REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2019/00032

In the matter between:

SEBASTIAN JANSEN AND OTHERS **APPELLANTS**

and

ELGIN BROWN HAMER NAMIBIA (PTY) LTD **FIRST RESPONDENT**

EMMA N. NIKANOR NO. **SECOND RESPONDENT**

Neutral citation: *Jansen v Elgin Brown Hamer Namibia (Pty) Ltd* (HC-MD-LAB-APP-AAA-2019/00032) [2019] NALCMD 30 (8 NOVEMBER 2019)

Coram: Kangueehi AJ
Heard: **18 October 2019**
Delivered: **8 November 2019**

Flynote: Labour Law – Appeal against an arbitration award – Dismissal for operational requirements – The application of section 34 of the Labour Act 11 of 2007 – Whether the employer proved both substantial and procedural fairness.

Summary: The employment of the appellants was terminated in terms of section 34 of the Labour Act. The appellants lodged an unsuccessful arbitration process with

the Labour Commissioner. Dissatisfied with the award of the Labour Commissioner, they then lodged the present appeal.

Court held: It is common cause between the parties that substantive fairness is not at issue as there were valid grounds for retrenchment.

Court held further: Contrary to the assertion by the appellants, the employer did negotiate in earnest with the employees. The various correspondences indicate that there was a genuine and *bona fide* attempt on the part of the employer to settle the matter.

Held further: The court held that the employer proved compliance with section 34 of the Labour Act 11 of 2007.

ORDER

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1. The appeal is dismissed.
2. I make no order as to costs.

JUDGMENT

KANGUEEHI AJ:

Introduction

[1] The dispute between the parties concerns the retrenchment of the appellants. The appeal lies against the finding of the arbitrator[1] that the appellants were not unfairly dismissed but that they were retrenched procedurally in terms of section 34 of the Labour Act[2] (hereafter referred to as the Act).

[1] See pages 434-435 of the Record.
[2] Labour Act No 11 of 2007.

[2] The complaint by the appellants is three-fold:

1. That the first respondent (the company) refused to negotiate in good faith.
2. That the conduct of the first respondent clearly showed that it was negotiating in bad faith
3. That the first respondent adopted a new organizational structure in which vacancies existed, but that it rather opted for a retrenchment process.

[3] The common cause facts are that the appellants were employed by the first respondent until their services were terminated on 22nd February 2018. This termination was preceded by notices of retrenchment[3] received on 22 January 2018[4].

[4] It is further common cause that, dissatisfied with the process, the appellants then lodged arbitration proceedings. In same, the appellants complained of unfair dismissal, sought their severance packages, complaint that the employer refused to bargain and obviously the erroneous retrenchment.

[5] I have already indicated that the arbitration found for the employer. This appeal lies against the said finding of the arbitrator.

The Legal Issue

[6] The nub of this appeal is whether or not the employer complied with the provisions of section 34 of the Act.

The Law

[7] The relevant portion of Section 33 (1) of the Act provides as follows:

'Unfair dismissal

Section 33.

(1) An employer must not, whether notice is given or not, dismiss an employee –

[3] In terms of section 34.

[4] The notice was also served on the employees and is on record marked exhibit "C".

(a) without a valid and fair reason; and

(b) without following –

(i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34 (1);

(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.' (My emphasis)

[8] Section 33(4) provides as follows:

In any proceedings concerning a dismissal –

(a) if the employee establishes the existence of the dismissal;

(b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair[5].

[9] The relevant part of section 34 of the Labour Act provides as follows:

Dismissal arising from collective termination or redundancy

Section 34

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

(d) negotiate in good faith[6] with the trade union or workplace union representatives on –

(i) alternatives to dismissals;

(ii) the criteria for selecting the employees for dismissal;

(iii) how to minimise the dismissals;

(iv) the conditions on which the dismissals are to take place; and

(v) how to avert the adverse effects of the dismissals

[10] I have reproduced these sections verbatim for they are the pillars on which the appeal is based.

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[5] This section casts an *onus* on the employer to prove that the dismissal was for a fair reason and was followed by a fair procedure.

[6] As I understand it, the appellants are questioning the *bona fides* of the employer throughout the negotiation process. In fact, all three grounds of appeal can be confounded under the rubric of *bona fides*.

[11] Dismissal for operational requirements must be substantively and procedurally fair[7].

[12] Ueitele J held in *Novanam Ltd v Percival Rinquest*[8] that:

'The procedures set out in s34 are detailed. They provide that when an employer contemplates dismissing employees for operational reasons it is required to consult with them or their representatives over a range of issues. During the course of such consultations, the employer must disclose relevant information to make the consultation effective. The purpose of such consultation is to enable affected employees to make representations as to whether retrenchment is necessary, whether it can be avoided or minimised, and, if retrenchment is unavoidable, the methods by which employees will be selected and the severance pay they will receive. It follows, therefore, that if a joint consensus-seeking process, envisaged by s 34 of the Labour Act, 2007, is not achieved the dismissal of an employee for operational reason will be procedurally unfair.' [9]

[13] He continues that:

'if a joint consensus-seeking process as contemplated in that section (Section 34) is not achieved the dismissal of an employee for operational reason will be procedurally unfair.'

[14] I associate myself fully with the sentiments above. I, however, do not understand the learned judge as saying that if the parties do not ultimately reach consensus then the process is procedurally unfair. I understand the court to say that the parties should embark on a process to find consensus. The end result is clearly not guaranteed.

Substantive Fairness

[15] On my reading of the papers, the appellants do not take issue with the reasons for the retrenchment.

[16] It is in evidence that the retrenchments were necessitated by the economic downturn in the oil and gas industry. This in turn has led to the need to reduce the workforce in Namibia.

[7] *Matuzee v Sihlahla* (LCA2/2016) [2018] NALCMD 3 (15 March 2018).
[8] *Novanam Ltd v Percival Rinquest*[7] (LCA 65/2012) [2014] NALCMD 35 (22 August 2014)
[9] Also see J Grogan *Workplace Law* 2009 10th Ed at 272-273.

[17] In order to comply with section 34, the employer authored a letter to the Labour Commissioner on 22nd January 2018 wherein the reasons for the retrenchments are clearly set out[10].

[18] At the hearing, the court pertinently enquired from Mr. Bangamwabo, for the appellants, whether they have any qualms with the reasons for the retrenchment. The answer was in the negative.

The Procedure

[19] The question for decision is hence only whether or not the employer followed the process enshrined in section 34.

[20] The appellants argued that the employer adopted a 'take-it-or leave-it' attitude and refused to negotiate in good faith.

[21] In turn, Mr Dicks, for the first respondent, argued that there were more than adequate negotiations *in casu*.

[22] The record, exhibit 'G', exhibit 'H', exhibit 'I' and the incomplete email reveal that, through meetings, negotiations and correspondence, the parties in fact compromised on many issues.

[23] Exhibit "H" is a memorandum dated 13 February 2018 from the appellants. It speaks of proposals made on 29 January 2018. It also speaks of responses to these proposals. What is clear from the said letter is that the parties agreed to various aspects in the negotiations. The letter ends with the appellants thanking the employer for the responses received.

[24] Exhibit 'I' is a memorandum from the company dated 16 February 2018, which gives the appellants the final position of the company pertaining to the retrenchments. The memorandum makes reference to negotiations of 14 February

[10] I shall revert to this letter when I deal with procedural fairness and compliance with section 34(1)(d).

2018 and a meeting held on 15 February 2018. Being at its wits end, the employer says that if the employees feel aggrieved, they are free to lodge a labour complaint.

[25] There is also the email[11] of 16 February 2018 by the first appellant to the employer. Importantly, this email refers to the meeting of 15 February 2018. It then provides the employer with the monetary claims by each employee. It also proposes what should happen to each employee.

[26] I hasten to add that the values in the email above deal with the severance for each employee. It once again ends with the employee representative thanking the employer for the good leadership displayed in the meeting the previous day.

[27] The acting Chief Executive Officer, replied shortly[12] after receipt of the Jansen email and indicated to him that certain proposals will serve before the board on 19 February 2018.

[28] There is the further correspondence from the employer on 20 February 2018 in the form of a memorandum under the hand of the acting Chief Executive Officer[13]. This memorandum outlines what is due to each employee, in terms of leave encashment, retrenchment notice, severance and additional week's salary etc.

[29] The conclusion I come to is that the first respondent has discharged the *onus* that the appellants' dismissal was both procedurally and substantively fair.

[30] Contrary to the assertion by the appellants, the employer did negotiate in earnest with the employees. The various correspondences indicate that there was a genuine and *bona fide* attempt on the part of the employer to settle the matter.

[31] There was the further submission by Mr. Bangamwabo that the first respondent acted or negotiated in bad faith when it froze the process of recruitment. I find no merit in this complaint since none of those posts were filled at February

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[11] Exhibit "J".
[12] Exhibit "K".
[13] Exhibit "L".

2019. The complaint would have seen the light of day if these posts were subsequently filled with persons other than those that were retrenched.

[45] In the result, I make the following order:

1. The appeal is dismissed.
2. I make no order as to costs.

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KNG Kangueehi

Acting Judge

APPEARANCES:

APPELLANT:	Adv. G Dicks Instructed by De Klerk Horn & Coetzee, Windhoek
RESPONDENT:	FX Bangamwabo Of FB Law Chambers, Windhoek