but that the decision to block the access card made after he was informed to move to the town office. No other explanation for blocking the access card was proffered.

[57] He also testified that the respondent was instructed to report to the town office as from 22 June 2018, because the respondent made numerous untrue allegations about the mine and therefore he thought it would be better to change the respondent's duty station to the town office.

[58] Mr McCallum testified that the appellant wanted to reach an amicable solution with the respondent but he simply turned it down. Because the applicant refused to leave his employment, the appellant was left with no option but to commence with the retrenchment process. The respondent was informed on 14 June 2019 already that his position became redundant as a result of restructuring however attempts were made to see if the respondent would accept a voluntary separation package, before formally handing the retrenchment notice to the respondent.

[59] Mr McCallum stated that the respondent did not have the required skills for any of the other positions that were available. He further stated that the respondent was responsible to manage the construction projects and that the Projects Department was managing projects, but there were failures on their side because they were careless. In this regard he stated that the respondent proposed three positions which he could be transferred to, but he was neither qualified for those positions nor did he meet the requirements for the position of HOD E & M. The witness also testified that the appellant was busy with restructuring and therefore the position of engineering was put on hold at the time.

[60] As regards the appointment of Mr Karsten in the role of Superintendent in the Projects Department 22 days after the respondent was dismissed, Mr McCallum testified that it was a lower-level position and that the role of Mr Karsten was not available during the respondent's employment. This was a new position which only became available after the respondent had left the employment of the appellant. He also confirmed that the two engineers who previously reported to the respondent, now reported to Mr Karsten in the new structure.

[61] He further testified that the respondent had caused labour unrest at the mine with his negative comments about the appellant and this is why the decision was made to move his duty station to the Husab office. Mr McCallum also testified that the respondent was revealing confidential information after he was offered a voluntary separation package. This happened between 14 and 22 June 2018.

Arbitrator's findings

[62] After considering the evidence the arbitrator made the following findings:

62.1. that the procedures followed by the appellant to terminate the respondent's contract were questionable, in particular because he was first offered a voluntary separation package, and after he rejected the package, he was essentially denied access, and later told not to report at work anymore before the period under s 34 for retrenchment was even concluded;

62.2. with regard to the evidence that the respondent was recruited for construction phase only, the arbitrator pointed out that the respondent had testified that his contract was on a permanent basis, and not only for construction, and further that he was appointed 2 months after the first uranium was already produced and drummed, which meant that at the time the respondent started working at the appellant in February 2017 the appellant was already in the operational phase;

62.3. in addition, the arbitrator found that the respondent's employment contract did not mention that it was only for construction phase.

[63] The arbitrator made the following finding(s) relating to the credibility of the appellant's witness:

'I fail to understand why the respondent have (sic) to be dishonest and state that the applicant was employed for construction phase only. This is again one of the things which makes me believe that the respondent wanted the applicant to leave employment but as they did not have a reason to do so they came up with a story which was not part of the applicant's contract. I believe that if the applicant was recruited for construction phase only the respondent could have let him sign a fixed term contract which clearly states that he was only recruited for construction phase.'

[64] The arbitrator pointed out that the appellant's representative argued that the employee / employer relationship between the appellant and the respondent had broken down because he made disparaging remarks about the CEO, and that he did not think that the respondent would add value to the company if reinstated because he questioned the competency of the CEO. If this was an important consideration then it is

clear that retrenchment was an attempt to get rid of the respondent.

[65] As regards the appointment of Mr Karsten, the arbitrator also found that even though the appellant testified that the respondent's position became redundant, she did not believe the witness because the respondent's responsibilities and functions continued to be part of the appellant's business, even though the appellant changed the title of the position. In this regard the arbitrator stated that:

'If there was a need to create a similar position, that was supposed to be offered to the applicant during the negotiation process and not to offer him a much lower position. This is an indication that the respondent wanted to get rid of the applicant because they waited for him to leave and created a position similar to his former position.'

[66] The arbitrator held that the appellant had failed to prove on a balance of probability that the respondent's dismissal was fair. She found that the respondent had been dismissed unfairly and that his dismissal was both substantively and procedurally unfair without a valid reason to dismiss him.

[67] As regards the question of compensation the arbitrator reasoned that in determining compensation she looked at the period in which the respondent had been unemployed as a result of his dismissal. Applying the principles enunciated in *NovaNam v Rinquest*[9] she found that the respondent needed to be properly compensated without punishing the appellant. She made the following finding as regards reinstatement and compensation:

'In his prayer, the applicant claimed for reinstatement plus his salary for the period he was out of employment until date of arbitration award. He also claimed for 7% increase on his salary which other employees received in 2019. I am of the opinion that he is entitled to the 7% increase which he would have received if he was not unfairly dismissed. The applicant further claimed for his bonus and leave days for the same period. Even though the applicant claimed for his bonus and leave days, I do not believe that he is entitled to two claims because the bonus is on the employer's discretion and mostly it should be paid on performance. The applicant did not work hence he was not rated on his performance. Although the applicant is reinstated in his former position he was not physically at work and I do not think it would be fair for me to order compensation for leave days. I believe the applicant's claim of bonus and leave

[9] *NovaNam v Rinquest* 2015 (2) NR 447.

days is unreasonable hence I will not consider it. Be that as it may, the applicant was honest enough to state that he was employed by the school under contract and he deducted the salary which he used to get at the school from his claim. I commend him for being honest.'

The variation of the compensation award

[68] The variation of the award resulting in an increase of the award by one month's compensation[10] was made on 26 May 2020 on application by the respondent in terms of s 88(b). In considering the arguments of both parties, the arbitrator appears to have found that there was an obvious error in the compensation award, and that it should have been calculated up to May and not April 2020, given that the respondent was to report for work in June 2020.

Submissions

[69] Mr Muhongo appearing for the appellant submitted that the arbitrator's interpretation of the facts was essentially perverse and that a reasonable arbitrator would not have reached a conclusion that the retrenchment of the respondent was unfair. In this regard it was submitted that the evidence of Mr McCallum made it clear that the appellant's decision to retrench was informed and justified by a proper and valid commercial or business rationale.

[70] Thus, it was argued that the retrenchment was in line with the provisions of s 34 of the Labour Act in that the reason for the intended dismissal arose from a reorganisation of the business and the notice of dismissal was given at least four weeks before the intended dismissal was to take place. It was also submitted that the evidence showed that Mr McCallum attempted on behalf of the appellant to negotiate in good faith, and it was apparent that there were no alternative positions which the respondent was qualified for apart from the one offered at 80% less salary.

[71] It was further submitted that on the evidence the requested information (relevant to the respondent's position) was indeed provided.

[72] Further, the court had to take into consideration the evidence to the effect that

[10] Other clerical errors were also requested to be addressed and were addressed.

the management structure was not efficient, that it was too top heavy and that was one of the main reasons why the respondent's position became redundant.

[73] He further submitted that, demonstrative of the appellant's compliance with the jurisdictional requirements of s 34 of the Labour Act, the evidence adduced by the appellant during arbitration proceedings is reflective of the fact that the appellant had numerous meetings both before and after the commencement of the retrenchment processes in terms of s 34 of the Labour Act. Thus, the appellant had discharged its onus to show that a rational and valid commercial reason for embarking on the respondent's retrenchment had been proved.

[74] Mr van Vuuren appearing for the respondent argued that it was apparent from the evidence of Mr McCallum that the arbitrator was correct in not only her credibility findings against Mr McCallum but also in her finding that the retrenchment was not substantially or procedurally correctly followed and that the entire retrenchment process was in effect a ruse to get rid of the appellant.

[75] Mr van Vuuren highlighted the following aspects for the court's consideration:

75.1. the respondent was employed permanently as Deputy Director: Projects at the mine without any indication in the contract of employment that the appointment was for a fixed term only or only for the construction process;

75.2. the appellant unilaterally changed job titles of all directors to HODs;

75.3. the respondent acted as HOD Projects for a period;

75.4. the appellant appointed a Chinese national in exactly the same position for which the appellant was employed, namely Deputy HOD: Projects, and another person was appointed HOD: Projects, while the respondent was acting in the same position. When the respondent queried this he was specifically informed that his official title as Deputy HOD remained unchanged. Yet no attempts were made to explain what his responsibilities were and how two people with exactly the same title were going to perform their respective roles for

the appellant;

75.5. it was clear from the evidence of the other erstwhile employees of the appellant, that other employees who participated in the grievance were also given a voluntary separation package. Their evidence showed that although they accepted the package, it was clear to them that they were being offered this package as a result of their grievance;

75.6. shortly after refusing the accept the retrenchment package, the respondent's access card no longer functioned and he was effectively locked out of the office. Only when he requested clarification on this was he informed that there was a change in workplace;

75.7. after being locked out the retrenchment notice was served;

75.8. considering the respondent's long term experience in the engineering department as well as his attempts to apply for a different position and suggest other alternative positions in which he could serve, this was met with a blanket statement that he was not qualified for it, however no explanation was given for this;

75.9. after his dismissal appointments were made with substantially similar responsibilities to that which the respondent had during his employment, without a satisfactory explanation.

Applicable legal principles

[76] As an overriding principle it is to be borne in mind that unless the decision of an arbitrator is asserted to be perverse, an Appellate Court should be assiduous to avoid interfering with the decision for the reason that on the facts it (the Appellate Court) would have reached a different decision on the record. That is not open to the Appellate Court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision maker could have reached?[11]

[11] *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* (LCA 62/2013) [2017] NALCMD 27 (14 August 2017) at par [45].

[77] It is trite that the onus to show that the retrenchment was for a valid and fair reason rests on the employer. Thus, it is incumbent on the appellant to show that the decision to retrench was justified by a proper and valid commercial business rationale.

[78] The purpose of s 34 is essentially to bring the employer and employee to the negotiating table. An employer is under an obligation to enter into genuine negotiations and to negotiate in good faith.

[79] 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 affected employees will be selected and the severance pay that they will receive. It follows therefore that if a joint consensus seeking process envisaged by s 34 of the Labour Act is not achieved, the dismissal of the Labour Act for operational reasons will be procedurally unfair.[12]

[80] In circumstances where an employee is retrenched and the employer is unable to show that the dismissal was for a fair reason, reinstatement is the appropriate remedy, unless it is shown that reinstatement would be inappropriate.[13]

[81] In considering the amount of compensation payable in the circumstances, various factors are taken into account such as the reason for the dismissal, the conduct of the parties during the currency of the dispute, evidence of any loss occasioned to the employee due to the dismissal as well as evidence of the likely impact of the compensation order on the employer[14].

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[12] *NovaNam v Rinquest supra* at [14].

[13] *NovaNam v Rinquest supra* at 455H [19].

[14] In the context of the principles relating to a discretion, see *Chevron Engineering v Nakambule* 2004 (3) SA 495 SCA [31] and the authorities collected there.

[82] In *Novanam v Rinquest*[15] Ueitele J held that compensation must be reasonable, fair and equitable and not be aimed at punishing the employer or enriching the claimant.

Findings on appeal

[83] Having considered the evidence and arbitrator's ruling, the court is of the view that the arbitrator's finding of fact and findings relating to the credibility of the appellant's witness cannot be faulted.

[84] The respondent was permanently employed as a Deputy Director, then Deputy HOD in the Projects and Planning department. He even acted as HOD in the department. Issue was never taken with his performance, yet two people were appointed to the position that he was employed in, and to his acting position – with no explanation, not even when same was requested.

[85] The respondent was effectively locked out before the notice of retrenchment was formally given. Despite numerous consultations, the appellant maintained that he was not qualified for any alternative position, except the one that was offered at 20% of his salary.

[86] To aggravate matters, shortly after the dismissal, there was an appointment of another person with similar roles and functions as the respondent, and the appellant's only explanation was that the position did not exist at the time when the respondent was employed. Even the persons who had previously reported to the respondent, now reported to the incumbent. This shows that there was no meaningful attempt on the part of the appellant to consider in good faith, alternative roles. The action of locking the respondent out, then serving a retrenchment notice, and then asking the respondent to leave at the end of the month, failing which he would be charged for trespassing, show that there was malintent on the part of the respondent.

[87] To the court, the appellant appears to have had no qualms about changing job titles and positions as it suited it, and then, after retrenching the respondent, hiring someone new in a similar role, with the excuse that the position was not available at the

[15] *Supra* at 456I-457CC

time that the respondent was employed and therefore could not be offered to the respondent.

[88] The arbitrator was therefore correct in finding that on the evidence, the appellant did not discharge the onus of proving that the retrenchment was in compliance with the provisions of s 34 of the Labour Act.

[89] As regards reinstatement the arbitrator cannot be faulted for ordering reinstatement in the circumstances, and taking a dim view of the appellant's assertion that there was no position available for the respondent, especially given the appellant's conduct both pre and post termination of the employment, and in particular employing persons to do similar work as the work done by the respondent under the guise of the position only being created post termination. It is apparent that the arbitrator considered this in the order of reinstatement.

[90] As regards the question of compensation, although an award up to date of hearing may have been ill-considered; given the time frame between date of dismissal and date of award, as well as the refusal to consider the bonus payments in the circumstances, the compensation order is not manifestly unreasonable on the facts as a whole as to jettison the amount ordered.

[91] So too, it is found that the variation of the award was properly made in terms of s 88(b). It was an increase of one month, made on application by the respondent. The arbitrator had by her ruling accepted that she had made an error.

[92] In the result, the appeal fails and the cross appeal fails and the following order is made:

[93] The appeal is dismissed.

2. The cross appeal is dismissed.

3. The ruling of the arbitrator as varied, is upheld.

[94] There shall be no order as to costs.

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EM SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPELLANT	Adv T Muhongo Instructed by ENS Africa (Namibia)
RESPONDENT	Adv A Van Vuuren Instructed by Fisher, Quarmby & Pfeifer