REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00033

In the matter between:

ANDREAS NGWENA **APPELLANT**

and

ELGIN BRON AND HAMER **FIRST RESPONDENT**
OFFICE OF THE LABOUR COMMISSIONER **SECOND RESPONDENT**
GERTRUD USIKU N.O **THIRD RESPONDENT**

Neutral citation: *Ngwena v Elgin Bron and Hamer* (HC-MD-LAB-APP-AAA-2018/00033) [2019] NALCMD 8 (31 January 2019)

Coram: ANGULA DJP
Heard: **31 January 2019**
Delivered: **31 January 2019**
Reasons: **11 March 2019**

ORDER

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

2. The appeal is upheld

3. The first respondent is ordered to re-instate the appellant in his previous position; in the event that the previous position is not available, that the appellant be re-instated in a position comparable to or better than the position the appellant held before he was dismissed.

4. The first respondent is ordered to pay compensation to the appellant equal to the monthly remuneration he would have received had he not been dismissed. The first respondent is entitled to deduct the sum of money paid to the appellant when he was retrenched.

5. The remuneration in paragraph 4 above is to be calculated from the month following the month in which the appellant was dismissed, to the date of this order.

6. There shall be no order as to costs.

7. The reasons for this order shall be delivered on or before 6 March 2019.

REASONS

ANGULA DJP:

Introduction:

[1] On 30 January 2019, after I heard counsel for the appellant, I condoned the late filing of the appeal and upheld the appeal in favour of the appellant. I undertook to give the reasons for my order on 21 February 2019, however, due to other commitments, I was unable to keep to my deadline. I sincerely apologise for any inconvenience the parties to this proceedings might have suffered as a result of my

delay in furnishing them with these reasons. Following below are my reasons for the order I made on 30 January 2019.

Condonation:

[2] The appellant lodged the appeal on 29 May 2018, approximately 87 days after the arbitration award was made and outside the time period stipulated by section 89 of the Labour Act of 2007 ('the Act'), which requires the appeal to be lodged within 30 days after the award was served on the party.

[3] Rule 15 of the Labour Court Rules permits the court to condone any non-compliance on application and good cause shown. The appellant filed an application for condonation and the court is satisfied that the appellant gave acceptable and reasonable reasons as to why the appeal was not filed in time. Amongst the reasons is the fact that the appellant, as a lay litigant, first directed his appeal to the incorrect forum, being the Ministry of Labour, and this amongst other things caused the delay.

[4] The Court is satisfied with explanation furnished by the appellant, that it is genuine and *bona fide.* The Court accordingly accept the explanation and condones the late filing of the appeal. I now move on to consider the appeal.

Brief background:

[5] The appellant was employed by the first respondent as a semi-skilled boiler maker as from 2008 on a fixed-term contract, and then later in November 2013 appointed on permanent basis as a pipe fitter.

[6] On 12 April 2014, the appellant was injured during a sport event organised by the first respondent for its employees. It is not disputed that this was a work-related event and that the appellant was thus considered to have been injured on duty.

[7] On 19 April 2016, the first respondent sent to the Labour Commissioner and to the Mining Allied Workers Union (MMMC) (the exclusive bargaining agent for employees falling within the bargaining unit and of which the appellant is a member),

a notice in terms of section 34(1)*(a)* of its intention to retrench some employees. The first respondent's reason for the retrenchment was the unprecedented downturn in the ship repair industry, resulting in the company's operational costs exceeding their monthly sales revenues, which caused unsustainable losses to the business. One of the measures decided upon was to retrench some of its employees.

[8] During the period of 8 July to 8 August 2016, the appellant was booked off to undergo surgery to remove a locking nail and screws which remained in his leg since his injury in 2014. It appears that, while the appellant was on sick leave, the first respondent embarked on the retrenchment process, engaging the Union and the Labour Commissioner as required by the law.

[9] Subsequently, on 21 July 2016, the appellant, while booked off and on sick leave, was issued with a notice of retrenchment effective from 31 July 2016. When the appellant reported for duty on 5 August 2016 and on 11 August 2016, he was issued with another retrenchment notice, dated 11 August 2016, titled 'amendment of notice in terms of section 34 of the Labour Act, 11 of 2007'. The notice read *inter alia*:

> 'It has come to our attention the notice issued to you dated 21 July 2016 in respect of retrenchment in terms of Section 43 of the Labour Act, has been erroneously issued to you in terms of date of effect.
>
> Please take note that this letter does not nullify our previous communication regarding your retrenchment, but serves as an amendment of the date of effect from 31 July 2016 to 31 August 2016.'

[10] The appellant was thus retrenched. Aggrieved by his retrenchment, the appellant lodged a dispute of unfair dismissal with the Office of the Labour Commissioner.

<u>Proceedings before the Arbitrator:</u>

[11] At arbitration, the appellant testified that the dismissal was not substantively and procedurally fair because the dismissal was in contravention with section 30(5)

(a) of the Act, due to the fact that he was served with the retrenchment notice while he was on sick leave – which is prohibited by the section. The appellant further argued that the respondent failed to comply with the provisions of section 34 of the Act in that the first respondent failed to enter into negotiations with him and retrenched him while he was on leave and after he was served with the second notice of retrenchment.

[12] The appellant further testified that he found it unfair that a certain Mr Johannes Fillipus, who had a medical condition, was excluded from retrenchment because he was not in good health, whereas he himself suffered injuries at a work-related event and though he was still injured, he was not excluded from retrenchment.

[13] On behalf of the first respondent it was testified that the first respondent nullified the first retrenchment notice dated 21 July 2016 and issued the appellant with a new notice dated 11 August 2016 which terminated the appellant's employment on 31 August 2016. It was further testified that the letter of 21 July was given to the appellant by mistake as it had expired by the time he reported for work The appellant was thus issued with the correct letter dated 11 August 2016 with termination date being 31 August 2016 and that he would be remunerated for the period 1 to 31 August 2016. It was the first respondent's case that the appellant's representative Union (the MMMC) was engaged in negotiations with the first respondent and there was no legal requirement for him to be present during negotiations about the retrenchment.

[14] It was further the first respondent's case that it had undergone settlement discussions with the representative Union with regard to the intended retrenchment, and had reached an agreement with the Union which was signed on 14 July 2016. The first respondent's witness testified that the appellant was called to collect his notice of retrenchment which he did not because he was on sick leave. The witness testified further that in their settlement discussions, the Union negotiated that the appellant and a certain Mr Johannes Fillipus be excluded from retrenchment process due to their medical conditions; however the first respondent was only prepared for Mr Fillipus to be excluded because he suffered from cancer.

[15] At the end of the hearing, the arbitrator found that the applicant's contention for unlawful dismissal was mostly based on his ill health rather than on redundancy, which was the reason given for his dismissal by the first respondent due to the downturn in the ship repair in the industry and not because of his medical condition. Further, the arbitrator found that the appellant's Union representatives were involved in the negotiation of the settlement, and as the Union was the exclusive bargaining agent recognized by the first respondent it was not considered necessary for the first respondent to have a separate negotiation with the appellant.

[16] Accordingly, the arbitrator held that the dismissal was both procedurally and substantively fair, and that the first respondent had valid and fair reasons to terminate the services of the appellant, and that a fair procedure was followed.

Proceedings before this Court:

[17] The appellant, aggrieved by the arbitrator's award, filed a notice of appeal and raised the following grounds of appeal:

> '4. The arbitrator erred in law in finding that the first respondent had proven, on a preponderance of probabilities, that the appellant was substantively and procedurally dismissed in that:
>
> 4.1 She failed to take into account that the appellant was not served with any notice relating to retrenchment proceedings;
>
> 4.2 She failed to take into account that the appellant was on sick leave and that the retrenchment negotiations and agreement were conducted in his absence;
>
> 4.3 She failed to consider that the appellant was not given an opportunity to be heard in terms of section 34 in order to negotiate his terms of retrenchment;

4.4 She failed to weigh up and consider all the evidence, both oral and documentary, prior to embarking upon the process of making factual findings.

4.5 From the record, it appears that the Arbitrator failed to take into consideration that the first respondent had given preference and or immunity to employees who were medically unfit in conducting its retrenchment criteria, however failed to include the appellant in such category.'

[18] The respondents were served with the appeal, and none of them opposed this appeal.

Submissions on behalf of the appellant:

[19] Ms Shipindo, who appeared on behalf of the appellant, submits in her heads of argument that the respondent was not served with any notice for retrenchment as he was on sick leave, which the first respondent was aware of. Counsel further argues that the appellant was served with an amended notice of retrenchment when he reported for duty again in August 2016. Counsel submits that by the time the appellant returned to work, a decision of his retrenchment was already made in his absence and therefore it cannot be said that he received a notice in terms of section 34 of the Act. In support of this submission, counsel points out that an amount of N$81 520.29, being severance pay was paid into the appellant's bank account on 5 August 2016.

[20] With regards to the appellant's medical condition, counsel submits that the arbitrator disregarded the appellant's medical condition and should have found that the appellant was liable and qualified to be excluded from retrenchment the same way the first respondent excluded Mr Johannes Fillipus, who was excluded due to ill health.

[21] Ms Shipindo points out that according to section 34(1)*(e)*, the selection of the employees to be retrenched should be according to selection criteria either agreed or fair and objective. In this regard Counsel submits that the selection in this matter was

not fair since appellant was retrenched but Mr Fillipus who suffered from a medical condition was not retrenched.

Applicable legal principles:

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

> 'Dismissal arising from collective termination or redundancy 34.
>
> (1) If the reason for an intended dismissal is the reduction of the workforce arising from the re-organisation or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons, an employer must –
>
> (a) at least four weeks before the intended dismissals are to take place, inform the Labour Commissioner and any trade union which the employer has recognised as the exclusive bargaining agent in respect of the employees, of –
>
> (i) the intended dismissals;
> (ii) the reasons for the reduction in the workforce;
> (iii) the number and categories of employees affected; and (iv) the date of the dismissals;
>
> (b) . . .
>
> (c) subject to subsection (3), disclose all relevant information necessary for the trade union or workplace representatives to engage effectively in the negotiations over the intended dismissals;
>
> (d) negotiate in good faith with the trade union or workplace union representatives on –
>
> (i) alternatives to dismissals;
> (ii) the criteria for selecting the employees for dismissal; how to minimise the dismissals;

(iii) the conditions on which the dismissals are to take place; and
(iv) how to avert the adverse effects of the dismissals; and

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

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

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

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

[23] In *Novanam Ltd v Percival Rinquest*[1], Justice Ueitele explained the purpose of the provisions of section 34 in the following words:

'[14] 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 reasons will be procedurally unfair.'

Procedural Fairness:

[24] What is settled in terms of the Act is that an employer can make a decision to reduce its workforce for any of the reasons set out in the opening line of section 34 of the Act, without involving the Labour Commissioner or the bargaining agent or workplace representative and/or the affected employees. The employer is further required to inform the above mentioned parties about the intended dismissals; the

[1] (LCA65/2012) [2014] NALCMD 35 (22 August 2014).

reasons for the reduction in the workforce, the number and categories of employees that will be affected; and the date of dismissal.

[25] It appears from the record that the first respondent did give and serve notice to the Labour Commissioner and the Union – being the exclusive bargaining agent for the employees and informed them of the intended dismissals, the reasons for the reduction in the workforce, the number and categories of employees that would be affected, and the date of dismissal.

[26] The Act further requires the employer, together with the recognized exclusive bargaining agent, workplace representative or affected employees, an opportunity 'to negotiate the conditions on which, and the circumstances under which, the termination ought to take place with a view to reducing or preventing unfavourable effects[2]'.

[27] It is generally accepted in law that once an employer has consulted with the bargaining agent or workplace representative, he/she is not obliged by law to further consult separately with the individual employees who are affected by the dismissal and who are represented by that exclusive bargaining agent[3].

Discussion:

[28] The test in this type of appeal is whether the findings made by the arbitrator are such that a reasonable arbitrator faced with the same facts would have arrived at. Keeping in mind the statutory provisions and its purpose as explained by the Court in the *Novanam* matter referred above. I proceed to consider the facts of this matter.

[29] It is common cause that the appellant was a member of the Union. The union and the first respondent concluded an agreement in which the selection criteria for the employees to be retrenched were agreed upon. It is further common cause that the appellant was injured on duty on 21 April 2014 and sustained a fracture of his right femur. The appellant was served with the notice of retrenchment on 21 July

[2] C Parker, (2012), *Labour Law in Namibia*, University of Namibia Press: Windhoek, p.161.
[3] See Parker at p. 162.

2016 while on leave and again on 11 August 2016 when he was back from his sick leave. In an attempt to rectify the contravention of the provisions of section 30 of the Act which prohibit serving a notice of termination on an employee while he or she is on leave, the respondent issued the appellant with an 'amended notice' of retrenchment. It is common cause that no further consultation took place between the first respondent and the appellant following the serving of the amended notice of retrenchment upon the appellant.

[30] In a letter dated 26 May 2016 from the appellant's orthopaedic surgeon Dr van Niekerk, handed into the record by agreement, the doctor advised that:

'[The appellant] has recovered well, but is starting to have pain that may be attributed in part to the presence of his fixation device.

The nails needs to be removed and the initial planning is to do his surgery on 8 July 2016 at Welwitschia Hospital, Walvis Bay. This should allow enough time to formalise arrangement and also still be within a reasonable time to have instrumentation out.

Following his surgery he will be unfit to work for 6 weeks. If an office based job can be arranged he may be able to start working again after 2-3 weeks. Normal unrestricted activities will not start until after 6-12 weeks.'

[31] In a subsequent addendum signed on 29 July 2016 to the main retrenchment agreement which was signed on 14 July 2016, it was agreed that an employee Johannes Fillipus who was selected for retrenchment be excluded from retrenchment due to ill-health. In this connection the Union demanded that the appellant be likewise excluded for health reasons; however the demand was not acceded to by the first respondent.

[32] The Court is required to determine whether there was valid and fair reason to terminate the employment contract with the employee. Parker AJ, at page 164 of *Labour Law in Namibia,* expounded the test to see whether the decision of the employer was fair, and stated the following:

'The Labour Court or the arbitrator must determine the question according to the general principles of fairness and reasonableness.'

[33] In my view the retrenchment exercise is a process and not an event. In the present matter, certain positions were identified to be declared as redundant. It was not the employees who were occupying those positions who were declared redundant. Once the positions have been declared redundant during the process of consultation, the Union and the employer are under a statutory obligation to consider the impact of the redundancy on the employees who are occupying those positions and to further consider how to mitigate the adverse impact on such affected employees.

[34] In the present matter, the notice of retrenchment was issued to the appellant while he was on sick leave, contrary to the provisions of section 30 of the Act. In my view, even if it were to be accepted that the amended notice was valid, which in my view was not valid, there is no evidence to indicate that subsequent to the issue of the second notice, any consultation took place between the appellant and the first respondent about how to minimize the adverse effect of the appellant's retrenchment. In my view the first respondent was obliged to consult afresh with the appellant. In this connection it has been held that: 'Failure to consult selected employees on the issue may render a retrenchment procedurally unfair, even if the employer has consulted adequately with employee's union over other issues[4]'. In my judgment the sentiment expressed by the learned author applies with equal force to the present matter. The lack of consultation following the issuance of the amended notice constitutes a fatal procedural non-compliance with the provisions of section 34. For this reason alone the appeal stands to be upheld. I proceed to consider whether first respondent had complied with the requirement of substantive fairness.

Substantive fairness:

[35] The learned author Parker, with regard to the question of substantive fairness in dismissal due to redundancy, says the following[5]:

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[4] John Grogan: *Dismissal Second Edition*, p. 456.

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

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

[36] The arbitrator concluded that the appellant was dismissed for a valid and fair reason. It would appear from reading of the record, that in reaching her decision, the arbitrator approached the matter in a rather mechanical manner by, so to speak, ‘ticking off boxes’. I say this for the reason that the arbitrator reached her decision by merely ascertaining whether the activities stipulated by section 34 have been followed but not whether they have been substantially complied with. My observation will become apparent below.

[37] It is trite that an employer has a duty to accommodate an incapacitated employee. This duty is even more so in the circumstances where the employee was injured in the course of his or her duties. In the present matter, it was not disputed that the appellant was injured on duty; in fact there is ample evidence which indicates that the respondent acknowledged and took responsibility for caring for the appellant, such as paying for his medical expenses and for arranging for his incapacity to be evaluated by a panel of medical doctors. In my view, even though the appellant’s position was identified as redundant, when it came to consider the personal circumstances of the appellant a different consideration should have been applied with regard to his incapacitated condition.

[38] I consider it rather unconscionable for the first respondent to have refused to consider to grant the appellant alternative employment. I say this for the reason that first respondent had decided to accommodate another employee, Mr Fillipus, for early medical retirement while refusing to extend the same treatment to the appellant. In my view, not only is the first respondent’s decision contradictory under the circumstances, it is also irrational when considered in the light of the medical advice by Dr van Niekerk.

[39] Section 34(1)*(e)* requires the selection criteria agreed upon to be fair and objective. Fairness means, that if one preference is given to a selected group of people, such preference should apply to everyone in that selected group. The first respondent did not furnish any reason why it was not prepared to accord the same treatment to the appellant as that extended to Mr Fillipus, though both were medically unfit. The first respondent was under statutory obligation to act fairly and objectively reasonably. It failed to do so. Accordingly, its decision is liable to be set aside.

[40] I have therefore arrived at the conclusion that the arbitrator erred in finding that the first respondent had proven on a balance of probabilities that it had a valid reason to dismiss the appellant.

[41] These are my reasons for the order made on 31 January 2019.

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H Angula

Deputy-Judge President

APPEARANCES

APPELLANT:	R SHIPINDO Of Metcalfe Attorneys, Windhoek
RESPONDENTS:	No appearance