REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-LAB-APP-AAA-2021/00062

In the matter between:

PUPKEWITZ MOTOR DIVISION (PTY) LTD **APPELLANT**

and

GEOFFREY KATJIRURU **1ST RESPONDENT**

FABIOLA KATJIVENA **2ND RESPONDENT**

Neutral citation: *Pupkewitz Motor Division (Pty) Ltd v Katjiruru* (HC-MD-LAB-APP-AAA-2021/00062) [2022] NALCMD 78 (16 December 2022)

CORAM: SIBEYA J

HEARD: **15 SEPTEMBER 2022**

DELIVERED: **16 DECEMBER 2022**

Flynote: Labour law - Retrenchment - Provisions of s 34 of Labour Act, 2007 - The procedures set out in that section are detailed. If a joint consensus-seeking process as contemplated in that section is not achieved the dismissal of an employee for operational reason will be procedurally unfair.

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 the employer or enriching employee but factors to be considered include (but are not limited to) the reason for the dismissal, and the conduct of the parties during the current dispute.

Summary: The respondent was employed by the appellant as an Assistant Workshop Manager from 1 September 2014.The appellant was experiencing a decline in auto sales.

During April and May 2019, the appellant had engagements with the respondent regarding the economic difficulties the appellant was facing and as a result, the position of the respondent was declared redundant.

On 30 July 2019, the first respondent referred a dispute of unfair dismissal to the Labour Commissioner's office. The arbitrator handed down an award on 16 August 2021 where she found that the respondent's dismissal was procedurally and substantively unfair and ordered compensation.

The award handed down by arbitrator is the core of this present appeal.

Held that: the onus to show that the retrenchment was for a valid and fair reason rests on the employer and, therefore, it is incumbent on the appellant to show that the decision to retrench was justified by a proper and valid commercial business rationale.

Held *further* that: The appellant failed to lead any evidence to show that the retrenchment of the respondent was an act of last resort, in that there were no other alternatives but to retrench the respondent.

Held further that: the purpose of s 34 is essentially to bring the employer and employee to the negotiating table and an employer is under an obligation to enter into genuine negotiations and to negotiate in good faith while *in casu*, it appears that the appellant on the facts did not negotiate in good faith.

Held further that: the arbitrator was correct to find 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.

ORDER

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1. The appellant's late filing of the appeal is condoned.

2. The award issued by the Arbitrator dated 16 August 2021 in favour of Mr Katjiruru, is hereby confirmed in so far as it held that the dismissal of Mr. Katjiruru was both procedurally and substantially unfair.

3. The monetary award issued by the arbitrator in favour of Mr Katjiruru is hereby set aside.

4. The matter is referred back to the Office of the Labour Commissioner to allocate the aspect relating to the monetary award (compensation) to the same arbitrator Ms Fabiola Katjivena, or should she be unavailable, to another duly appointed arbitrator, to without delay, deal with the aspect of the monetary award according to law after hearing evidence and submissions in this regard.

5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

SIBEYA J:

Introduction

[1] The loss of jobs through retrenchment has a deleterious effect on the lives of employees and their families. It is thus imperative that even though reasons to

retrench employees may exist they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken into account to prevent the retrenchment or to limit it to the minimum. [1]

[2] Our labour laws were developed over the years to set out peremptory procedures that must be followed before an employee can be retrenched. Courts in our jurisdiction and that of South Africa, have played their part to add context to the said procedures.

Parties and representation

[3] The appellant is Pupkewitz Motor Division (Pty) Ltd, a private company duly incorporated and duly registered in terms of the laws of Namibia, with its principal place of business situated at Harold Pupkewitz Street, Windhoek. The appellant shall be referred to as such.

[4] The first respondent is Geoffrey Katjiruru, an adult male and former Assistant Workshop Manager of the appellant at Windhoek. The first respondent is the only one who opposed the appeal and he shall be referred to as the 'respondent'. Where reference is made to the appellant and the respondent jointly, they shall be referred to as 'the parties'.

[5] The second respondent is Fabiola Katjivena, an adult female cited in these proceedings in her official capacity as the arbitrator duly appointed by the Labour Commissioner in terms of s 120 of the Labour Act 11 of 2007 ('the Act'),[2] to arbitrate over the dispute referred to the Labour Commissioner. Her address of service is 32 Mercedes Street, Khomasdal, Windhoek. The second respondent shall be referred to as 'the arbitrator'.

[6] The appellant is represented by Mr Nekwaya, while the respondent is represented by Ms Mombeyarara.

Legal issue

[7] Central to this appeal is the question whether or not the appellant breached s 34 read with s 33 of the Act when it terminated the respondent's employment on 19

[1] *General Food Industries Ltd v FAWU* (2004) 7 BLLR 667 (LAC) at 682J Para 55.
[2] Labour Act, Act 11 of 2007.

July 2019. Simply put, whether the respondent's dismissal was procedurally and substantively unfair.

[8] But, before I consider the merits of the appeal, there is a sticking thorny issue that begs for an address and that is the application for condonation for the appellant's non-compliance with rules 17(10); (12) and (13) of the Labour Court Rules insofar as it may be necessary and an order reinstating the appeal, if it's found that the appeal lapsed.

[9] The condonation was sought for the filing of missing portions of the appeal record which included the s 34 notices, correspondence between the parties and a list of positions which had been rendered redundant by the appellant.

[10] The parties conceded that apart from the missing documents as aforesaid, the appeal was timeously prosecuted. What this court is now called upon to decide is whether the lodging of an appeal record, which is incomplete, and subsequently setting the appeal down for hearing constitutes the prosecution of an appeal as contemplated in rule 17(25) of the Labour Court Rules.

[11] I hold the view that this issue can be disposed of without breaking a sweat. An incomplete appeal record cannot, as a matter of course, constitute no record. The record must be examined in order to determine the significance of the missing portion. In the present matter, the respondent was at all materials times aware of the nature of the appellant's case. The missing portion of the appeal record filed, merely corroborates the appellant's case. It is not new evidence placed on record. As a matter of fact, the documents adduced were common cause between the parties and not disputed during the arbitration proceedings. The delayed filing of the missing portion, therefore, causes no prejudice to the respondent.

[12] As a result, I find that the record filed was in substantial compliance with the rules. The appeal was ripe for hearing and was prosecuted timeously, save for the missing documents from the appeal record which were later provided.

[13] In light of the above, condonation ought to be granted to the appellant. I am further acutely aware of the intricate nature of this matter and the interest of justice

that weigh towards granting condonation. I, thus, condone the late filing of the missing portions of the appeal record.

Factual Background

[14] The respondent was employed by the appellant as an Assistant Workshop Manager from 1 September 2014.

[15] On 16 April 2019, Mr Van Rensburg (Dealer Principal of the appellant) invited the respondent to a meeting scheduled for 17 April 2019 by email. The email read as follows:

'I am going to send you a meeting invite for tomorrow with Joseph. We need to discuss your position as assistant workshop manager as we got instructions from Head Office to seriously cut on costs.

Our dealership and especially the workshop is running on big losses at the moment and if we don't do something drastic there is no use for us keeping our doors open. I am busy analyzing our salary costs and if we don't cut on that, we will not be able to be profitable again.'

[16] At the said meeting, the respondent was informed that his position has become redundant due to 'operational reasons'.[3] The meeting was further postponed to 14 May 2019.

[17] It is common cause that when the appellant declared the respondent's position redundant no notice in terms of s 34 of the Labour Act was given to the Labour Commissioner prior to the engagements on 17 April 2019 and 14 May 2019.

[18] On 20 May 2019, the respondent addressed a letter to the appellant stating:

'SUBJECT: REDUNDANCY OF MY POSITION (ASSISTANT WORKSHOP MANAGER)

1. The above matter refers.

[3] Volume 1 of the Appeal Record. Page 40.

2. I was informed that my position of Assistant Workshop Manager has become redundant or is going to become redundant.

3. Nothing was discussed with me regarding the criteria used to identify my position as the only one to be made redundant nor were there any negotiations that took place with regard to the anticipated exercise, which according to me is contrary to the provisions of section 34 of the Labour Act, Act 11 of 2007.

4. As a result, I regard that to be an unfair Labour Practice or intimidation from the side of management.

5. On the 7th May 2019, at 15:08, I received an SMS from my Dealer principal, Mr Janse about a vacancy at BMW for a Work Shop Controller (C1) and was asked if I was interested in it and to forward my CV as soon as possible to Lucille, to which my reply was for us to wait from HR for alternative options available.

6. A meeting took place on the 14th May 2019 and in that meeting no negotiations or alternatives available were discussed regarding the redundancy as it was already decided that my position was going to be redundant.

7. Thereafter, I received an email from Luciile Links on the 16th May 2017 with the Subject “Vacancies” in which she asked me to forward my CV to her for the positiom at BMW as soon as possible.

8. The position of Assistant Workshop Manager I currently occupy is at D1 and the one I am asked to apply for is at C1 which is lower than my current position.

9. It has come to my attention that there is a vacant Work Shop Manager Position band (C4/D1) at Tsumeb which is more or less equivalent to my current position.

10. The purpose of section 34(d)(i) of the Labour Act is to ensure that employees do not lose their jobs or are not place *(sic)* in a disadvantaged position.

11. Forcing me to apply for a lower position while there is an alternative position available equivalent to the one I currently occupy is a clear sign of victimization from management.

12. I would like to urge management to reconsider its position of making my position “redundant” as it will amount to a “disguise retrenchment” which will lead to an unfair dismissal.

13. If management want to act in good faith the best thing to do is to put me in a similar position to the one I occupy and not try to disadvantage me by forcing me to apply for a lower position.

14. I would suggest that we sit and discuss this to fulfill the mandate of section 34 of the Labour Act, otherwise I will be left with no other choice (than) to approach the Office of the Labour Commissioner for help.'

[19] Mr Joseph Khaiseb, the Manager: Human Resources for the appellant responded by email that:

'1. Redundancy of the positions due to Economic reasons is one of the legitimate reasons for redundancy as stated in section 34 of the Namibian Labour Act, Act 11 of 2007;

2. We followed the due process of engaging you through the meetings mentioned in the attached summary of Redundancy Meeting as per directives in the section 34(1)(a), in the absence of a recognized union and a work place representative:

a. Reasons of redundancy was explained in that meetings. *(sic)*

b. Positions which become *(sic)* redundant was also mentioned but due to confidentiality and people involved, full disclosure of some positions were withheld.

c. Since there was no specific effective date of the redundancy, it was not communicated.

3. In the said meetings, the provisions stipulated in section 34(1)(d) was also communicated of which outcome resulted in the email on vacancies. It was confirmed in the summary of the minutes as attached.

4. The option of dismissal was never on the table as I informed you that the MD will give us further directive should you not be successful and/or be interested in the vacancies that are available at the time.

5. Therefore, I disagree with points 3 and 6 in your letter as it was covered as aforementioned.

6. With reference to your point 7 in your letter, be informed that Lucille was not employed by the 16th May 2017. However, should that be your typo and you meant 16th May 2019, please be informed that the email was in response to your telephonic conversation with her on your query for possibility to apply for BMW Workshop Controller Position.

7. Your interpretation of the mentioned section and subsection under point 10 of your letter is a misguided understanding as it does not imply, indicate or direct as per your interpretation.

8. There is no indication in the attached documents that you have been "forced to apply for a lower position" as per point 11 in your letter, unless you proof *(sic)* to the contrary. What can be proven is that you have been given the options of all available vacancies at the time from which you can choose to apply provided you meet the requirements, as you will not be automatically appointed in any position. Thus you will be subject to the normal recruitment process.

9. In response to point 12, the position of which you are an incumbent of has become redundant, due to economic reasons and that is a fact and a harsh reality, of which you also acknowledge. Therefore, there is no reason to keep a position which is not economically and operationally viable in the business.

10. Further response to point 12, retrenchment is a legal provision in the Namibian Labour Act and the employer is eligible to exercise such a right provided it is done within the applicable guidelines and processes. Therefore, it if not an unfair labour practice, by following retrenchment. Furthermore, never did we mention retrenchment in any of our meetings and communications with you as we did not receive such a mandate from our MD…

12. It must be noted that after detailed response to your letter in the afore captioned, you did not exercise any option by applying for any of the available vacancy. *(sic)'*

[20] On 4 June 2019, the respondent referred a dispute of unfair labour practice to the Labour Commissioner. The respondent, however, withdrew the complaint.

[21] As a result, on 5 June 2019, the appellant purportedly commenced with what it termed as a 'formal retrenchment process' in terms of s 34 of the Labour Act. A notice of retrenchment to this effect was provided to the respondent on the same date and served with the Labour Commissioner on 7 June 2019. The parties were in agreement on this issue of the service of the notice.

[22] The notice invited the respondent to a meeting to be held on 7 June 2019 to negotiate various issues contemplated by s 34. The respondent was also invited to bring a representative of his choice.

[23] The respondent declined to attend the meeting and on 6 June 2019, he addressed the following email, quoted verbatim, to the appellant:

'RE: NOTICE OF ANTICIPATED RETRENCHMENT II MYSELF

Receipt of your letter regarding the above mentioned subject matter which was given to me yesterday 05 June 2019 is herewith acknowledged.
However, I am not in any position at this moment to attend the meeting scheduled to take place on 07th June 2019, 14h30 for the following reasons:

1. I was already made aware that my position has been put on Radar for redundancy at all cost without following the due process as stipulated in Section 34 of the Labour Act, 11 of 2007.

2. The manner in which you conducted yourself in addressing this matter has affected me adversely to the extent that I was circumstantially compelled to register a case at the Office of the Labour Commissioner for further determination.

3. You already received a copy of the referral on form LC 21 and its summary of the dispute.

4. Therefore, this matter is sub judice and I will not be party to any meeting that seems to be undermining the powers of the Laws of the land and the Labour Act in particular. I trust that this communique will meet with your propitious appraisal.'

[24] On 10 June 2019, the appellant again invited the respondent to a s 34 meeting scheduled for 12 June 2019. The respondent expressly made his position plain when he stated that: "As I have already mentioned I have registered a dispute with the Labour Commission *(sic)* regarding this, it will not make any sense for me to attend such a meetings."

[25] On 14 June 2019, the respondent was again reminded to partake in the scheduled s 34 negotiations. He was informed that he would not be dismissed within the 4 weeks period of his dispute being referred, but that should he not partake in the negotiations and the period of 4 weeks pass, he would have forfeited his right to negotiate on the issues as prescribed by s 34(1)*(d).* The respondent was further informed that the possibility of negotiations remained open to him.

[26] The respondent again declined to partake in the negotiations in terms of s 34(1)*(d)*. On 19 July 2019, the respondent was dismissed by way of a letter.

[27] On 30 July 2019, the respondent referred a dispute of unfair dismissal, unfair discrimination and unfair labour practice. On 16 August 2021, the arbitrator handed

down an award where she found that the respondent's dismissal was procedurally and substantively unfair and ordered compensation in the amount of N$ 438 530.28.

[28] Disgruntled by the award, the appellant appeals against the entire award.

Relevant legal principles

[29] Section 33 of the Act provides that:

'(1) An employer must not, whether notice is given or not, dismiss an employee
(a) without a valid and fair reason; and
(b) without following –
(i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34 (1); or
(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.'

[30] Section 34 of the Act, which I find crucial to quote verbatim, provides that:

'(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) if there is no trade union recognised as the exclusive bargaining agent in respect of the employees, give the information contemplated in paragraph (a) to the workplace representatives elected in terms of section 67 and the employees at least four weeks before the intended dismissals;

(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;

(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.

(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.

(4) If, after the negotiations and selections contemplated in subsection (1), the parties do not reach an agreement, either party may, within one week after the period referred to in subsection (1) or subsection (2), refer the matter to the Labour Commissioner, who must appoint a conciliator to assist the parties to resolve their dispute.

(5) After appointment in terms of subsection (4), the conciliator must, as soon as is reasonably possible, in an attempt to resolve the dispute, convene a meeting of the parties and may convene additional meetings as may be necessary up to a maximum period of four weeks as from the date that the dispute was referred to the Labour Commissioner in terms of subsection (4).

(6) During the periods referred to in subsections (1), (4) and (5) -

(a) subsection 1(c) and (d) continues to apply to the employer, with the necessary changes; and

(b) the employer may not dismiss employees in terms of this section, unless the dispute has been settled or otherwise disposed of.

(7) If there is a disguised transfer or continuance of an employer's operation which employs or employed employees who are to be dismissed or were dismissed in terms of this section, the employees or their collective bargaining agent have the right to apply to the Labour Court for appropriate relief, including an order:

(a) directing the restoration of the operation;

(b) directing the reinstatement of the employees; or

(c) awarding lost and future earnings.

(8) Nothing contained in this section prevents an employee from referring a dispute of unfair dismissal or failure to bargain in good faith to the Labour Commissioner in respect of the employee's dismissal.

(9) For the purposes of subsection (7), "disguised transfer or continuance of an employers operation" includes any practice or situation whereby an employer who runs or operates any business purports to have gone out of business or to have discontinued all or part of its business operations, when in fact those business operations are continued under another name or form or carried out at another location, without the employer disclosing the full facts to the affected employees or their collective bargaining agent.

(10) An employer who contravenes or fails to comply with this section commits an offence and is liable to a fine not exceeding N$10 000, or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.'

[31] It must be borne in mind that the intervention of the Labour Commissioner in terms of s 34 occurs only after negotiations have failed. Where no negotiations took place at all, the remedy available to the respondent is to allege unfair dismissal and to take the route provided by s 33 of the Act.

Appellant's case and argument

[32] It was the appellant's case from the onset that it informed the respondent that his position has become redundant due to declining auto sales. The appellant contends that it did this at the earliest opportunity in order to advise the respondent of the possibility of retrenchment and the reasons for it, even before it formally commenced with the s 34 process, but the respondent had no intention to participate in such processes. The appellant stated that even when they formally commenced with the s 34 negotiations, the respondent frustrated the process when he was invited to come and participate, make representations, ask questions and place his grievances on record for the employer to consider, but he elected a combative approach.

[33] Mr Nekwaya argued that failure by the respondent to partake in the s 34 negotiations is fatal to the respondent's case as it becomes clear that the respondent lacked genuine intentions to seek consensus between the parties despite the obligations placed on both parties to consult in good faith. He relied on a plethora of South African authorities to support his proposition including *Visser v Sanlam*;[4] *Smith & others v Courier Freight*[5] and *Van Rooyen v Blue Financial Services (SA) (Pty) Ltd*.[6]

[34] Mr Nekwaya submitted, in conclusion, that the respondent must be held to the election he made.

Respondent's case and argument

[35] The thrust of the respondent's case is that the appellant failed to comply with the peremptory requirements of s 34(1)*(a)*, in that no required notice was provided to the Office of the Labour Commissioner at least four weeks before the intended dismissal of the respondent took place. Ms Mombeyarara stood her ground and threw the accusation back to the appellant that it is the appellant that did not negotiate in good faith. She drove the argument home by arguing that the respondent did not consider alternative positions for the respondent as opposed to opting for dismissal.

[4] *Visser v Sanlam* (2001) 22 ILJ 666 (LAC) para 24.
[5] *Smith & others v Courier Freight* (2008) 29 ILJ 420 (LC) para 68-69.
[6] *Van Rooyen v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC) para 19.

[36] The respondent further argued that his dismissal was not for a valid reason as no business case was made out to render his position redundant.

[37] To augment the above, Ms Mombeyarara made reference to the position of Technical Supervisor created by the appellant as a demonstration that the appellant was not facing economic hardship.

Discussion - *Procedural fairness*

[38] When I refer to procedural fairness, I refer specifically to the procedure set out in s 34 of the Act, which details the processes to be followed prior to retrenchment.

[39] From the facts of the matter, it is apparent that the decision to render the respondent's position redundant was taken in May 2019. The appellant, in my view, correctly argues that when it decides to render a position redundant, this is a prerogative of the employer.[7]

[40] A holistic view of the evidence, however, demonstrates that when the decision was taken to render the respondent's position redundant, retrenchment would most likely be the outcome. The respondent, in my view, failed to demonstrate that this would not have been the outcome.

[41] In *Novanam Ltd v Percival Ringuest,*[1] Ueitele J explained the provisions of s 34 in the following words:

'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 minimized, 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.'

[7] *Mores/er Bande (Pty) Ltd v National Union of Metalworkers of SA & Another* (1990) 11 ILJ 687 (IC) at 689A. See also: *Building Construction & Allied Workers Union & Another v Murray & Roberts Buildings (Tvl) (Ply) Ltd* (1991) 12 ILJ 112 (LAC).

[42] From the above cited authority, it is clear that s 34 requires that the employer discloses all relevant information, except privileged information, necessary to enable the affected employees to engage effectively in the negotiations over the intended dismissals. It is also a requirement in terms of the s 34 that the employer indicates the criteria for selecting the employees for dismissal and the conditions on which the dismissals are to take place which must be based on the selection criteria that is fair and objective.

[43] The appellant in its s 34 notice, and in the meetings held in April/May 2019, did not provide any such information to the respondent concerning the criteria adopted in the retrenchment of the respondent and the number of employees who had been affected by the restructuring program. Providing sufficient information as indicated above was a necessary requirement to address the possibility of retrenchment.

[44] The appellant argues that by April/May 2019, it was dealing with redundancy of the respondent's position and not retrenchment. From the evidence on record it is difficult to phantom that during the consideration of redundancy of the respondent's position, retrenchment was nowhere in sight. This is because, as a matter of consequence, once a position is redundant the incumbent will be an outcast unless the employer places him or her in another position. The respondent did not sleep on his rights but was alive to the reality that retrenchment was within sight.

[45] As stated above after the meeting in April/May 2019, the appellant, on 5 June 2019, addressed a s 34 notice to the respondent to formally initiate the s 34 process as contemplated in the Act. In the notice, the appellant invited the respondent to a meeting to negotiate various issues contemplated by s 34(1) to be held on 7 June 2019. The respondent was also encouraged to bring a representative of his choice.

[46] It is common cause that the respondent declined to attend the meeting on 7 June 2019. It is further common cause that the appellant did not end there and made a further attempt on 10 June 2019 to invite the respondent to an s 34 meeting for 12 June 2019. The respondent expressly made his position plain that it will not make any sense for him to attend such a meeting.

[47] On 14 June 2019, the appellant again informed the respondent to attend the scheduled s 34 negotiations. This time, the appellant attempted to explain the consequence of a failure or refusal to participate which will mean that the appellant forfeited his right to negotiate on the issues as prescribed by s 34 (1)*(d).* Again, such desperate advice ended in deaf ears as the respondent, elected non-participation.

[48] The question that begs for an answer is why the appellant was required to make written submissions in the absence of the information required by s 34(1)*(a), (c)* and *(d).* The speed at which the appellant was pressing for the meeting is difficult to apprehend.

[49] It is clear, in my view, that the decision of the appellant to retrench the respondent had already become settled in April/May 2019, when the respondent was advised to apply for another vacant position of lower rank in the company of the appellant, without any preferential treatment and without assurance of being recruited.[8]

[50] An important element of the obligation to bargain in good faith involves meeting, discussing and negotiating with an honest intention to reach an agreement, if this is feasible. What is required is a demonstration of a genuine willingness to compromise, to shift ground, to make concessions; this is because willingness to do any of the above-mentioned is an important feature of bargaining in good faith with a view to resolve the differences that exist between the parties.

[51] The appellant's failure to consult and engage the respondent in order to meaningfully discuss alternatives to dismissal, cannot be attributed to the respondent. This is because the appellant's bad faith was already laid bare for the respondent to see, when he was not offered a similar position; when he was requested to apply for a lower position but subject to normal recruitment process without any guarantee of being offered the position; when he was not responded to regarding queries on the availability of a position similar to his in Tsumeb and when there were vacancies in the company of the appellant.

[52] The purpose of such consultation is to enable affected employees to make representations as to whether retrenchment is necessary, whether it can be avoided

[8] Volume 1 of the Appeal Record. Page 188.

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 Act, is not achieved, the dismissal of an employee for operational reasons will be procedurally unfair.[9]

[53] The activities stipulated by s 34 have been followed but were not substantially complied with. The cumulative effect of the irregularities in the appellant's s 34 notice highlighted above and the engagement in the redundancy of the position exercise with retrenchment in sight leads to one inescapable conclusion: that the respondent had become a target for retrenchment. This, and the above conclusions and findings leads to a conclusion that the arbitrator did not err when she disregarded the appellant's s 34 notices for want of compliance with s 34 and found that the dismissal was procedurally unfair.

Discussion: *Substantive fairness*

[54] The appellant is required to have a valid and fair reason to carry out dismissals based on any of the reasons mentioned in s 34(1) of the Act, as per s 33(1) of the same Act.

[55] The reasons for the dismissal of the respondent was indicated to be economic downturn.

[56] The respondent’s bone of contention was that nothing of economic downturn was exhibited by the appellant during the arbitration proceedings.

[57] Mr Nekwaya argued that, it was common cause that the appellant was restructuring its company due to economic reasons as an ongoing company-wide restructuring exercise, and which was referred to as ‘Project X’.

[58] Mr Nekwaya further argued that Project X aimed at cutting costs due to declining auto sales and income through service or work done at the appellant where

[9] *Novanam Ltd v Percival Ringuest* (LCA65/2012) [2014] NALCMD 35 (22 August 2014).

the first respondent worked. The appellant identified the positions of Assistant Workshop Manager as a means to cut costs because it had a Workshop Manager already in its structure.

[59] The courts in South Africa held as follows regarding to the test for substantive fairness in dismissal based on operational reason:

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

[60] In *CWIU and Others v Algorax (Pty) Ltd,* the court held that the onus is on the employer to prove that the retrenchment of an employee was necessary and that the employer has a duty to point out the basis upon which an employee is to be retrenched. It was further held that substantive fairness requires the employer to show that the retrenchment of the employee was an act of last resort. The employer is also required to show that there were no other alternatives but to retrench the employee.[11]

[61] Ms Mombeyarara did not take Mr Nekwaya's submissions lightly. She came out of the starting blocks guns blazing and argued that the retrenchment was not genuine or properly justified for operational requirements. In that connection, she argued that there was a lower rank position available, which position the respondent was informed to apply, without any preferential treatment in the recruitment process.

[62] Additionally, Ms Mombeyarara argued that the respondent was at all times enquiring about the position of Workshop Manager (D1) at Tsumeb, which was equivalent to the one that he occupied, but the appellant was evasive and did not adequately answer the respondent.

[63] In light of the above, the contention of the appellant that there were no alternative options available to the appellant other than retrenching the respondent is unattainable as the evidence speak of the fact that there were alternative positions

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[10] *Survey International (Pty) Limited v Dlaminna* (2002) ZACC 27, (1999) 5 BLLR.
[11] *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC) at p.1102.

that the respondent could fill without resorting to retrenchment, so Ms Mombeyarara argued.

[64] A disturbing fact that came to light during argument is that the appellant created a Technical Supervisor position after declaring the concerned position redundant.[12] It is against best labor practices that the same entity (appellant) that has send out notices of termination due to redundancy is the same entity creating positions.

[65] An essential consideration when faced with retrenchment in a restructuring exercise is whether there is work available which the affected employee can perform. If there is, then fairness would require the employer to offer such a position to the affected employee. In a case where a position is available but the employee lacks skills to perform in that position, the employer is obliged to consider any additional training, even to a minimum degree, that may assist the employee to achieve the level of performance required. As part of the principle of seeking to avoid retrenchment, as envisaged in s 34, the same consideration would apply where new positions are created.

[66] Similarly, if the new position requires a higher performance level and the employee lacks the skills thereof, training as a means to avoid retrenchment has to be an option to consider. In this regard the decision of the Labour Court in *Andre Johan Oostehizen v Telkom SA Ltd,*[13] is instructive. At para 4, Zondo JP (as he then was) held that:

'Implicit in section 189 (2) (a) (i) and (ii) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if it can be avoided. Accordingly, these provisions envisage that the employer will resort to dismissal as a measure of last resort. Such an obligation is understandable because dismissals based on the employer's operational requirements constitutes the so called no fault terminations.'

[67] Zondo JP went to further say:

'[8] In my view an employer has an obligation not to dismiss an employee for operational requirements if the employer has work which such employee can perform either without any additional training or with minimal training. This is because that is a measure

[12] Volume 1 of the Appeal Record. Page 45.
[13] *Andre Johan Oostehizen v Telkom SA Ltd* (2007) ILJ 2531 (LAC).

that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirements ... A dismissal that could have been avoided but was not avoid is a dismissal that is without a fair reason.'

[68] I find that the appellant failed to lead any evidence to show that the retrenchment of the respondent was an act of last resort, in that there were no other alternatives but to retrench the respondent. On the contrary, the evidence established that there were alternatives to dismissal. There was a position on the same level as that of the respondent available in Tsumeb. There were other positions, albeit of lower rank than that of the respondent available for which the respondent was encouraged to apply and be subjected to the normal recruitment process. Furthermore, another position of Technical Supervisor was advertised.

[69] I further find that no evidence was led at the arbitration proceedings by the appellant that the retrenchment was properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances. In *Nehawu & others v The Agricultural Research Council & others*,[14] the Court held that:

'[27] The ultimate decision to retrench must be fair. In this context, fairness means that the ultimate decision to retrench must properly and genuinely be justified by operational requirements. The ultimate decision must be genuine and not merely a sham. The court's function, therefore, is not merely to determine whether the requirements for a proper consultation process have been followed and whether the decision to retrench was commercially justifiable. The enquiry is whether the requirement is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances.'

[70] The only evidence presented at the arbitration hearing was about the redundancy of the respondent's position. The redundancy might have been justified but retrenchment is a different matter from redundancy. When a position becomes redundant, the employer becomes obliged to reposition the affected employee. If such employee lacks the required training or skill for the available position, the

[14] *Nehawu & others v The Agricultural Research Council & others* [2000] 9 BLLR 1081 (LC).

employer should subject such employee to minimum training in order to be suitable for the position.

[71] In *casu*, the appellant failed to offer alternative employment or implement less drastic measures to protect the respondent's employment as required in terms of s 34(1) of the Act. If it was the appellant's case (which is not apparent from the record) that the respondent lacked the required skills to occupy the available positions, no training was suggested to the respondent which results in the retrenchment falling short of what is required.

[72] The appellant, in my view, was left in the cold when his position was regarded as redundant without being offered an alternative position. On a question from the court, Mr Nekwaya was at pain to explain why the appellant failed to offer another position to the respondent other than offer to subject him to a recruitment process without the guarantee to secure such other position.

[73] In view of the foregoing findings and conclusions, I find that the appellant failed to lead evidence to support the alleged downturn and prove that the redundancy was for economic purposes. The appellant further failed to prove that it had no other option than to retrench the respondent. The respondent failed to prove that retrenchment was the last resort available to the appellant. It is my considered view that, in the premises, the arbitrator was correct when she found that the appellant failed to prove on a balance of probabilities that it had a valid reason to retrench the respondent.

[74] I thus find that the appellant's appeal falls to be dismissed on this ground alone.

Compensation

[75] Section 86 (15) of the Act requires the arbitrator to act judicially in the exercise of her discretion in order to determine the appropriate award of compensation.

[76] Mr Nekwaya argued that the respondent led no evidence that he suffered financial loss as a result of the dismissal and that he took reasonable steps to mitigate his losses.

[77] Compensation that is relevant to this matter consists of an amount that is equal to the remuneration that the employee ought to have been paid by the employer had he not been unfairly dismissed. It is important for the employee to lead evidence which demonstrates that he took reasonable steps to mitigate his losses.

[78] This court in *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others,*[15] had an occasion to discuss an award of compensation in labour matters and Gibson J remarked that:

'In my view had the case been similar to the case of *Navachab Gold Mine v Ralph Izaaks* delivered by this Court (Hannah J) on 1 September 1995 the position would have been different. The *Navachab* case as well as the *Ferado (Pty) Ltd v De Ruiler* 1993 14 ILJ 974 (LAC) are clearly distinguishable on the facts, in that in both cases the respondents sought compensation including loss of certain benefits, such as medical and loss of a house. In such a case it was up to the respondents to establish subjectively what the losses entailed were.

Section 46(1)(a)(iii) is formulated in a way that distinguishes two types of awards. The Learned Chairperson shoes to award the latter award, ie the amount equal to what could have been paid to the respondents as opposed to compensating for the patrimonial loss suffered. Given that election it became unnecessary for the Chairperson to call for evidence of the actual losses sustained by the respondents to be led.'

[79] I associate myself with the above remarks that where compensation is equal to remuneration which excludes other benefits there is no need to lead evidence in order to establish the extent of the financial loss suffered. This, however, in my view, does not relieve the employee of the burden to lead evidence on his attempts to mitigate the losses.

[80] In the matter of *Novanam Ltd v Rinquest,*[16] the Court quoted with approval from *United Bottlers v Kudaya,*[17] a judgment of the Supreme Court Zimbabwe where it was said that:

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[15] *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC) at 223.
[16] *Novanam Ltd v Percival Rinquest* (LCA 65/2012) [2014] NALCMD 35 (22 August 2014) at para 22.
[17] *United Bottlers v Kudaya* 2006 JOL 1856.

'A wrongfully dismissed employee has a duty to mitigate damages by finding alternative employment as soon as possible. A wrongfully suspended employee has a duty by operation of law to remain available for employment by his employer. This is the legal position, as stated in 21 See section (15) (d). 22 See section (15) (e). 23 2005 NR 372 (SC). 24 2015 (2) NR 447 (LC). 25 (ZS case No 63/05) [2006] ZWSC 34 (12 September 2006). 23 the Zimbabwe Sun case. The issue was further clarified in Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S), wherein McNally JA at pp 418H – 419D stated as follows:

"I think it is important that this Court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have been expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased."

[81] Mitigation of losses is key to compensation based on unfair dismissal lest employees sit idle without seeking employment elsewhere in the hope of milking the employer. I find that the determination of whether or not the employee attempted to mitigate the losses is an important consideration when one considers the award of compensation.

[82] In *casu*, the respondent testified that he unsuccessfully searched for employment and took this statement no further. It is on this basis that I hold the view that evidence on mitigation of losses was not properly led resulting in the unfairness of the computation of the award of compensation.

Conclusion

[83] Redundancy can be one of the most distressing events an employee can experience and should be of last resort. It requires sensitive handling by the employer to ensure fair treatment of the employees whose positions are declared redundant as well as to uphold the morale of the remaining workforce. Retrenchment, on the other hand raises the bar even higher and demands strict compliance with s 34 of the Act.

[84] In *SACTWU v Discretio Division of Trump & Springbok Holdings,*[18] 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 scrutinizing 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.'

[85] The procedure set in s 34 of the Act should not be seen as a mere formality but as an important process to mitigate losses that may arise out of redundancy of positions and retrenchments.

[86] Once the positions have been declared redundant during the process of consultation, the Union and the employer are under a statutory obligation to consider the impact of the redundancy on the employees who are occupying those positions and to further consider how to mitigate the adverse impact on such affected employees. The appellant's conduct, *in casu*, fell short of this requirement and thus fell short of substantive fairness.

Costs

[87] Section 118 in the Act provides that no order for costs would be issued by the Labour Court in labour matters, save in situations where the institution, defence or further pursuit of proceedings is either frivolous or vexatious. None of the parties argued that the institution or defence raised in the proceedings is frivolous or

[18] *SACTWU v Discretio Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LCA).

vexatious and it is also not apparent from the record of proceedings. I will therefore not make an order as to costs in keeping with the purpose of s 118 of the Act.

Order

[88] In view of the foregoing findings and conclusions, I make the following order:

1. The appellant's late filing of the appeal is condoned.

2. The award issued by the Arbitrator dated 16 August 2021 in favour of Mr Katjiruru, is hereby confirmed in so far as it held that the dismissal of Mr. Katjiruru was both procedurally and substantially unfair.

3. The monetary award issued by the arbitrator in favour of Mr Katjiruru is hereby set aside.

4. The matter is referred back to the Office of the Labour Commissioner to allocate the aspect relating to the monetary award (compensation) to the same arbitrator Ms Fabiola Katjivena, or should she be unavailable, to another duly appointed arbitrator, to without delay, deal with the aspect of the monetary award according to law after hearing evidence and submissions in this regard.

5. The matter is removed from the roll and is regarded as finalised.

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O S Sibeya

Judge

APPEARANCES:

FOR THE APPELLANT:	E Nekwaya Köpplinger Boltman Windhoek
FOR THE 1ST RESPONENT:	M Mombeyarara MM Legal Practitioners Windhoek