NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No A 323/2010

In the matter between:

NAMIBIA WILDLIFE RESORTS LTD **APPLICANT**

And

GOVERNMENT INSTITUTIONS PENSIONS FUND **FIRST RESPONDENT**

SIMEON IINGWAPHA **SECOND RESPONDENT**

SELMA CHRISTOPH **THIRD RESPONDENT**

Neutral citation: *Namibia Wildlife Resorts Ltd v Government Institutions Pensions Fund* (A323-2010) [2014] NAHCMD 379 (9 December 2014)

Coram: VAN NIEKERK J

Heard: 12 July 2012

Delivered: 22 October 2012

REASONS FOR JUDGMENT

VAN NIEKERK J:

Introduction

[1] This application was originally brought on an urgent basis, but later the applicant removed it from the roll. It was subsequently renewed in the normal course. At a later stage the second and third respondents each filed a counter-application claiming the same relief, which was opposed by the applicant.

[2] All the applications were heard on 12 July 2012. On 22 October 2012 I made an order dismissing the application with costs. In respect of prayers 1 and 2 of the second and third respondent's counter-applications no order was made. The costs of the counter-applications were ordered to be in the cause. The reasons for the orders are now provided.

[2] The applicant is a public company established in terms of section 2 of the Namibia Wildlife Resorts Company Act, 1998 (Act 3 of 1998). The first respondent is a pension fund which came into being by virtue of section 2(b) of the Pension Matters of Government Institutions Proclamation, 1989 (Proc. AG 56 of 1989). Under section 10(4)(c) of Act 3 of 1998, the applicant is deemed to be a statutory institution which has been admitted to membership under the rules of the first respondent. The second and third respondents are former employees of the applicant and by virtue of their employment, were members of the first respondent.

[3] The applicant approached the Court for, *inter alia*, the following relief:

> '2. Declaring that applicant is not liable, in terms of any of the provisions of the first respondent's *"Fund Rules and Procedures"* (hereinafter "the Fund Rules"), or specifically, without derogating from the generality of the foregoing, in terms of rule 3.4 of the Fund Rules, to make any contribution or payment to either first respondent, or to, or on behalf of second and third respondents, as benefit payable to the latter respondents arising from their termination of their employment with the applicant."

<u>The provisions of Rule 3.4 of the Fund Rules</u>

[4] The relevant part of rule 3.4 of the Fund Rules provides as follows:

‘3.4 EARLY RETIREMENT FOR REASONS OTHER THAN AGE OR STATE OF HEALTH

(1) A MEMBER may retire from SERVICE prior to his/her NORMAL RETIREMENT DATE in the following instances:

(a) with the approval of the TRUSTEES, owing to dismissal as a result of the re-organisation of his/her EMPLOYER; or

(b) with the approval of the TRUSTEES, owing to dismissal in terms of section 24(4) (h) of the Public Service Act, 1995 (Act No. 13 of 1995); or

(c) owing to unsuitability for duty or inability to carry out duties in an efficient manner, provided such a MEMBER has completed at least ten years' PENSIONABLE SERVICE; or

(d) with the approval of the TRUSTEES, owing to his/her dismissal for reasons other than his/her unsuitability or inability, in order to promote efficiency or economy of his/her EMPLOYER

Such MEMBER shall receive a PENSION vesting on the first day of the following month. Such PENSION shall be calculated as 2,4 percent of the MEMBER'S FINAL SALARY multiplied by the MEMBER'S term of PENSIONABLE SERVICE, subject to (2) below.

(2) It is provided that –

(a) in the case of a MEMBER who retires in terms of Rule 3.4 (1) (a) or 3.4 (1)(d) above, such PENSION shall be increased by-

(i) one-third of the period of the MEMBER'S PENSIONABLE SERVICE; or

(ii) the period between the date on which the MEMBER so retires and the date on which the MEMBER would have attained the NORMAL RETIREMENT AGE; or

(iii) a period of five years,

whichever is the shortest;'.

The relevant events and correspondence

[5] In October 2009 the board of the applicant decided to declare its internal audit unit where the second and third respondents were employed redundant.

[6] On 3 November 2009 (according to the date stamp on the relevant documents) the applicant's senior manager for human resources, Mr Hamwele, completed a 'request for quotation' form in respect of the second respondent to request the first respondent to provide a quotation of the second respondent's pension benefits. The form makes provision for the type of quotation to be indicated. The pre-printed options on the form are: 'Resignation Cash', 'Resignation Transfer', 'Normal Retirement', 'Early Retirement', 'Ill-health Retirement', 'Disability Retirement' and 'Other'. Next to the word 'Other' the words 'Redundancy/Retrenchment' were inserted. On the same date the applicant's human capital officer, Ms Iyambo, completed the same form in respect of the third respondent. The type of quotation requested was for 'Retrenchment'. On both forms the last working date was indicated to be 31 December 2009.

[7] On 12 November 2009 the applicant's manager director addressed a letter (hereinafter 'the redundancy letter') to each of the second and third respondents. The relevant part of the letter reads as follows:

'**SUBJECT: STRUCTURAL REORGANISATION IN NWR**

NWR was created by an Act of Parliament No. 3 of 1998 and was commercialized to operate and be managed on sound business and profitable principles.

This prompted the Cabinet as the shareholder called (*sic*) for strong, comprehensive and accountability systems (*sic*). Cabinet henceforth approved the turnaround strategy of NWR which has been implemented successfully between the years 2006 to 2009.

NWR is now embarking on another strategy, namely the Growth strategy. It is against this background that the Board of Directors of NWR met and resolved to have the company audited twice a year by external auditors ***(Resolution No.2009.02.27/12)*** this *(sic)* will be done in order to anticipate future potential deficiencies such as the 2005 collapse. This decision thus brought about other business implications, namely, the Internal Audit section. The Board then decided to as in line with *Section 34 (1) of the Labour Act, No. 11 of 2007* declare the Internal Audit section redundant ***(Resolution No.2009.10.09/04)*** because of duplication as their work will be done by external auditors from now on. It is against this background that I wish to inform you about these structural changes.

Henceforth the position you occupy in NWR no longer exist *(sic)*, there for *(sic)* I am informing you so that should you have interest in working for NWR further, existing options will be made available to you upon showing interest yourself. However if you do not have interest in pursuing your career further with NWR, you will be compensated accordingly and in line with the Labour Act.'

[8] The applicant's managing director called the second and third respondents in and discussed the contents of these letters with them on 12 November 2009. The second respondent signed for receipt of this letter on 16 November 2009, but as I understand it, he received the letter on 12 November 2009. The third respondent was served with the letter on 12 November 2009.

[9] On 4 December 2009 the two requests for a quotation referred to above were received at the offices of the first respondent.

[10] Meanwhile the second and third respondents instructed a labour relations practitioner of Labour Dynamics CC to assist and represent them. On 9 December 2009 the representative wrote a letter to the applicant, the relevant part of which reads as follows:

> 'Our instructions are:
>
> 1. That our clients have been notified in terms of respective personally addressed missives (same contents) that essentially their posts do not exist anymore.
>
> 2. Both our clients have expressed the wish to negotiate respective retrenchment packages as no alternate positions exist within NWR in line with their respective disciplines and skills.
>
> 3. Accordingly, as this is a very sensitive matter and of some urgency (specially this time of year) you are requested to peruse (and confirm one of) the following date, time, frame for such negotiations: Monday 14 Dec 2009 at 14H00, alternatively, Tuesday 15 Dec 1009 at 08H00.
>
> I do believe that this matter will be amicably and fairly resolved without undue delay.'

[11] On 9 December 2009 Mr Hamwele on behalf of the applicant replied in writing by stating, *inter alia*:

> 'As per your request of an audience to negotiate respective retrenchment packages for the above-mentioned staff members, we hereby confirm that we are available on Monday, 14th December 2009 at 08:00.'

[12] On 14 December 2009 the first respondent addressed a letter to each of the second and third respondents which letter read the same, except for certain specific details. The details in respect of the third respondent are inserted in the following quotation in square brackets (the omissions are mine):

> '**RE: QUOTATION: EARLY RETIREMENT (OTHER THAN AGE OF ILLNESS) BENEFIT .....**
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> 1) We have completed the latest quotation on early retirement benefits due to you as at 31 December 2009.
>
> 2) According to the information submitted, you will involuntarily retire on 31st December 2009. In computing your benefit entitlement, we have used your current salary of N$387 828.00 [N$151 104.00] as your salary at early retirement date of 31 December 2009.
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> 3) At the early retirement date your "accrued" Pensionable Service will be 11 years 11 months [20 years 9 months]. In line with the Rules applicable to members involuntarily retiring from the Fund, an additional 4 years [4 years 9 months] is added to your Pensionable Service. Therefore, your retirement benefit is calculated based on Pensionable Service of 15 years 11 months [25 years 6 months].
>
> 4) The additional liability created as result of your early retirement and additional service shall be paid to the Fund by the employer in order for your full benefits to be paid. This is in line with current GIPF Rules.
>
> 5) Therefore the full retirement benefit payable from January 2010 will amount to:
>
> Monthly Pension N$ 8 216.21 [5 137.54] [Taxable]

Lump Sum N$991 919.10 [587 451.28] [Tax free]

6) The Employer is required to pay a lump sum of N$1 941 971.99 [N$1 033 758.30] to cover the additional costs of benefits so as to ensure that the member receives full benefits as stated above.

Please note that this quotation is based on information supplied and current actuarial valuation assumptions.'

[13] On 14 December 2009 the meeting arranged between the applicant and the second and third respondents took place, but the negotiations were unsuccessful.

[14] On 17 December 2009 the second and third respondents referred a dispute about the matter to the Labour Commissioner under the Labour Act, 2007 (Act 11 of 2007). On Form LC 21 the nature of the dispute is indicated to be (i) unilateral change of terms and conditions; (ii) unfair discrimination; (iii) unfair labour practice; (iv) severance package; (v) disclosure of information; and (vi) refusal to bargain.

[15] The particulars of the complaint are set out as follows:

'1. The applicants (S Iingwapa and S Christoph) were employed by Namibia Wildlife Resorts respectively for 3.5 and 20.9 years.

2. Over the last few years it became clear that both the applicants were at loggerheads with the respondent because of various issues (including unilateral transfers) that arose from the both (*sic*) applicants being in the internal audit department.

3. Finally both the applicants were notified in writing dated 12 November 2009 of the structural reorganisation in NWR, that their positions within the NWR were redundant, no longer existed and that retrenchment was imminent.

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4. No proof of compliance with the Namibian Labour Act in terms of notice to the Offices of the Labour Commissioner is evident and it is believed unless proven otherwise that such notice was never complied with.

5. It was agreed that Labour Dynamics would represent the applicants and a letter to this affect was sent to the NWR. Their reply dated 09/12/2009 under authorship of Mr. Olavi Hamwele made it clear that the NWR **agreed to meet to negotiate the respective entrenchment packages of the applicants.**

6. At the first meeting which took place on 14 December 2009 NWR realised after being informed by the applicants that they would be liable to pay the age difference between the current age and retirement age in monetary values to the GIPF. The NWR when informed of this then provided letters to each of the applicants dated 11 December 2009 wherein the applicants were essentially offered 're-deployment". It is pertinent to note that the offers of "re-deployment" are substantially different in terms of remuneration and job positions wherein (*sic*) it is clear that both applicants do not have the knowledge or the skills required for such positions. Therefore the applicants fear that they have merely been offered these positions in terms of a hidden agenda by the respondent with a view to being dismissed a few months later for poor performance.

7. The respondent cannot claim not knowing that they would have to pay GIPF as they have been through this same scenario recently.

8. The applicants did not agree with the manner in which this was done because it is seen as nothing more than a feeble attempt to avoid negotiating retrenchment packages for the applicants and to avoid having to pay GIPF.

9. The respondent was informed in no uncertain terms that the negotiations of retrenchment CANNOT be linked to any payments they have to make to GIPF.

10. The respondent then attempted to reach some form of agreement that retrenchment packages could be offset against payment to GIPF of pension money of the applicants.

11. This was refused by the applicants on the basis that retrenchment packages have nothing to do with the obligations of NWR towards GIPF and the respondent informed those present that the Board of NWR would meet early the following day to decide what to do.

12. The applicants have since been informed that a letter would be sent from the lawyers of NWR in this regard but to date no letter has been received.

13. The issues of outstanding leave, pro rata 13th cheque and certificate of service indicating the reason for leaving as retrenchment are a given in terms of the Namibian Labour Act No 11 of 2007 and as far as the applicants are concerned, have been settled.

14. The outstanding issue is severance pay which has not been finalized.

SHORT STATEMENT OF RELIEF CLAIMED BY THE COMPLAINANT

1. That the respondent be compelled to continue retrenchment negotiations with the applicants in terms of the letters provided by the respondent to the respective applicants in terms of (*sic*) severance pay.

2. The full compliance by the respondent with sections 34 and 35 of the Namibian Labour Act No 11 of 2007.

3. The payment of all monies due and owing to the applicants in terms of their retrenchment.

4. The provision of all documentation pertaining to the retrenchment of the applicants in terms of section 34(c).

5. Any further/alternative relief.'

[16] After conciliation failed the dispute went to arbitration under the Labour Act. The hearing took place on 8 March 2010. On 25 March 2010 the arbitrator delivered an award, also setting out his reasons for the award and a summary of the evidence and the arguments presented.

[17] In paragraph 10 of his reasons the arbitrator indicates that during the hearing the second and third respondents moved that 'an order be made in their favour that the respondent [i.e. NWR] must pay out the retrenchment as per the terms that were agreed already during the negotiations'. He recorded these terms to be 3 months medical aid; 3 months social security; a certificate of service; annual bonus; 53 leave days for the second respondent; 60 leave days for the third respondent; one months notice period; and a tax directive.

[18] The arbitrator further recorded the second and third respondents' evidence that no understanding could be reached on severance pay because of the contributions which the applicant was required to make to them in respect of their pension benefits.

[19] The actual award itself reads as follows:

"12. AWARD:

The respondent, Namibia Wildlife Resorts, must respect and honour the option exercised by the applicants, Mr Simeon Ingwapha (*sic*) and Mrs Selma Christoph, as was made available to them, by paying a retrenchment package to them made up as follows:

SIMEON INGWAPHA (*sic*):

1. One month notice: N$ 32 319.00
2. Leave days: N$ 1 491.60 x 53 = N$ 79 054.80
3. Severance: N$ 7 458.80 x 3 = N$ 22 376.40
4. Medical Aid contributions for three months by the respondent.
5. Social Security contributions for three months by the respondent
6. Prorated Annual Bonus payment and
7. Certificate of Service strictly in terms of Section 37 (5) of the Labour Act

Total: N$133 750.20 (excluding prorated bonus)

SELMA CHRISTOPH:

1. One month notice: N$ 12 592.00
2. Leave days: N$ 581.21 x 60 = N$ 34 872.60
3. Severance: N$ 2 906.06 x 21 = N$ 61 027.26
4. Medical Aid contributions for three months by the respondent.
5. Social Security contributions for three months by the respondent
6. Prorated Annual Bonus payment and

7. Certificate of Service strictly in terms of Section 37 (5) of the Labour Act

Total: N$ 108 491.80 (excluding prorated bonus)

Payment to be made at the Office of the Labour Commissioner or legally acceptable proof of payment directly to the applicants must be forwarded to the Arbitrator by not later than the 24th April 2010.

This award is final and binding on the parties."

[20] On 20 April 2010 Mr Hamwele wrote a letter to each of the second and third respondents in which he stated, *inter alia*:

'The company has decided to abide by the arbitration award dated 25th March 2010, in which the payments to be done to you were set out. This payment will be done to you by cheque, after lawful deductions, in front of the Arbitrator. With regard to the month notice, the company has decided to settle the one month notice period.

You are therefore officially informed that the 30th April 2010 is your last day of employment with NWR thus you are required to effect the complete handover on or before the 30th April 2010.'

[21] On 22 April 2010 Mr Hamwele completed a 'benefit claim' form in respect of the pension benefits of each of the second and third respondents for the attention of the first respondent. He indicated that the type of benefit claimed is in respect of 'Other retirement' by virtue of 'retrenchment'. He, as the 'authorised Personnel/HR Officer' completed a "Declaration and Certification for and on behalf of Employer' (i.e. the applicant) that all the particulars furnished in these forms are complete and correct.

[22] In a letter dated 15 July 2010 by the applicant's lawyers directed a letter at the chief executive officer of the first respondent in which the following was *inter alia* stated:

‘2.7 Two employees of the NWR, Mr Simeon Iingwapha and Ms Selma Christoph (“the employees”) were entrenched (*sic*) by NWR, the latter who was ordered, through an award of the Labour Commissioner dated 25 March 2010, to pay certain retrenchment benefits to them.

2.8 The award ordered and directed NWR to pay the employees a “*retrenchment package*” made up by certain benefits, but which did not include any “*additional sum*” as contemplated by Rule 3.4 of the GIPF rules.

2.9 In two pre-emptive letters directed to the employees on 14 December 2009, the GIPF informed them that “*the employer .... (NWR) ... is required to pay a lump sum*” of respectively N$1 941 971 and N$1 033 985 to cover the additional costs of the increased pension contemplated by paragraph 2.6 above.’

[23] The letter then continues to pose the following two questions to the first respondent:

‘3.1 Upon what basis can the GIPF demand payments falling outside the “*retrenchment package*” (that was clearly intended to be an all inclusive award) awarded to the employees?

3.2 Upon what basis, in any event, can the GIPF assume or assert the powers to demand that the NWR, an autonomous corporate entity with plenary powers in terms of section 34 of the Companies Act, and with the further powers set out in section 7 of the NWR Act, pay a unilaterally determined sum, the extent of which was made up in the discretion of the “*trustees*” and/or “*actuary*” of the GIPF, to or for the benefit of the employees?’.

[24] On 26 July 2010 the first respondent’s manager of legal services replied, *inter alia,* as follows:

‘Kindly note that we are aware that the Labour Commissioner’s award which directed NWR to pay retrenchment packages did not include any “additional sum” which GIPF is claiming from NWR. That is because the award was made to resolve a dispute which arose in the relationship between the employer (NWR) and the employees (Mr. Iingwapha and Mrs. Christoph). You will note and appreciate that GIPF, being an autonomous legal entity, was not a party to that dispute and is, therefore, not bound by the award.

Kindly note further that the additional sum being claimed by the GIPF from NWR is not regulated by the award but by the Pensions Funds Act 24 of 1956 (“the Pension Funds Act”) and the GIPF Rules (“the Rules”) to which NWR is a subscriber by virtue of being a participating employer in the GIPF, consequent to the provisions in section 10(4)(c) of the Namibia Wildlife Resorts Act 3 of 1998.

The Rules, specifically Rule 3.4 which deals with early retirement for reasons other than age or state of health, provides that a member who retires owing to his or her dismissal for reasons other than his/her unsuitability or inability, in order to promote efficiency or economy of his/her employer, is entitled to receive a pension which shall be calculated as 2.4% of the members (*sic*) final salary multiplied by the member’s term of pensionable service, plus one third of the period of the members (*sic*) pensionable service, or the period between the date on which the member so retires and the date on which the member would have attained the normal retirement age or a period of five years; whichever is the shortest.

In these matters, the financial implication for the shortest additional period was determined by actuarial calculations in terms of rule 3.4 (2)(b) which provides that any additional liability as determined by the actuary and incurred by the Fund as the result of the retirement of a member shall be paid to the Fund by the employer of the member, unless the trustees, acting on the advice of the actuary, determine otherwise. Since the method (being the shortest additional period) for determining the amount has already

been determined in the Rules (rule 3.4(2)) to which the NWR is a subscriber, all that the actuary did was to translate the shortest additional period to the pensionable service to monetary values. Accordingly, the GIPF denies that the amount claimed was "unilaterally determined".

The GIPF submits that rule 3.4(2) is applicable in these matters since the said employees were either retrenched due to NWR's *re-organization* or in order to promote *the efficiency or economy* of the NWR. This is evident from the NWR's letters to the said employees dated 12 November 2009 which stated that the Internal Audit section was "*declared redundant because of duplication as their work will be done by external auditors*". Consequently, the employees are entitled to pension benefits in terms of rule 3.4(1) and (2) as if they have retired and not retrenched (*sic*). The NWR is obliged to pay for the shortfall in the pensionable service of the employees in terms of rule 3.4(2)(b) and the GIPF is obliged to pay the total pension benefits in terms of rule 3.4.

With regard to NWR's claim that the retrenchment package was intended to be an "*all inclusive award*", the GIPS re-iterate that pension benefits are not regulated by the award and are not included in the retrenchment packages referred to in the award. If the retrenchment packages were intended to be an all inclusive award (e.g. inclusive of pension benefits), then the award is, as far as it is applicable to pension benefits, null and void for contravening section 37A of the Pension Funds Act which provides, inter alia, that no benefit provided for in the rules of a registered fund, or right to such benefits, shall be capable of being reduced, except to the extent permitted by the Pension Funds Act, Income Tax Act and the Maintenance Act.

GIPF being a registered fund as referred to in Section 37A of the Pension Funds Act, the effects of its rules means (*sic*) that Mr. Iingwapha and Mrs. Christoph are entitled to total pension benefits of N$2 975 757-59 and N$1 762 353.80 respectively (as at 01 January 2010). The retrenchment packages for Mr. Iingwapha and Mrs. Christoph are only

> N$173 538-15 and N$118 673-17 respectively. You will immediately note that if the retrenchment packages are to be treated as "*all inclusive*" award (*sic*) to the employees, it will have an effect of reducing their pension benefits provided for in the Rules and that effect is contrary to section 37A of the Pension Funds Act.'

[25] On 6 October 2010 the manager of legal services of the first respondent directed a further letter to the applicant's lawyers demanding payment of the additional amounts determined in respect of the second and third respondents' pension within 10 days. On 11 October 2010 the second respondent's lawyers also directed a letter of demand to the applicant for payment of the additional amount in respect of his pension by 13 October 2010.

[26] Disputing liability to make the payments demanded, the applicant launched this application on 27 October 2010.

The applicant's case

[27] Much of the applicant's founding affidavit essentially amounts to legal argument. The applicant first sets out the dispute between the parties in summary. It alleges that the second and third respondents voluntarily terminated their employment with the applicant; that the applicant was ordered through 'a purported "award" of an Arbitrator commissioned by the Labour Commissioner dated 25 March 2010' to pay certain retrenchment benefits to the second and third respondents; and that the award ordered and directed the applicant to pay 'a retrenchment package' made up of certain benefits, but did not include any additional sum as contemplated by rule 3.4.

[28] The applicant refers to the letters dated 14 December 2009 which the first respondent directed to the second and third respondents informing them that the applicant is required to pay a lump sum of respectively N$1 941 971 and N$1 033 985

to cover the additional costs of the increased pension contemplated in rule 3.4. The applicant disputes that it is liable to make these payments.

[29] The applicant continues to state in paragraph 17 of its founding affidavit:

> '17. The issues arising from the above facts are the following (the italicized excerpts in parenthesis reflect terminology used in the award of the Arbitrator):
>
> 17.1 Did the *"exercise of the option"* by the employees to terminate their employment with NWR amount to *"early retirement"* due to *"dismissal for operational requirements"* (i.e. retrenchment)?
>
> 17.2 Are the GIPF rules or any other internal rules of the NWR governing retrenchments or pension payments applicable to the *"exercise of the option"* by the employees?
>
> 17.3 Was the *"retrenchment package"* an all inclusive award that excluded the entitlement to pay further pension benefits?'

[30] The applicant's managing director alleges in the founding affidavit that the following are the 'comprehensive background facts' (the insertion between square brackets and the omissions are mine):

> '18. The employees were employed in the Internal Audit Department of the NWR during the course of 2009/2010.
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> 19. In November 2009 they were informed that their department was abolished, and that they were given the choice to be redeployed within the NWR, or to accept a retrenchment package. They indicated a preference for the second option, i.e. retrenchment.

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20. Before the details of the retrenchment package(s) were finalized or the retrenchments were implemented, the NWR withdrew the retrenchment offer.

21. Alternative positions within the NWR were made available to the employees. Allegations were made by the employees in the arbitration proceedings before the Arbitrator commissioned by the Labour Commissioner, on 8 March 2010 ..... that the details of the redeployment offers were in a *"closed envelope"* which could only be opened after the employee indicated acceptance of the offer to be redeployed, hence the conclusion (by the employees) that the redeployment offers were insincere and a contrived charade.

22. The employees were however sufficiently aware of the details of the redeployment offers to enable them to comprehensively complain about a variety of features thereof. For such reason I contend in the founding affidavit that the *"closed envelope"* argument was insincere.

23. The employees eventually elected not to accept the redeployment offers for a variety of personal reasons including (on the part of third respondent) wide ranging unfounded speculation about her likely *"victimization"* that would ensue in the wake of the redeployment.

24. The employees initiated arbitration proceedings before the Arbitrator which were heard on 8 March 2010. The Arbitrator described the nature of the dispute before him as follows in his award (a copy of which is annexed hereto as annexure "ATA5"): *"The issue at hand was a dispute over whether a retrenchment package should be paid out and whether the applicants should be redeployed within the company."* As would be demonstrated fully later below, such synopsis of the issues bore no resemblance to the complaints expressly formulated by the employees in the papers that initiated the arbitration proceedings.

25. The Arbitrator made his award on 24 March 2010. The essential component thereof was recorded thus: *"The respondent, National Wildlife Resorts, must respect and honour the option exercised by the applicants, Mr Simeon Ingwapha and Mrs Selma Christoph, as was made available to them, by paying a retrenchment package to them made up as follows: ...."* (my emphasis)

26. The *"retrenchment package"* determined by the Arbitrator did not include any pension benefits.

27. The award did not address the issues arising from the letters referred to hereinbefore [i.e. the letters dated 14 December 2009 by the first respondent] to the employees providing particulars of the substantial pension benefits allegedly payable to them, that included a substantial contribution from the applicant.'

[31] The applicant attaches the full written reasons for the arbitrator's award as annexure "ATA5" to the founding affidavit. I take note of the fact that the accuracy of the arbitrator's summary of the evidence and his recording of the arguments and the issues agreed upon and not agreed upon is not in dispute. As the applicant stated in its founding affidavit, the award is a 'convenient memorial' of the evidence and also of the arguments and issues mentioned.

[32] In its founding affidavit the applicant then proceeds to deal separately with each of the issues set out in paragraph 17 of its founding affidavit. As far as the first issue is concerned the applicant, relying, *inter alia*, on certain portions of the arbitrator's reasons, contends that the second and third respondents resigned voluntarily from the applicant's service and were not retrenched. The applicant also contends for certain

reasons that the arbitration proceedings are a nullity which need not be set aside before the applicant may seek to rely on the nullity thereof.

[33] As regards the second issue set out in paragraph 17, the applicant contends, in summary, that as the second and third respondents were not retrenched, or, put differently, dismissed for operational requirements, the provisions of rule 3.4 and the internal rules of the applicant do not apply.

[34] As to the third issue set out in paragraph 17, the applicant contends for certain reasons and on the assumption that the arbitrator's award is not a nullity, that the award intended to finally determine the disputed issues between the parties; that the award was intended to be an 'all inclusive' package and cannot be supplemented by the addition of further benefits, such as the pension benefit and that section 37 A of the Pension Funds Act does not apply.

[35] The applicant concludes in paragraph 76 of the founding affidavit that it is not obliged to pay any amount to the first respondent.

The respondents' cases

[36] In summary it may be said that the respondents contend that the second and third respondents were retrenched and that they are entitled to the pension benefits as provided for by rule 3.4. Certain preliminary points raised by the second respondents in the papers were not persisted with at the hearing.

The factual basis upon which the first question raised in paragraph 17.1 of the applicant's founding affidavit is to be decided

[37] Mr *Barnard*, who appeared for the applicant, launched a preliminary attack on the answering affidavits of the second and third respondents, submitting in his heads of argument that these affidavits are 'replete with bare denials that failed to meaningfully, or at all, deal with or dispute crucial evidence' of the applicant in the context of the first question posed. The essential point made by counsel is that the second and third respondents' bare denials amounted to untruths and did not raise *bona fide* factual disputes.

[38] In light of this submission it is necessary to examine in more detail the specific averments made and the responses thereto in the second and third respondents' answering affidavits.

(i) Paragraph 20 of the founding affidavit

[39] The first averment is contained in paragraph 20 of the founding affidavit and it is that the applicant withdrew the retrenchment offer before the retrenchment packages were finalised or the retrenchments were implemented. Having referred to this averment, counsels' further submission, as set out in paragraph 14.3 of the applicant's heads of argument, is that the alleged bald denials are made –

> 'despite the finding of the arbitrator based on, *inter alia*, the evidence of Christoph referred to at page 3 of the award:
>
> *"According to them* (the employees) *everything went well and an understanding was reached on a number of aspects of the packages until when it later emerged that the respondent had to make some substantive payment to the pension fund as part of the retrenchment exercise. According to the applicants it was only at this juncture that respondent made a u-turn and attempted to remove the second option which they have already opted for."* '

[40] I pause to note that counsel's submission must be considered based on the assumption that what is termed 'the retrenchment offer' is referred to by the arbitrator as 'the second option'. Using for the moment the terms used in the founding affidavit, it is, in my view, of importance to note here that the arbitrator did not find that the retrenchment offer was withdrawn, only that there was an attempt to withdraw the offer which had already been accepted.

[41] The second respondent's answer to the allegation in paragraph 20 of the founding affidavit is set out in paragraph 29 of his answering affidavit as follows:

'**29.**

AD PARAGRAPH 20 THEREOF

29.1 I deny the contents hereof and I state that the retrenchment was not an offer made towards me but a decision which the applicant made. I was informed that the decision to abolish my employment position was made by the applicant's Board of Directors and I was never informed that the Board took the decision as an offer. I would thus challenge the deponent to produce a resolution which confirms a withdrawal of an offer of retrenchment;

29.2 Needless to say. I find it most absurd that the applicant as employer would consider retrenchment as an offer. I am advised that retrenchment is made on specific operational grounds under the labour law and cannot be made as an offer which may be accepted or declined by an employee.'

[42] It is, to my mind, clear that the answer focuses on the traversing the contention that retrenchment can, in principle, be an 'offer' (which is a legal issue) and denying, in any event, the fact that such an offer or withdrawal was made (which is a factual issue). In my view this answer sufficiently explains the denial and is, contrary to the further

submission by the applicant's counsel, not untruthful in light of the arbitrator's summation of the evidence before him. The arbitrator refers to 'an attempt to remove the second option which they have already opted for'. In my view it is debatable whether the second respondent should have understood the allegation that the retrenchment offer was withdrawn to be referring to the facts as summarized by the arbitrator.

[43] As far as the third respondent is concerned, it is so that in paragraph 21 of her answering affidavit she merely denies the allegations in paragraph 20. However, reading paragraphs 19, 30, 31, 32, 38, 50 and 51 together it is evident that her case is that she had finally exercised the so-called 'second option'.

(ii) Paragraph 21 of the founding affidavit

[44] The second instance cited by counsel for the applicant is set out as follows in the applicant's heads of argument:

> '14.5. In paragraph 21 of the founding affidavit the following evidence was recorded on behalf of NWR:
>
> *"Alternative positions within the NWR were thereupon made available to the employees. Allegations were made by the employees in the arbitration proceedings before the arbitrator commissioned by the Labour Commissioner, on 8 March 2010 (to which more comprehensive reference will be made later hereinbelow) that the details of the redeployment offers were in a 'closed envelope' which could only be opened after the employee indicated acceptance of the offer to be redeployed, hence the conclusion (by the employees) that such redeployment offers were insincere and a contrived charade."*

14.6. In paragraph 22 of the answering affidavit of Christoph and in paragraph 30 of the answering affidavit of Ingwapha (*sic*), the totality of such evidence was simply denied, despite the fact that, as is evident from what is quoted in subparagraph 14.3 above from the arbitrator's award, read with further excerpts from the award, set out below, the arbitrator effectively confirmed what was stated in paragraph 21 of the affidavit on behalf of the NWR:

14.6.1. *"Subsequent to this some redeployment offers were made to them. They however declined them, as according to them the purpose of the meeting was only to negotiate or finalise their retrenchment packages. The other reason they were no longer prepared to listen to redeployment alternatives as* (sic) *when they were ready to consider that the details were withheld by the respondent.";*

14.6.2. *"Playing open cards or full disclosure become* (sic) *even more important when the affected employee is faced with the mammoth task of making a decision that involve (*sic*) 'choosing among alternatives'. It is a fact which is not disputed that the two applicants were presented with two alternatives and that they had to make a decision, alternatively a choice. It remained also a fact that one of the alternatives 'was in a closed envelope', <u>which could only be opened after the employee had exercised that option".</u>* (the parenthesis and emphasis are as in the award).'

[45] The second respondent states as follows in paragraph 30 of his answering affidavit:

'**30.**

AD PARAGRAPHS 21 AND 22 THEREOF

I deny the averments contained therein and I state that the alternative position (*sic*) were not made available but were proposed by the applicant's officials after the retrenchment

> was already put into force. Moreover in that (*sic*) the terminology of "closed envelope" was used by the Arbitrator in his arbitration award and not by me. This terminology was quite descriptive of the bad faith in which the applicant chose to offer redeployment to me and the third respondent;'

In my view this answer does not amount to a bare denial and it is not untruthful.

[46] In paragraph 22 of her answering affidavit the third respondent does indeed merely deny the contents of paragraph 21 of the founding affidavit. The third respondent did not take issue at any stage in the papers with the accuracy of the arbitrator's summary of evidence and submissions before him and in light hereof the denial is not understood. I therefore agree with Mr *Barnard's* submission that in respect of the allegations contained in paragraph 21 the third respondent's bare denial does not raise a *bona fide* dispute of fact. It is, however, not clear to me whether the denial was necessarily knowingly made as a deliberate untruth and I prefer not to make any finding on this point.

(iii) *Paragraph 22 of the founding affidavit*

[47] The next averment which was taken up by the applicant's counsel is dealt with as follows in the heads of argument:

> '14.8. In paragraph 22 of the founding affidavit the following was stated on behalf of NWR:
>
> *"The employees were however sufficiently familiar with the particulars and details of the redeployment offers to enable them to comprehensive* (sic) *complain about a variety of features thereof. For such reason I contend that the 'closed envelope' argument of the employees was insincere."*

(emphasis supplied)

14.9. Paragraph 23 of the answering affidavit of Christoph, and paragraph 30 of the answering affidavit of Ingwapha (sic), boldly denied this evidence whilst, yet again, the factual findings of the arbitrator demonstrated such evidence to be entirely correct, and to be corresponding with the employees' testimony in the arbitration proceedings:

14.9.1. *"There were also some aspects of the redeployment offers that were problematic. With regard to Mr Ingwapha* (sic) *if he was to accept the offer it would result in alteration of his terms and conditions of employment ...";*

14.9.2. *"With regard to Mrs Christoph, the redeployment offer promised to retain her terms and conditions of employment. However, she was not happy as this was a totally new career path, and she was afraid that she might not perform in the new position as it was not her line of expertise and skills."*.

14.10 It is clear that the above findings could only be made if the employees had full knowledge of what was contained in the alleged "*closed envelopes."* '

[48] The second respondent's answer to paragraph 22 of the founding affidavit is also contained in paragraph 30 already quoted above. In my view the second respondent does not answer the allegations contained in the first sentence of paragraph 22 to the point of substance. The bare denial in this respect does not create a *bona fide* factual dispute.

[49] However, the second sentence in paragraph 22 is in the nature of an argument and to some extent the second respondent does deal with it by denying that he used the

‘closed envelope’ expression. He goes further by placing a certain interpretation on it, which is also argumentative in nature.

[50] In this regard it is convenient to observe at this stage, in order to avoid any misunderstanding, that the contention made by the applicant in the second sentence of paragraph 22 of its founding affidavit and the second respondent’s answer thereto misinterprets the context in which the arbitrator used the ‘closed envelope’ expression. It is common cause that the ‘redundancy letter’ gave the second and third respondents a choice to indicate whether they wished to continue their careers with the applicant or whether they would accept retrenchment. They were required to first indicate their choice and if this choice was to continue working for the applicant, they would be informed of employment options available. The arbitrator summed up this part of the letter and the evidence given on this aspect as follows in paragraph 4 of his reasons (pp49-50 of the record):

> ‘According to those letters the first option was for them to indicate whether they were interested in pursuing their careers further with the respondent. It was stated that they were first to declare their interest before the details of alternative positions were made available to them. As a result the MD did not provide them with those details even when they requested for them.’

[51] When regard is had to what the arbitrator states in his reasons in paragraph 7(f) (p54 of the record) and in paragraph 8 up to and including the paragraph ending with the words, ‘The employer had a duty to provide details of the alternative positions available to put the applicants in a position to engage meaningfully in the negotiations.’ (pp54-56 of the record), it is clear that he used the ‘closed envelope’ expression when referring to the lack of details about alternative employment positions provided under the so-called ‘first option’ in the ‘redundancy letter’ of 12 November 2009. He did not

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use the ‘closed envelope’ expression when referring to the re-deployment offers made at the negotiation meeting on 14 December 2009. My finding on the absence of a *bona fide* dispute regarding the factual allegations made in paragraph 22 must therefore not be interpreted to mean that the second and third respondents were indeed insincere when they complained about the lack of details divulged to them on 12 November 2009.

[52] As far as the third respondent’s answer to paragraph 22 of the founding affidavit is concerned, it is indeed so that she merely denied the contents thereof without dealing meaningfully with the contents. Subject to the *caveat* expressed in the previous paragraph about the ‘closed envelope’ expression, I agree that the third respondent’s bare denial does not raise a *bona fide* dispute of fact.

(iv) *Paragraph 23 of the founding affidavit*

[53] Mr *Barnard* also highlighted the averments contained in paragraph 23, which reads as follows:

> *‘The employees eventually elected to not to* (sic) *accept the redeployment offers, for a variety of personal reasons including (on the part of third respondent) wide ranging unfounded speculation about her likely ‘victimisation’ that would come in the wake of the redeployment.’*

Counsel pointed out that the third respondent’s response consists of a bare denial. I agree that there is no genuine dispute of fact raised by the response.

(v) *Paragraphs 28 and 29 of the founding affidavit*

[54] The applicant’s counsel next highlighted paragraphs 28 and 29 of the founding affidavit which read as follows:

‘28. The employees indubitably had an option to remain employed by the NWR. The evidence to such effect appears overwhelmingly from the facts referred to in the written award of the arbitrator.

29. Such conclusion is also reinforced by the fact that the Arbitrator, when he described the disputes between the parties, stated that such disputes entailed an adjudication upon the impugned insistence of the NWR that the employees should remain employed by the NWR, assessed against the insistence of the employees that they should be paid a retrenchment package.’

[55] In the second respondent’s answer, which is contained in paragraph 32 of his answering affidavit, he makes a composite denial of all the averments contained in paragraphs 28 to 55 of the founding affidavit ‘on the grounds that same are irrelevant to the issue because the relief sought by the applicant relates to the pension regime’ of the first respondent. Even if the second respondent considers the allegations to be irrelevant, they should be answered by more than a bare denial if the second respondent wishes to properly put them in issue. The obvious danger lies therein that the Court might not consider the applicant’s allegations to be irrelevant.

[56] The third respondent once again contented herself with a bare denial to both paragraphs 28 and 29.

(vi) *Paragraphs 30 and 31 of the founding affidavit*

[57] Although the heads of argument do not expressly refer to paragraphs 30 and 31 of the founding affidavit, counsel includes in his complaint about bald denials paragraphs 31 and 32 of the third respondent’s answering affidavit, which are the responses to paragraphs 30 and 31 of the founding affidavit. In my view these paragraphs of the founding affidavit in essence amount to legal argument and need not be considered any

further in the context of whether the third respondent's answer raises factual disputes or not.

(vii) *Paragraph 38 of the founding affidavit*

[58] In this paragraph the applicant states as follows (the emphasis is that of the deponent):

> '38. The *"Short statement of relief claimed by the complainant"* further described the relief sought as follows: *"That the respondent be compelled <u>to continue retrenchment negotiations</u> with the applicants in terms of the letters provided by the respondent to the respective applicants in terms of severance pay"* (my emphasis). The *"continuation"* of such negotiations could also only signify that no prior dismissal or retrenchment had finally been agreed upon, finalised or implemented.'

[59] Counsel refers in his heads of argument to several extracts from the arbitrator's reasons to submit that the third respondent made a bald denial when she stated in paragraph 39 of her answering affidavit that she admits the excerpts from the 'short statement of relief claimed' but that she denies that no retrenchment had been finally agreed upon or implemented.

[60] In my view it is a matter of argument how the relief claimed and the extracts from the arbitrator's reasons should be interpreted. Seen in context, it is, to my mind, clear that the second and third respondents' case throughout was that they had exercised the 'second option' of retrenchment and that this decision was final and binding; that the only issue that remained was to negotiate the retrenchment package; and that the only issue on which they could not agree was the severance pay (because of the issue of the pension contributions). It is in this context that the arbitrator mentions that no agreement had been reached. This is confirmed by the award in which he stated that

the applicant ‘must respect the second option exercised’ by the second and third respondents.

[61] Apart from this, the response of the third respondent in paragraph 38 of her answering affidavit includes a submission that ‘...after the Applicant retrenched me, the following issues became a dispute between myself and the Applicant’ (my emphasis) and she then lists the issues listed in the complaint to the Labour Commissioner. Again, seen in light of the third respondent’s case that she was already ‘retrenched’ before the matter went to arbitration, I think that the third respondent’s answer to the allegations contained in paragraph 38 of the founding affidavit, are adequate. In finding this I think it must be borne in mind that paragraph 38 forms part of a series of paragraphs which really amount to argument.

[62] This brings me to the end the issue of whether factual disputes were effectively raised by the second and third respondents. To sum up, I largely agree with the submission made in paragraphs 14.22 and 14.23 of Mr *Barnard’s* heads of argument that ‘....on an overall conspectus of the above *“denials”* by the respondents, very little of the factual evidence set out in the founding affidavit of the applicant was properly placed in dispute’ and that the ‘...issues arising in this application are accordingly not *“factual issues”,* but related to the interpretation of the common cause facts, or facts that should be treated as not in dispute.’

The first question posed in paragraph 17.1 of the applicant’s founding affidavit: ‘Did the “exercise of the option” by the employees to terminate their employment with NWR amount to “early retirement” due to “dismissal for operational requirements” (i.e. “retrenchment”)?’

[63] There are some aspects about the formulation if this question which should be noted from the outset. Firstly, it assumes that the employees 'terminated' their employment, something which they dispute. Secondly, as set out below, the formulation is based on wording contained in South African legislation.

[63] The term 'retrench' or 'retrenchment' does not occur in the Namibian Labour Act. However, there is no dispute that an employee is 'retrenched' if he or she is dismissed for the reasons mentioned in section 34(1) of the Act, namely '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'. There is further no dispute that in South African legislation the equivalent of section 34 is section 189 of the Labour Relations Act, 1995 (Act 66 of 1995) (of South Africa), which governs 'dismissals based on operational requirements' of the employer, in other words, 'retrenchments'.

[64] In considering the first question now under discussion it should be noted that there is no dispute that the 'second option' was an option to be retrenched because of a reduction of the workforce arising from the structural re-organisation of the business of the applicant. In this particular case the re-organisation was effected unilaterally by the applicant, which did away with the internal audit section of the applicant. The result was that the employment positions occupied by the second and third respondents no longer existed with effect from at least 12 November 2009.

[65] Mr *Barnard* stressed that it is central to the concept of retrenchment that the employee is 'dismissed'. This is indeed clear from the wording of section 34 of the Labour Act. Much of counsel's argument focused on the question of whether the second and third respondents were dismissed or not. He approached the argument on

the basis of two main contentions. The first is that the arbitration proceedings themselves indicate that the employees had not been dismissed. The second it that, by taking the second option and therefore not opting to remain employed, although in other positions, the employees had voluntarily terminated their employment and had therefore not been dismissed. I shall consider each of these contentions below in more detail.

[66] As to the first contention, counsel referred to the fact that the written reasons for the arbitration award contained a handy memorial of the evidence and arguments presented. He submitted that there is overwhelming indication in the reasons that the employees had not been dismissed. I agree with this submission in so far as it concerns the point in time at which the arbitration proceedings took place. Apart from several other indications, the arbitrator specifically recorded in his reasons that the parties were in agreement before him that the second and third respondents were at the time still employed by the applicant. I do not agree with the stance taken in paragraph 38 of the third respondent's answering affidavit that the issues referred for arbitration became disputes 'after the Applicant retrenched me'. Clearly the third respondent had not yet been retrenched when the disputes were referred to arbitration. At that stage the third respondent had only indicated that her choice was to be retrenched as the applicant had intended to do (unless she opted for redeployment) and the parties were involved in negotiations about the retrenchment package.

[67] As to the second contention, counsel for the applicant submitted that the second and third respondents clearly had an option to remain employed by the applicant and that, by not exercising this option, or by taking the 'second option', they voluntarily terminated their employment and, in effect, elected to 'resign.' He further submitted in paragraph 3 of the applicant's written supplementary submissions (the insertion between square brackets is mine):

> 'Central to the notion of a "dismissal" in the ..... [context of a retrenchment] is the requirement that the employer must have acted unilaterally in terminating the employment of the employee, before the departure can be described as a "retrenchment" or "dismissal". If the employee himself/herself elected or agreed to depart from the employer, the termination of the contract of employment is no longer unilateral, and no longer a dismissal'. [emphasis supplied]

[68] In this regard counsel relies on several South African labour law cases which will be considered below. The first is *CEPPWAWU obo Qhelile v First National Batteries* [2002] 12 BALR 1275 (CC). In this case the facts were as follows, as conveniently summarized by the editor of the law report (the insertion in square brackets is mine):

> 'The applicant, a machine operator, was no longer able to perform his work after being stabbed in the hand. At his request, the respondent [his employer] applied to the applicant's provident fund for temporary boarding. When the period of temporary boarding expired, the respondent applied at the request of the applicant's attorney for his permanent boarding. The applicant was paid out a sum of money in terms of the rules of the fund. About six months later, an official of the applicant's union advised him that he had been unfairly dismissed. The applicant claimed reinstatement to an alternative position. The respondent denied that it had dismissed the applicant, and claimed that, in any event, there were no suitable vacancies for him.'

[69] The commissioner said during the course of the written award (at p1277-1278)(the insertion between square brackets in the second paragraph is mine):

> 'I am required on the basis of the above facts to determine whether the applicant was dismissed within the meaning of that term in section 186(1) of the Labour Relations Act 66 of 1996 ("the LRA"). The only paragraph in the statutory definition of "dismissal" that is possibly applicable in this case is paragraph (a) – ie termination of the contract by the

employer with or without notice. The onus rests on the applicant to adduce sufficient evidence to prove that in the circumstances the termination of his employment falls within the terms of this paragraph: see section 192(1).

'Section 192(1) [the reference should be to 186(1)(a) of the LRA] of the definition of dismissal leaves no doubt that the form of termination contemplated there requires an act of will on the part of the employer; it is the employer which by its conduct terminates the contract without the consent of the employee – the employer's act must be unilateral: *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another* [2002] 3 BLLR 189 (LAC). Where the employee terminates the contract, or where the contract is terminated by mutual consent, no dismissal occurs: see also *Jones v Retail Apparel* [2002] 6 BLLR 676 (LC).

On the respondent's version, the contract of employment terminated as a result of the applicant's successful application for medical boarding. That application was made at the applicant's request. At no stage after his injury did the applicant indicate that he wished to remain in the respondent's employ. On the contrary, his actions were consistently directed at obtaining disability benefits. Although Mr Euijen sought bravely to persuade me otherwise, the applicant's version in fact supports that of the respondent.....

Whether a dismissal has occurred must be assessed on the circumstances existing on the date it is alleged to have taken place. According to the applicant, his dismissal occurred on 30 May 2000. By that date, he had exhausted his temporary disability benefits, and had informed the respondent through his attorneys that he "looked forward to receiving payments in terms of the Provident Fund" and through his doctor that he would not be able to do manual labour again, and the respondent had duly processed his claim for permanent disability benefits on the strength of these representations. Furthermore, the applicant had at that time not received a salary for some five months, during which time he raised no objection and made no inquiry whatsoever. On the face

> of these acts and omissions, it is impossible to conclude that the termination of the contract between the applicant and the respondent was anything but consensual.'

[70] The commissioner went on to state (at p1275):

> 'Determining whether a dismissal has occurred is not a matter of fairness. It is a matter of fact. On the basis of the evidence, the only possible conclusion is that the applicant set the machinery in motion that led to the termination of his employment, and that the respondent did not terminate the contract within the meaning of that term in section 186(1)(a) of the definition of dismissal.'

[71] From the first paragraph quoted from this case it is clear that the commissioner was considering a particular kind of dismissal, namely where 'an employer has terminated a contract of employment with or without notice' as defined in section 186(1)(a) of the Labour Relations Act. There is no such definition in the Namibian Labour Act. However, the definition contained in section 186(1)(a) is in accordance with the common law.

[72] In support of his second contention, Mr *Barnard* also relied on *Jones v Retail Apparel* [2000] 6 BLLR 676 (LC). In the report the editor's summary provides a satisfactory overview of the salient facts:

> 'After a merger of the company by which she was employed as training manager and another company to form the respondent, the applicant's job title was changed to 'group training manager." Her conditions of employment remained the same, except that she was required to report to an employee who was younger than she was, and she was not required to travel as much because most training was done at the group's head office. The applicant rejected the change of title, claiming that it reduced her status and that she would be "in the field" less often. The applicant proposed instead that she be considered for the position of credit manager of one of the respondent's divisions. This proposal was rejected, and the applicant was told that she must either accept the new

training position or apply for one of several other vacancies. When she declined to make a choice, the applicant was told that her employment would be terminated of she did not accept the position, apply for another, or apply for early retirement. The applicant then accepted early voluntary retirement. She then referred a dispute concerning her alleged unfair dismissal for operational requirements.'

[73] The court discussed the matter as follows (at p678):

'[10]

The respondent bears the onus of proving the dismissal and the fact that it was for operational reasons. It is not the applicant's case that she was compelled to retire or otherwise terminate her services at her own instance. She had the opportunity to consider, she did consider and elected after receiving advice to exercise the option of early retirement which she did on 16 February.

[11]

On this basis alone I must find that the applicant was not dismissed but had opted for early retirement. There are other factors which support the conclusion that the applicant was not dismissed. The applicant relied on the letter dated 11 February as a clearer statement of her services being terminated. I disagree. The termination of her contract was one of several other options that the applicant was invited to consider.

[12]

Neither the oral nor the documentary evidence support the submission for the applicant that she was informed on 11 February that her services were terminated. The applicant's evidence wavered between 23 January and 12 February as the date on which the respondent dismissed her. Not much weight

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can therefore be placed on her evidence in this regard. The documentary evidence suggests not only that the applicant was not dismissed at all but that she knew she had not been dismissed.

[13]

That the applicant knew that the termination of the contract by the respondent was not a fact, but an option was confirmed in her letter dated 12 February when she referred to “the third option”. In that letter she also sought clarity about the notice and the notice period. If she had already been dismissed, then it seems unlikely that she would be enquiring about the notice period. In none of her correspondence of February 1998 did the applicant seek clarity about why the respondent would give her options of alternative forms of employment if it had dismissed her. Her correspondence is absolutely silent about her alleged dismissal. On the basis of these facts too I must find that the applicant was not dismissed.

[14] .....

[15]

The applicant led not a shred of evidence to support her claim that she had been retrenched. On the contrary, she conceded that in the discussion no mention was made of retrenchment. This case is not about the retrenchment of the applicant. It is about the respondent initiating changes in the terms of her employment which the applicant refused to accept. The changes were a process of consultation. The door was not closed on other options when the applicant elected to retire. If the applicant was not prepared to accept the changed terms of her employment or any alternative employment then a parting of the ways was inevitable. This could take place at the instance of either party. In this case it occurred at the instance of the applicant.

[16]

> In the circumstances I find that the applicant was not dismissed for operational reasons.'

[74] Mr *Barnard* also relied on *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC). In this matter the applicant employee was engaged as a skipper on a fishing vessel of the respondent. The applicant alleged in the Labour Court that he had been unfairly dismissed for a reason relating to the respondent's operational requirements. The respondent alleged that on 27 June 2000 the applicant had agreed that he would leave the respondent's employ and that in consequence there is no "dismissal" as defined by section 186 of the LRA. The issue of whether there had been a dismissal was first to be decided as a point *in limine*.

[75] The court approached the matter on the following factual basis. At the end of the fishing season the respondent's operational manager called the applicant to a meeting on 27 June 2000 to advise him that consideration was being given to the withdrawal of the particular vessel from the respondent's fleet because of a reduction in the fishing quota. He informed the applicant that while no final decision had been taken, it would be advisable that the applicant starts seeking other employment. The manager discussed the possibility of the applicant being involved in fishing elsewhere and that he would revert to the applicant during the following week after discussing the matter with his principal.

[76] The applicant left the meeting assuming that the vessel was to be decommissioned and with no desire to pursue discussions on the alternative raised by the manager. He formed the intention then to leave the respondent's employ of his own accord and to

seek work elsewhere. He did not attempt to contact the manager after the meeting, nor did he return the manager's calls.

[77] The applicant was paid until the end of July 2000, the respondent having concluded that he had elected to leave its employ and seek employment elsewhere.

[78] On or about 17 August 2000, the applicant became aware that the assumption he had made about the vessel's decommissioning was misinformed, as he then learnt that the vessel was in fact still in service with his employer with a new skipper.

[79] Acting on the realization that his assumptions were unfounded, the applicant then claimed that he had been dismissed by the respondent and that the latter had dismissed him unfairly by failing to comply with the statutory provisions relating to a dismissal for operational requirements.

[80] The Labour Court discussed the legal position as follows:

> '[14]
>
> > Prior to dealing with the parties' respective submissions I turn to consider the relevant legislative provisions. Section 194(1) of the Act required the employee in any proceedings concerning dismissal to establish the existence of the dismissal. The applicant accordingly bears the *onus* to satisfy the court that he was dismissed. Section 186(1)(a) of the Act defines a dismissal. For the purposes of these proceedings the parties agreed that the relevant provision is section 186(1)(a) which defines dismissal to mean "an employer has terminated a contract of employment with or without notice." This formulation would appear to contemplate that the employer party to a contract of employment undertakes an action that leads to the termination of the contract. In other words, some initiatives undertaken by the employer must be established, which has the

consequence of terminating the contract, whether or not the employer has given notice of an intention to do so.

[15]

It is accordingly incumbent upon an employee to establish on a balance of probabilities, where that employee claims to have been dismissed in terms of section 186(1)(a), some overt act by the employer that is the proximate cause of the termination of employment. A dismissal in this sense should be distinguished from a voluntary resignation (where the contract is terminated at the initiative of the employee) and the termination of a contract by mutual and voluntary agreement between the parties. The latter is not a dismissal for the purposes of section 186(1)(a). (In this regard see *CEPPWAWU & another v Glass & Aluminium 2000 CC* [2002] 5 BLLR 399 (LAC).)

…….

[27] ……. I am satisfied though that in the absence of any intentional misrepresentation by .... [the manager] as to the state of the respondent's affairs and the fate of the .... [fishing vessel] and in the absence further of any attempt by .... [the manager] to mislead the applicant so as to avoid its statutory obligation, I find that the applicant decided to leave the employ of the respondent of his own accord and volition and an appreciation of the consequences of that choice.'

[81] The Labour Court concluded that the termination of the applicant's employment did not constitute a dismissal as defined by section 186(1)(a) of the LRA.

[82] Another matter to which counsel referred is *Newton v Glyn Marais Inc* [2009] 1 BALR 48 (CCMA). In this matter it appears form the editor of the law report's summary that the applicant employee left the respondent's services after being accused of not

doing her work properly. She claimed that she had been unfairly dismissed. The respondent claimed that she had left her employment voluntarily. The commissioner noted that, to establish that she had been dismissed the applicant employee had to prove that the respondent performed some overt act which signified an intention to terminate the contract. However, to establish that the termination was consensual, the respondent had to prove not only that there was an agreement to terminate, but also the specific terms of the agreement. He held that while the parties had discussed the possibility of a severance agreement, they had not reached agreement on its terms. The commissioner further noted that, while the fact that the applicant had packed her belongings and left the office might indicate an intention to resign, she had never communicated that intention to the respondent. He accordingly found that the applicant had not resigned and that the respondent had dismissed the applicant.

[83] In considering whether there had been a dismissal or a mutual agreement that the employee should leave the commissioner stated as follows (at p7 – 8):

> ‘**Dismissal or mutual agreement?**
>
> 42.
>
> > A contract of employment may end in various ways; some consensual, other unilateral. Consensual would be, for instance, by way of an agreed termination agreement or even by way of a pre-determined termination date such as found in so-called “fixed-term agreements.” Section 186(1)(a) of the .....[LRA] reflects what the common law understands by a dismissal: the repudiation of the contract by the employer, or the employer’s acceptance of the employee’s repudiation. The only requirement that must be satisfied for this form of dismissal is that the contract must be terminated at the instance of the employer.

43.

Just as the consensus of the parties brings the employment contract into existence, so too consensus may end a contract of may alter its basic terms. For a contract to be terminated by mutual agreement, the agreement of both parties must be genuine. Once there is genuine agreement, neither party can unilaterally change his or her mind; the employment contract ends and along with it the employment relationship. If the employment relationship is terminated by mutual agreement, the termination does not constitute a dismissal for purposes of the common law or the LRA. A dismissal occurs only if the employer performs some clear and unequivocal act that indicates that it no longer intends fulfilling its contractual commitments (see *Stocks Civil Engineering (Pty) Ltd v Rip NO and another* (2002) 23 ILJ 3568 (LAC); *Jones v Retail Apparel* [2002] 6 BLLR 676 (LC)).

44.

In most cases, informing the employee that the contract has come to an end effects a dismissal in the sense as contemplated in section 186. Cases frequently arise in which the employee claims to have been dismissed, but the employer claims that the employee resigned. *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC) serves as an example. In that case, the employer claimed that the termination was “consensual” as the employee had abandoned his employment voluntarily, and that the employer had accepted this. The court held that in such circumstances, the employee is required to prove “some overt act by the employer that is the proximate cause of the termination of employment”. Where an employer pleads that the termination of the employee’s employment was effected in terms of an agreement, the employer bears the onus to prove not only the parties’ common intention to enter into the agreement, but also its specific terms. In a case such as this were an employee effectively signs

> away her rights, it must be absolutely clear what the terms are, especially the amount involved. The employee effectively "sells" her rights for an amount. .....[I]t is simply a case of the money (see *Springbok Trading (Pty) Ltd v Zondani & others* (2004) 25 ILJ 1681 (LAC) and *Stocks Civil Engineering (Pty) Ltd v Rip NO and another* (2002) 23 ILJ 3568 (LAC)). The employer discharged this onus in the *Stocks Civil Engineering* case. The court found that an employee's acceptance of a proposal that he would leave the employer's service if he was paid a severance package, constituted a consensual termination even though the parties had not agreed on the amount of severance pay. The employer failed to discharge the onus in the *Springbok Trading* case.'

[84] The commissioner in the *Newton v Glyn Marais Inc (supra)* also dealt with the question of whether the employee resigned and said (at para. 49):

> '.....Resignation is a unilateral act by the employee. If the employer has a hand in that decision to resign, then that might well constitute a constructive dismissal and be the overt act by the employer that constitutes the proximate cause for termination, as referred to by the court in the *Ouwehand* matter (see above).'

[85] The authorities relied upon by the applicant's counsel illustrate that the factual circumstances of each particular case are very important to determine whether there was a dismissal or not. As was said in *Ouwehand v Hout Bay Fisheries (supra)* (at paras. [15] and [27]):

> '…… Where it is alleged that a contract of employment has terminated by consensus between the parties, the court shall be cautious to ensure that the employer party does not seize upon words or actions that afford them meanings that were not intended. What is required is a consideration of all the factual circumstances and a determination of whether it can truly be said that the

> employee left the employ of his or her employer on his or her own accord and volition.
>
> .....

[27]

> As I have noted above, in matters such as this where it is alleged that an employee has effectively acquiesced to the state of affairs represented by the employer and elected on that basis to leave and seek employment elsewhere, the court ought to adopt a cautious approach.'

[86] The first aspect to note about these authorities is that none of them is factually similar to the instant case. What occurred in this matter is that the applicant unilaterally declared the internal audit unit redundant and with it the positions occupied by the second and third respondents. This declaration was professed to be 'in line with' section 34(1) of the Labour Act. The two respondents were presented with a *fait accompli.* They were further presented with two options. The first was that they could convey to the applicant that they were interested in working further for the applicant, whereupon 'existing options will be made available.' I think it is reasonable to conclude that this meant that the applicant had some options of alternative employment available, but that the employees had to first indicate that they wished to continue in the employ of the applicant. It is evident from the arbitrator's reasons that the two respondents and the arbitrator also interpreted the applicant's two options in this way. What is more, it seems to have been common cause that the two respondents requested details of the alternative employment from the applicant's managing director at the meeting on 12 November 2009, but that he declined to provide same until they had indicated their choice. This much is confirmed in the arbitrator's reasons. (See para. 4, page 2 and para. 7(f), page 7).

[87] The second aspect to note about the authorities relied upon is that, on a proper reading, they do not establish the principle that just because some element of choice between options by the employee is involved in the events leading to the termination of the employment relationship, the termination is not to be characterized as a dismissal. I fail to see on what principle of law or logic an intended retrenchment can become a voluntary resignation merely because the employee was offered an opportunity to indicate a preference for one of two options, the one being to negotiate or accept appointment in an alternative employment position and the other to negotiate or accept a retrenchment package, and because the employee then exercised a choice in favour of the second option. Indeed, it appears that employers often give this kind of choice in practice (See e.g. *Seebach v Tauber & Corssen Trading (Pty) Ltd and Another* 2009 (1) NR 339 (LC) 341B-C; *National Housing Enterprises v Beukes and Others* 2011 (2) NR 609 (LC) paras. [2] – [4]). (In this regard it should also be borne in mind that it is by no means uncommon that employers make offers of voluntary retrenchment to their employees).

[88] In my view the choice made by the two employees in this case merely indicated that they would not be resisting retrenchment by pushing for redeployment. By doing so the parties knew where to direct their efforts. They knew that they were to concentrate on negotiating the retrenchment packages and not on alternative positions of employment. By indicating their preference in this way the two employees certainly did not terminate their employment voluntarily by resignation or, for that matter, consensus.

[89] The applicant unilaterally decided to declare the internal audit unit redundant and to abolish the positions of the two employees. This decision did not necessarily mean that retrenchment was inevitable. The applicant also unilaterally decided to offer the two employees a choice between retrenchment and redeployment. After the two

respondents exercised their choice, the parties began negotiations on the retrenchment packages. When the applicant attempted to withdraw the option of retrenchment and negotiations stalled, the two employees turned to the Labour Commissioner. The appointed arbitrator decided that the applicant should respect the option of retrenchment chosen by the two employees and awarded a certain retrenchment package to be paid to each of them. The applicant elected to abide by the award and informed the two employees on 20 April 2010 of the details of the retrenchment payments to be made. Without discussing the matter with the employees, it decided to settle the one month notice which it was required to give the two employees by making a monetary payment instead, and also informed them that their last day of employment would be 30 April 2010. This was a unilateral decision whereby the employees' contracts of employment were terminated by the applicant. Clearly the second and third respondents were dismissed by retrenchment with effect from that date.

[90] I therefore reject the submissions made on behalf of the applicant. It further follows that I also do not agree with the submission made by Mr *Kamanja* on behalf of the second respondent that the latter was retrenched on the date the arbitrator's award was made.

[91] The next part of the question posed in the heading to this part of the judgment, namely whether the exercise of the [second] option amounted to 'early retirement' may conveniently be considered with the second question.

The applicant's collateral attack on the validity of the arbitrator's award

[92] The applicant contends in its papers that it may disregard the arbitrator's award without the need to review it or to have it set aside on appeal, as it is a nullity, the reason being that, so the contention goes, the arbitrator exceeded his jurisdiction under

the Labour Act in making the award. Counsel for the first and second respondents opposed this contention, submitting that it is not open to the applicant to launch a collateral attack on the award in the absence of an appeal of review. However, the third respondent in her answering affidavit admitted that the applicant may take this stance. I prefer not to decide the matter on this basis, but to assume, without deciding, that the applicant is entitled to do so.

[93] Mr *Barnard* referred to the 'short statement of relief' claimed by the second and third respondents and attached to Form LC 21, which statement states in paragraph 1 thereof:

> '1. That the respondent be compelled to continue retrenchment negotiations with the applicants in terms of the letters provided by the respondent to the respective applicants in terms of (*sic*) severance pay.'

[94] Counsel submitted that the relief claimed determined the nature of the dispute referred to arbitration. Relying on section 86(15) which sets out what awards the arbitrator may make, he submitted that the relief claimed does not fall under this provision. Section 86(15) provides as follows:

> '(15) The arbitrator may make any appropriate arbitration award including-
>
> (a) an interdict;
>
> (b) an order directing the performance of any act that will remedy a wrong;
>
> (c) a declaratory order;
>
> (d) an order of reinstatement of an employee;
>
> (e) an award of compensation; and
>
> (f) subject to subsection (16), an order for costs.'

[95] Counsel acknowledged that the arbitrator realized that he was not empowered to grant the relief claimed when he made certain statements to this effect (see para 11, p14 of the reasons for the award) and therefore proceeded 'to determine the dispute at arbitration for once and for all' by making the award that the applicant should pay the retrenchments packages as determined by him. However, counsel submitted, because the unattainable relief determined the nature of the dispute which the arbitrator considered, he acted *ultra vires* by, in effect, determining a dispute which exceeded his jurisdiction. As such the award was a nullity.

[96] I do not agree with counsel's submissions. The nature of the disputes which the second and third respondents complained about are listed on Form 21C as being (i) unilateral change of terms and conditions; (ii) unfair discrimination; (iii) unfair labour practice; (iv) severance package; (v) disclosure of information; and (vi) refusal to bargain. The relief claimed in the 'short statement of relief claimed' also included the following:

> '2. The full compliance by the respondent with sections 34 and 35 of the Namibian Labour Act No 11 of 2007.
>
> 3. The payment of all monies due and owing to the applicants in terms of their retrenchment.'

[97] The arbitrator recorded in his reasons that the parties had reached agreement on all the issues relating to the retrenchment package, except the severance pay, which became an issue when the applicant realized that it would have to make the pension contributions as well. He clearly also accepted that the second and third respondents had made a final decision to be retrenched and that the applicant had agreed to meet to negotiate their retrenchments packages, not their redeployment. During the

proceedings the second and third respondents reiterated their claim that the matter be referred back to the parties to negotiate (in good faith) the amount of the severance pay. He declined to do so because he realized that this was not his function or within his powers. He rather concentrated on the other relief claimed in paragraphs 2 and 3 of the 'short statement of relief claimed'. He proceeded to determine the retrenchment package on the basis of what the parties had already agreed upon. As for the severance pay, he made a determination which accords with the minimum requirements of section 35(3) of the Labour Act, which provides that severance pay paid for dismissal in terms of section 35(1) must be in an amount equal to at least one week's remuneration for each year of continuous service with the employer. This can be seen from his award read with the facts recorded in paragraph 6(b) and (f) of the reasons.

[98] Applicant's counsel complained that the arbitrator unilaterally made an award of severance pay without hearing the parties on the amount to be paid. If this is so, it would probably constitute a misdirection, but it is not necessary to make any finding on this. In any event, the applicant suffered no prejudice because it was merely ordered to pay what section 35(3) states it should pay. In my view the arbitrator did not exceed his jurisdiction and the award is not a nullity.

Evidence suggesting that the applicant itself regarded the departure of the second and third respondents as 'retrenchments'

[99] The three respondents referred in their papers and during oral argument to evidence contained in the applicant's documents forming part of the papers pointing to the fact that the applicant itself regarded the termination of the relationship between it and the two employees as being retrenchments. I also refer to these documents at various stages of the reasons for judgment. As counsel for the applicant presented

certain submissions tending to ‘neutralize’ such evidence, it is necessary to deal with these documents separately in more detail.

[100] The first documents are those relating to the requests for quotations of the second and third respondents’ pension benefits completed by Mr Hamwele and Ms Iyambo (see para. [6] *supra*) and the documents relating to their pension benefit claims completed by Mr Hamwele (see para. [21] *supra*). In the applicant’s replying affidavit the company secretary of the applicant gave certain explanations as provided to her by Mr Hamwele and Ms Iyambo for the inclusion in the documents of references to the second and third respondents being retrenched. However, these explanations are clearly hearsay as they have not been confirmed by any affidavits by Mr Hamwele and Ms Iyambo. As such these explanations must be ignored.

[101] Another such document is the letter by Mr Hamwele dated 20 April 2010 in which he indicates that the applicant has elected to abide by the award. Mr *Barnard* submitted that the extent to which applicant ‘indicated it would *“abide”* by the arbitration award however only related to the amount that was required to facilitate the amicable departure of the employees from’ the applicant. I do not agree. The election to abide is not qualified in any way whatsoever. While I agree with Mr *Barnard’s* submission that an election to abide by the award does not mean that the applicant admits that the reasoning of the arbitrator is correct in every respect, or that the two employees’ arguments were all correct or that all the applicant’s arguments were incorrect, I do think that the fact that the applicant abided by the award without any qualification means that the applicant agreed to ‘respect and honour the option exercised by’ the two employees ‘by paying a retrenchment package to them made up’ as the arbitrator determined.

[102] Furthermore, it means that the applicant elected to abide without qualification by paragraph 7 of the award in respect of each of the two employees to provide them with a 'Certificate of Service strictly in terms of section 37(5) of the Labour Act'. Section 37(5) provides for certain information which must be included in such a certificate of service and in terms of paragraph (f) thereof must 'if the employee requests, the reason for termination of employment.' By abiding by the award the applicant must clearly have contemplated providing a certificate of service which, if the two employees so requested (and I think it is probable that they would do so), states the reason for termination of employment to be 'retrenchment'.

[103] The last document is the letter by the applicant's lawyers dated 15 July 2010 to the first respondent in which they record in paragraph 2.7 that the two employees were 'entrenched' by the applicant (see para. [22] *supra*). Nowhere in the letter is the retrenchment qualified in any way, nor is it disputed that what occurred was that the two employees were retrenched. I think the respondents are justified in regarding this as an acknowledgement that the two employees were indeed retrenched.

<u>The second question posed in paragraph 17.2 of the applicant's founding affidavit: Are the GIPF rules or any other internal rules of the NWR governing retrenchments or pension payments applicable to the *"exercise of the option"* by the employees?</u>

[104] Mr *Barnard* referred to the wording of rule 3.4(1), which may conveniently be re-quoted here:

> '(1) A MEMBER may retire from SERVICE prior to his/her NORMAL RETIREMENT DATE in the following instances:

(e) with the approval of the TRUSTEES, owing to dismissal as a result of the re-organisation of his/her EMPLOYER; or

(f) …..

(g) …..

(h) with the approval of the TRUSTEES, owing to his/her dismissal for reasons other than his/her unsuitability or inability, in order to promote efficiency or economy of his/her EMPLOYER.'

[105] Counsel submitted in the applicant's heads of argument that a dismissal is an essential prerequisite for rule 3.4(1) to find application. Given the wording of the rule, this submission appears to be correct. As the two employees were not dismissed, so the submission continued, they are not entitled to claim any contribution by the applicant towards the first respondent to cover the additional liability incurred by the first respondent. Clearly this argument cannot be upheld as I have found that the two employees were indeed dismissed.

[106] I now turn to the applicant's internal rules. The applicant attached an extract from its 'Human Capital Conditions of Service Policy' as annexure "ATA 7". From this extract it appears that section 113 provides that the applicant's management may approve voluntary early retirement in its discretion if an employee has already attained the age of 55 years and provided that the employee advances acceptable reasons. Section 114 provides that no employee shall be forced to retire before the agreed retirement age. Section 117 provides that the strategic value of the employee's position shall be considered before early retirement is approved and granted; and further, that employees holding strategic positions may be requested to continue in the position while it is being filled. Section 118 states:

> 'Early retirement is on own accord, however, in cases where the company requires the person to go on early retirement due to strategic reasons, the affected persons (*sic*) shall be settled (*sic*) as per pension fund rules and the Labour Act.'

[107] The papers do not include a definition of the expression 'strategic reasons', but from the arbitrator's reasons and the applicant's papers it appears that the parties approached the matter on the basis that the expression is meant to convey something like 'operational requirements' or 're-organisation' or 'in order to promote the efficiency or economy of the employer' or 'retrenchment'.

[108] The applicant's counsel submitted in paragraph 80 of the heads of argument that section 118 would only apply if the applicant 'required' the second and third respondents 'to go on early retirement.' He submitted in paragraph 81 of the heads of argument that the arbitrator's reasons clearly indicate that the applicant had in fact insisted that the employees should not go on early retirement but that they should be redeployed within the company. He further submitted in paragraph 82 of the heads of argument that therefore section 118 had no effect or impact on the positions of the two employees, other than operating against the case they seek to make out, the important provision in the section being that 'early retirement is on own accord.'

[109] At this stage it is necessary to observe that the only context in which 'early retirement' was mentioned in the arbitrator's reasons is in paragraph 10, p13 thereof where he states (the insertions between square brackets are mine):

> 'According to them [i.e. the second and third respondents] no understanding could be achieved on the Severance Pay (*sic*), because of the GIPF contribution that came about.
>
> The applicants [i.e. the second and third respondents] are however surprised how the respondent could play ignorance as this was not the first time it has retrenched

> employees, and the last retrenchment was during 2006 and the same procedure was followed as it was part of an agreement between GIPF and the respondent [i.e. the applicant] and was thus none of their business. According to them section 118 of the respondents (*sic*) [i.e. the applicant's] Human Capital Conditions of Service Policy of 2009 clearly indicated that retirement initiated by the respondent [i.e. the applicant] shall be settled as per the Pension Fund Rules and the Labour Act.'

[110] There is no instance in the arbitrator's reasons where it was recorded in so many words that 'the applicant had in fact insisted that the employees should not go on early retirement' as submitted in the applicant's heads of argument. What the applicant repeatedly insisted upon was that the employees should not be retrenched, as retrenchment would mean that the applicant would have to make the contributions to the pension fund. From this insistence it is clear that the applicant throughout the arbitration accepted that it was bound to make such contributions if the employees were retrenched. The reasons also indicate that, as I understand it, after the retrenchment negotiations stalled on 14 December 2009, the applicant's board decided against the retrenchments specifically because it did not want the applicant to have to make the pension contributions should the two employees be retrenched. All this necessarily means, although the applicant's representative, who was Mr Hamwele, never said it in so many words, that the applicant did accept that retrenchment, in effect, leads to early retirement under rule 3.4(1). In paragraph 81 of the applicant's heads of argument there is also, by necessary implication, an acceptance that retrenchment, in effect, leads to early retirement under rule 3.4(1). (I must say that this acceptance by the applicant did cause me some difficulty in deciding the matter. I shall return to this aspect later).

[111] During oral argument the position of the applicant appeared to change. Mr *Barnard* referred to a published law report in arbitration proceedings held by an

arbitrator of the Metal and Engineering Industries Bargaining Council in South Africa in the matter reported as *Wilson v Ingersoll-Rand Company (Pty)* [2005] 3 BALR 310 (MEIBC), in which the arbitrator held that an employee had no right to both the benefits of early retirement and a severance package as a result of being retrenched. Counsel specifically referred to what the arbitrator stated from the last sentence on page 8 to the end of the first paragraph on page 9 of the report:

> 'The distinction between voluntary early retirement and compulsory retrenchment because the job has become redundant is not simply semantic. There is a real, legally recognised, difference between the two. Voluntary early retirement is not a dismissal and does not legally include a statutory obligation for the employer to pay severance pay. From a tax perspective, SARS [the South African Revenue Service] may take a dim view of an employer paying a severance payment to an employee who has voluntarily agreed to take early retirement because of the tax concessions applicable to severance pay. The fact remains that whatever financial inducements the company offered to employees over 55 to voluntarily take early retirement in 1995 or 2003 cannot be simply tagged on to a retrenchment package and *vice versa*, severance pay cannot be tagged onto a voluntary early retirement agreement, in logic or in law.'

(I note that Grogan, *Dismissal, Discrimination and Unfair Labour Practices* (2005 ed) at 390 also discusses compulsory and voluntary early retirement as alternatives to retrenchment.)

[112] However, the case made out by the applicant on the papers is not that there is a legally recognised difference between early retirement and retrenchment. This argument was also not made in the applicant's heads of argument or in the applicant's supplementary written submissions, although a copy of the law report referred to is

included in these submissions which applicant's counsel made handed up at the hearing. It is no wonder that the respondents addressed no argument on this point. In the circumstances I shall therefore approach the matter only on the basis of the first respondent's rules and the applicant's internal rules, and assume, without deciding, that there is no other provision in Namibian law which precludes the payment of a severance package as a result of retrenchment as well as pension benefits due to an employee who goes on early retirement as a result of retrenchment.

[113] The first respondent's rule 3.4.(1) is not framed in such a way that it can be interpreted that early retirement is an alternative to a dismissal by retrenchment. The rule is drawn up in such a way that it contemplates early retirement 'owing to a dismissal', i.e. an actual dismissal. The only requirement is that the trustees of the first respondent approves such early retirement. There is no requirement that the employer must give its consent.

[114] Annexure 'E' to the third respondent's answering affidavit is an extract from the applicant's Human Capital Conditions of Service Policy', which sets out certain provisions regarding retrenchment. Interestingly, section 159 deals with avoidance of retrenchment and states:

> 'In the event of the need for retrenchment arising, NWR shall attempt to avoid retrenchment by:
>
> (a) Placing a prohibition on external recruitment for positions within the job categories of employees likely to be affected.'

However, the rest of the paragraphs following on (a) are not included in the extract attached to the answering affidavit. Suffice it to say that in none of the extracts from the

applicant's internal rules before the Court is early retirement described as an alternative to retrenchment.

[115] Returning for the moment to rule 3.4(1), I note that there is no indication in the papers that the trustees have in fact approved the two employees' early retirement. I do not know whether the trustees normally specifically approve each individual case, or whether a general blanket approval has been given on condition that each particular case meets certain laid down requirements. However, as the aspect of the trustees' approval has not been raised, I assume that the required approval is in place.

[116] Mr *Barnard* also submitted during oral argument that there is no evidence that the applicant required the two employees to go on early retirement as set out in section 118 of its internal rules. This submission touches on the difficulty I mentioned earlier on in para. [110] *supra*. When the applicant's human resources staff initially requested quotations in respect of the second and third respondents' pension benefits, they indicated that the type of quotation is for retrenchment or redundancy (see para. [6] *supra*). There was no indication that early retirement was involved. However, when the first respondent responded in its letters dated 14 December 2009, the quotations were stated to be in respect of early retirement benefits. This is the first indication in the correspondence before the Court that, for some reason not disclosed to the Court, early retirement has come into play. In the letters the first applicant stated that 'According to the information submitted, you will involuntarily retire on 31 December 2009' (see para. [12] *supra*). I do not know on what basis the first respondent concluded that the two employees would 'involuntarily retire'.

[117] Rule 3.4(1) states that an employee 'may' go on early retirement if retrenched. There is no indication that either the applicant or the two employees initiated an

application or request that the employees go on early retirement. In the absence of any other indication my impression is that the applicant assumed that the fact of retrenchment means that early retirement follows. My difficulty is further is the following: surely the mere fact of retrenchment does not give rise to an entitlement to early retirement, subject to the trustees' approval? Furthermore, why, for instance, should a 26 year old employee with five years' service go on early retirement if retrenched? Perhaps the answer to this question is that the trustees would not approve the taking of early retirement in such a case. In the present application the two employees were respectively 38 and 43 years old on 31 December 2009. Even these ages are some way off from the age of 55 when early retirement usually, according to the applicant's internal rules, might be considered. Be that as it may, the applicant did not attack what *prima facie* appears to be an assumption made by the first respondent. Instead, as was pointed out in above, the applicant accepted that, in the event that the two employees were to be retrenched, it would have to make the pension contributions in respect of early retirement.

[118] Although there are these reservations I have just discussed, I do not agree with Mr Barnard that there is 'no' evidence that the applicant required the two employees to go on early retirement. At least at the stage when the applicant elected to abide by the arbitrator's award, it indicated on the pension benefit claims in respect of the two employees that the type of benefit claimed was in respect of 'other retirement' by virtue of 'retrenchment'. This information was certified to be correct by Mr Hamwele. In these circumstances I do not think that counsel's submission should be upheld.

The third question posed in paragraph 17.3 of the applicant's founding affidavit: Was the *"retrenchment package"* an all-inclusive award that excluded the entitlement to pay further pension benefits?'

[119] From the reasons for the award the following is clear. The issue of the payment of pension benefits was not referred to the arbitrator for conciliation and arbitration. This issue was only mentioned in the reasons for the award when he canvassed the background to the dispute and the evidence and arguments presented. Indeed, it was common cause during the arbitration proceedings that, if the two employees were retrenched, the pension benefits would have to be paid. In any event, the arbitrator did not have jurisdiction to determine the issue of the payment of any pension benefits to the two employees and he also did not do so. When he determined 'the dispute at arbitration once and for all', he clearly did not determine whether the pension benefits are to be paid or not.

Conclusion

[120] On the basis of the reasons set out above, I concluded that the applicant's declaratory relief should not be granted.

The counter-claims

[121] As I understand it the purpose of the counter-claims is to make a positive order declaring the applicant liable to make the required contributions to the first respondent and for the first respondent to then pay the pension benefits to the second and third respondents. As the argument around the counter-applications developed it appeared that the consensus was, based on certain undertakings given by Mr *Barnard* on behalf of the applicant that the applicant would make the required contributions if it was ultimately unsuccessful in its application, that no order need be made.

[122] The final result was that the orders described at the beginning of these reasons were made.

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____(signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the applicant: Adv TA Barnard

Instr by Koep & Partners

and later by Mueller Legal Practitioners

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For the first respondent: Mr N Marcus

of Nixon Marcus Public Law Office

For the second respondent: Mr AEJ Kamanya

of Sisa Namandje & Co Inc

For the third respondent: Mr T Ipumbu

of Titus Ipumbu Legal Practitioners