REPORTABLE

CASE NO: SA 67/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIA WILDLIFE RESORTS LIMITED	**Appellant**
And	
GOVERNMENT INSTITUTIONS PENSION FUND	**First Respondent**
SIMEON INGWAPHA	**Second Respondent**
SELMA CHRISTOPH	**Third Respondent**

Coram:	MAINGA JA, MTAMBANENGWE AJA and HOFF AJA
Heard:	**27 June 2014**
Delivered:	**29 October 2014**

APPEAL JUDGMENT

MAINGA JA (MTAMBANENGWE AJA and HOFF AJA concurring):

Introduction

[1] This appeal raises the question of whether the second and third respondents, who were employees of the appellant, were retrenched or resigned from Namibia Wildlife Resorts Ltd (NWR). At the heart of the dispute between the parties are the provisions of s 10(1), (2), 4(*c*) of Namibia Wildlife Resorts Company

Act of 1998 and Rule 3.4 of the Government Institutions Pension Fund (GIPF Rules).

[2] Section 10 (1) provides that the staff members who were employed in the Ministry of Environment and Tourism (the Ministry) for performing functions in relation to the wildlife resorts enterprise shall on the transfer date be transferred to the service of the Company and be offered employment by the Company on such terms and conditions of service which, in the aggregate, shall not be less favourable financially than those held by such person in the Ministry at the date of transfer of service. Section 10(4)(*c*) provides that where a person is appointed in the service of the Company, such person shall continue to be a member of the Government Institutions Pension Fund . . . and for such purpose, the Company shall be deemed to be a statutory institution which has been admitted to membership under the Rules of that Pension Fund.

[3] Rule 3.4 provides for early retirement for reasons other than age or state of health and reads 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:
>
> …
>
> (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.

(b) any additional liability as determined by the actuary, and incurred by the fund as the result of the retirement of a member in terms of Rule 3.4(1)(a) or 3.4 (1) (d) shall be paid to the fund by the employer of the member, unless the trustees, acting on the advice of the actuary, determine otherwise.'

The Background

[4] Mr Simeon Iingwapha and Ms Selma Christoph, the second and third respondents, were employees in the internal audit section of NWR. During November 2009, the second and third respondents received identical letters dated 12 November 2009 from the managing director of NWR. These letters informed the second and third respondents that for reasons of structural reorganisation, the auditing of NWR would be done by external auditors twice a year, and the internal audit section was declared redundant in line with s 34(1) of the Labour Act 11 of 2007. The letters stated that the positions previously held by the second and third respondents no longer existed, but that existing options would be made available to them if they showed interest in working for the appellant. In the event that they decided not to pursue their careers with NWR, they would be compensated

accordingly and in line with the Labour Act. The letters in their entirety (using the one addressed to the second respondent) read as follows:

‘12 November 2009

Mr Simeon Iigwapha
Head Internal Audit
NWR
Windhoek

Dear Mr Iingwapha,

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 for strong, comprehensive and accountability systems. Cabinet henceforth approved the turnaround strategy of NWR which has been implemented successfully between the years 2006 – 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.2009.02.27/15)* this 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* declared 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 that background that I wish to inform you about these structural changes.

Henceforth the position you occupy in NWR no longer exist, there for 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.

I want to thank you and wish to assure you that the company will avail assistance to you where necessary.

Yours sincerely

Signed
Tobie Aupindi, PHD
Managing Director'

[5] The second and third respondents opted to be retrenched. A meeting between NWR and the second and third respondents was scheduled on 14 December 2009 to discuss the retrenchment packages. Before the meeting of 14 December 2009, the second and third respondents informed the human resources department that NWR would also be liable to pay a certain sum to GIPF in light of the difference between their age at the relevant time and retirement age. That information prompted NWR in letters dated 11 December 2009 to offer re-employment to the two respondents, but on substantially different terms of remuneration and with reference to job positions for which the second and third respondents did not have appropriate knowledge or skills.

[6] The two respondents declined the offers because they suspected that either the offers were not made in good faith, and NWR would later dismiss them for non-performance, or that NWR was attempting to avoid negotiating retrenchment packages and transferring their pension monies over to GIPF.

[7] The appellant attempted to reach some form of agreement with the second and third respondents that the retrenchment packages could be offset against the payment of the pension monies to GIPF. The two respondents declined this offer on the basis that the retrenchment packages and the transfer of pension monies constituted two separate issues. The second and third respondents were then informed that the board of NWR would meet and decide on the issue. Later they were informed that they would receive letters from NWR's lawyers, which they never received.When the retrenchment negotiations stalled, the second and third respondents complained to the Labour Commissioner. An arbitrator was appointed and the dispute between the parties was heard on 8 March 2010. The two respondents appeared in person and NWR was represented by Mr Olavi Hamwele, the senior manager of Human Capital, and Ms Zelna Hengari, who was the company secretary at the time. On 24 March 2010, the arbitrator rendered his/her award, interalia, holding that NWR must respect and honour the retrenchment option exercised by the two respondents as was made available to them by paying each a retrenchment package.

[8] Subsequent to the arbitration award, the two respondents received two identical letters dated 20 April 2010 relating to the arbitration award settlement. The only difference between the letters was the settlement amount; as the second respondent was the more senior of the two employees, his settlement amount was higher than that of the third respondent. The letters (again using the letter addressed to the second respondent) were worded as follows:

’20 April 2010

Mr Simeon Iingwapha
Namibia Wildlife Resorts Ltd
Private Bag 13378
Windhoek

Dear Mr Iigwapha,

SUBJECT: ARBITRATION AWARD SETTLEMENT

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.

The settlement is as follows:

Item	Unit	Total due
Notice Pay	55,362.70	55,362.70
Severance Pay	32,319.33	22,376.64
Leave Gratuity	32,319.33	82,028.76
Social Security	54.00	162.00
Bonus	32,319.33	29,626.05
Medical Aid	692.75	2,078.25
Sub-Total		**191,634.40**
Less TAX		12,925.16
Less GIPF	32,319.33	5,171.09
Total		**173,538.15**

Yours sincerely,

Signed
Olavi Hamwele
SENIOR MANAGER: HUMAN CAPITAL

I S Iingwapha hereby acknowledge receipt of this Arbitration Award Settlement from NWR and therefore confirm that the above is in line with the Arbitration ruling.

Signature: ___signed_____ date: __21.04.2010_
cc. Mr. Philip Mwandingi'

[9] Subsequent to receiving these letters regarding settlement, the two respondents requested quotations for their pension benefits from the first respondent, GIPF. The reason they gave for the early retirement was redundancy/retrenchment. The senior manager of Human Capital of the appellant certified that the information furnished in the application form was correct. GIPF quoted N$1,941,971.99 and N$1,033,785.30 respectively for the second and third respondents, monies that NWR was obliged to transfer to GIPF in order for the full benefits of the second and third respondents to be paid. What followed was an exchange of letters between the appellant and second and third respondents in which the two respondents demanded payment of their pension benefits.

[10] On 15 July 2010, the legal practitioners for the appellant addressed a letter to the Chief Executive Officer of the first respondent that confirmed that the second and third respondents had been retrenched. The relevant passages read as follows:

'2.7 Two employees of the NWR, Mr Simeon Iingwapha and Ms Selma Christoph ("the employees") were retrenched 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.

3. The questions arising from the above are the following:

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 unilateral 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?

4. Especially with reference to the contents of paragraph 3.2 above, it is pointed out that Article 16 of the Namibian Constitution entrenches the right of NWR to *"acquire, own and dispose"* (of) property, that also includes its financial resources, in a manner unimpeded by actions such as those of the GIPF.

5. The NWR is considering instituting urgent proceedings in the High Court of Namibia aimed at obtaining a declaration order pronouncing the NWR not to be liable for the *"additional"* amounts claimed by the GIPF to be payable to the employees.

6. Unless you can refer us to an appropriate and legitimate basis upon which the GIPF can completely do what it has asserted itself capable of, within 14 days of date hereof, we shall launch proceedings in the High Court aimed at achieving the relief set out in the aforegoing paragraph.

Your faithfully
KOEP & PARTNERS

signed
R T D MUELLER'

[11] It was at this juncture that GIPF, the first respondent, became party to the dispute. On 26 July 2010, the Manager of Legal Services of GIPF, Mr Melki Uupindi, responded to the letter received from the appellant's legal practitioners, Koep & Partners. Mr Uupindi in his letter drew attention to the provisions of Rule 3.4 and opined that the rule was applicable in the circumstances of the second and third respondents, as the employees were either retrenched due to the appellant's re-organisation or in order to promote the efficiency or economy of the appellant. He also pointed out that the appellant's claim that the retrenchment package was indeed to be an 'all inclusive award' was not valid, as benefits are not regulated by the award and were not included in the retrenchment package awards. He further pointed out that the total pension benefits of the second and third respondents were N$2,975,759.59 and N$1,762,353.80 respectively.

[12] The appellant did not respond to GIPF's letter of 26 July 2010. In a letter dated 6 October 2010 and addressed to the appellant, Mr Uupindi demanded that the pension benefits of the second and third respondents be paid to GIPF within 10

days. The second respondent through his legal representatives in a letter dated 11 October 2010 also made a demand for the payment of his benefits by noon 13 October 2010, failing which he said he would commence civil action against the appellant.

The High Court proceedings

[13] The imminent litigation prompted the appellant on 27 October 2010 to launch an urgent application in the High Court seeking the following relief:

> '1. Dispensing with the forms and service provided for in the rules of court and hearing this matter as one of urgency;
>
> 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 specially, 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;
>
> 3. Granting to applicant such further and/or alternative relief as this Honourable Court may deem fit;
>
> 4. Directing the respondents, jointly and severally, to pay the costs of this application.'

[14] Mr Aupindi Tobie Aupindi, the Managing Director of the appellant deposed to an affidavit on behalf of the appellant reiterating the provisions of s 10(1)(4)(*c*) of the Namibia Wildlife Resorts Act and Rule 3.4 of the GIPF Rules. He sketched the history of the dispute between the appellant and the second and third respondents.

He admitted that the second and third respondents were given options to be redeployed within the appellant or accept retrenchment, but stated that before the details of the retrenchment packages were finalised, the appellant withdrew the retrenchment offer. Without stating the exact positions proposed for the redeployment, he generally stated that alternative positions within the appellant were made available to the second and third respondents. He further stated that the second and third respondents declined the offers for a variety of personal reasons including (on the part of third respondent) an unfounded likelihood of victimization that would come in the wake of redeployment. Mr Aupindi's affidavit continued by attacking the award granted by the arbitrator. It then stated that the second and third respondents sought a defective and unachievable relief; that the defective and unachievable short statement of relief sought by the second and third respondents (providing that the appellant be compelled to continue retrenchment negotiations with the second and third respondents in terms of the letters that gave the second and third respondents options for redeployment or retrenchment) indicated that no prior dismissal or retrenchment had finally been agreed upon, finalized or implemented; that the defective and unachievable relief above vitiated the proceedings arising from the second and third respondents' complaints and rendered the proceedings a nullity; that the deponent was advised that it was not necessary for the appellant to have specifically sought to review the award before it could rely on the nullity thereof; that the arbitrator unilaterally and without having been requested to do so, proceeded to make an award not requested nor applied for by either of the parties; that the arbitrator had no jurisdiction to make the award and thus acted ultra vires of his powers; that for such reason, the award is a nullity that can be ignored without any application to set it aside; that the validity of the

award can also be impugned in a collateral attack without seeking to set the same aside. Mr Aupindi contended that the award was intended to be ‘once and for all’ and that this extended to the dispute regarding the pension; and that the term ‘package’ as used by the arbitrator, if the award is viewed not to be a nullity, is an all inclusive ‘once and for all’ award not capable of being supplemented by the addition of further benefits. He stated that retrenchment in modern terminology is also referred to as a ‘dismissal for operational requirements,’ and that central to this concept is the prerequisite that an employee must be dismissed for operational requirements before it can be said that the employee was retrenched. He further states that in the arbitration award there is evidence to the effect that the redeployment option at all times remained open, and was not challenged at any stage. Therefore, the second and third respondents were not retrenched nor dismissed for operational reasons or for any other reason. The evidence that they were neither dismissed nor retrenched can be found in the papers of the arbitration proceedings. The second and third respondents left the service of the appellant voluntarily, and Rule 3.4 of the GIPF Rules was not applicable as the Rule does not confer any right to a pension benefit on any employee prior to his/her normal retirement date.

[15] The application was opposed by the three respondents. The second and third respondents had initially only opposed the application but later brought counter-applications identically worded as follows:

‘DECLARING AND ORDERING THAT:

1.1 the APPLICANT is liable in terms of Rule 3.4 of the Government Institutions Pension Fund Rules (GIPF Rules) and is thus liable to pay the FIRST RESPONDENT such liability as may be determined by the FIRST RESPONDENT in accordance with Rule 3.4(2)(*b*) of the GIPF Rules; and

1.2 upon discharge of liability above mentioned under sub-paragraph 1.1, the FIRST RESPONDENT shall be liable to pay to the SECOND RESPONDENT the applicable pension benefits in terms of Rule 3.4 of the GIPF Rules;

2. DECLARING AND ORDERING that the APPLICANT is liable to pay the costs attendant to lodging an urgent application on an attorney client scale;

3. Costs of suit;

4. Further and alternative relief.'

[16] The respondents' case on the urgency of the application is that the appellant did not make out a case of urgency as the alleged urgency was self-created. On the merits, the respondents stated that the appellant failed to show why the appellant did not appeal the award or review the arbitration proceedings to have the award set aside. Instead, it accepted the award and paid the second and third respondents pursuant to such award. They contend that the ultimate finding of the award is that the second and third respondents were retrenched by appellant and that as a consequence, the appellant as a participating employer in the GIPF is obliged according to Rule 3.4 to cover any additional liability incurred by the fund as a result of the retirement of the second and third respondents; that the contention that the second and third respondents were declared redundant or retrenched is supported by their requests for quotations submitted by the second

and third respondents to GIPF for their pension benefits; that the reason given for their retirement was redundancy/retrenchment, which was certified by the senior manager for human resources of the appellant as correct; and that the letter of 15 July 2010 from the appellant's legal representatives addressed to the Chief Executive Officer of the first respondent acknowledged that the second and third respondent had been retrenched.

[17] The second and third respondents further added that they were not at all informed of the exact positions proposed for the redeployment (if any), and that they were informed that the positions of redeployment would only be disclosed if they were to show interest in continuing to work for the appellant, which they regarded as not offers made in good faith. They challenged the deponent of the founding affidavit made on behalf of the appellant to produce a resolution from the NRW board that withdrew the offer of retrenchment.

[18] The second and third respondents also argued that they were in fact retrenched. According to the second and third respondents, and on the advice they received, retrenchment is made on specific operational grounds under labour law and cannot be made as an offer that is accepted or declined by an employee. They made reference to the provisions of s 34(1) of the Labour Act, which relate to intended dismissal caused by 'the reduction of the workforce arising from the reorganisation or transfer of the business or discontinuance or reduction of the business for economic or technological reasons.'

[19] The respondents also explained that they eventually complained to the Labour Commissioner because the appellant did not negotiate with them in good faith, and that they could not terminate their employments with the appellant of their own accord. The respondents contended that the application was brought so that the appellant could escape the provisions of Rule 3.4. The first respondent also contends that the stance taken by the appellant in these proceedings is reprehensible and calls for censure by this Court. The respondents ask for costs against the appellant.

[20] Ms Helna Hengari, the company secretary, deposed to the replying affidavit reiterating the case for the appellant as set out in the founding affidavit. She explained that the 'request for quotations' forms which reflect 'retrenchment' as the reason for the departure of the second and third respondents from the service of the appellant were completed in confusion and suggestions by the second and third respondents to Mr Hamwele, the senior manager in human resources, and Ms Iyambo, who completed the requests of the second and third respondents respectively, that the forms should state 'retrenchment' as the reason for departure. Ms Hengari reiterated that the award of the arbitrator was fatally flawed and amounted to a nullity, and that the appellant decided to simply pay the second and third respondents in order to facilitate the speedy finalisation of the dispute between the parties. She maintained that the second and third respondents were told what the redeployment offers entailed and both refused such offers.

[21] The third respondent deposed to a supplementary affidavit stating that during November 2010, the appellant caused an advertisement to be placed in the

newspaper the ‘New Era’ inviting applications for two positions in the internal audit department. She states that the abolition of the internal audit department, including the two positions she and second respondent occupied, and re-advertisement of the same positions amounted to a tactical ploy to retrench herself and the second respondent.

[22] Mr Mueller, the legal practitioner on record for the appellant, deposed to an answering affidavit in response to the second and third respondents’ counter application. He stated that the relief sought by the second and third respondents in their counter applications was unintelligent and obscure, as they could not seek to place further obligation upon the appellant subsequent to ‘. . . the discharge of the liability contemplated by prayer 1.1.’ The counter applications were vague, embarrassing and excipiable; in any event they were superfluous as the relief sought by the appellant in its application would determine the rights of the second and third respondents.

[23] The second respondent in his replying affidavit stated that an outcome of dismissal of the appellant’s application would not guarantee that the appellant would discharge its obligations to pay over their pension benefits to GIPF. The counter application was necessary to compel the appellant to pay over the benefits in the event its application was dismissed.

[24] The application was heard and judgement reserved on 12 July 2012. On 22 October 2012, the High Court handed down the following order:

‘1. The application is dismissed with costs.

2. In respect of prayers 1 and 2 of the second and third respondents’ counter application, no order is made.

3. Costs of the counter-application shall be costs in the cause.’

[25] The court *a quo* had indicated to the parties that the reasons for the order/judgment would follow, but up to the date on which this appeal was heard no reasons were furnished. This Court has therefore been compelled to decide the issue to be determined without the benefit of the view of the court *a quo* on the matters before it. This is an unfortunate situation and lamentable indeed that both the appellant and the second and third respondents were denied reasons for their applications. In *Strategic Liquor Services v Mvumbi* No 2010 (2) SA 92 CC at 96G, the Constitutional Court of South Africa pointed out that ‘it is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensible. Failure to supply them will usually be a grave lapse of duty, a breach of litigants’ rights, and an impediment to the appeal process’.

[26] In *Mphahlele v First National Bank of SA LTD* 1999 (2) SA 667 CC, Goldstone J at 671E-H had the following to say: -

> ‘There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and

> transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation to the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial offer.'

[27] In *Botes and Another v Nedbank LTD* 1983 (3) SA 27 AD, Corbett JA as he then was, at 27H–28A expressed himself as follows:

> 'In a case such as this, where the matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons for the Judge's decision. Moreover, a reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did.'

[28] We ourselves agree with the sentiments outlined above. The failure by Van Niekerk J to furnish her reasons, when requested for the appeal process, cuts right across the appellant's right of access to courts.

[29] The appeal lies against paras 1 and 3 of the order above, the second para having been abandoned.

Condonation for the late filing of the appeal

[30] Unfortunately as is far too often the case, I must first deal with the condonation application before I can turn to the substance of the appeal. The appeal record was filed 19 days late. The reason for the delay is ignorance of the applicable rules of this Court on the part of the attorneys of record. Ordinarily the application should have been declined. In *Maria Susanna Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2013 (4) NR 1029 at 1031D we endorsed the sentiments of Friedman AJA in *Ferreira v Ntshingila* 1990 (4) SA 721 (A) at 281G where he stated:

> 'An attorney instructed to note an appeal is in duty bound to acquaint himself with the Rules of the Court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 101; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685A-B. Insomuch as an applicant for condonation is seeking an indulgence from the Court, he is required to give a full and satisfactory explanation for whatever delays have occurred.'

[31] In *Aymac CC and another v Widgerow* 2009 (6) SA 433 (W), Gautschi AJ made the following comments (which were also approved in the *Kleynhans* matter above at 450H-I):

> '[36] . . . An attorney is not expected to know all the rules, but a diligent attorney will ensure that he researches, or causes to be researched (by counsel if necessary), the rules which are relevant to the procedure he is about to tackle. And if he discovers at some stage that he has been mistaken or remiss, then it is doubly necessary that he study the rules carefully in order to ensure that further mistakes are not made, and that those that have been made are rectified. This is the least one expects of a diligent attorney.

And at 451-452A:

> [39] Culpable inactivity or ignorance of the rules by the attorney has in a number of cases been held to be an insufficient ground for the grant of condonation. See *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799B-H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J; *Ferreira v Ntshingila* 1990 (4) SA 721 (A) at 281G-282A; *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121C-122C. The principle established by these cases is that the cumulative effect of factors relating to breaches of the rules by the attorney may be such as to render the application for condonation unworthy of consideration, regardless of the merits of the appeal.
>
> [40] There is a further reason why the court should not grant condonation or reinstatement in the face of gross breaches of the rules. Inactivity by one party affects the interest of the other party in the finality of the matter. See in this regard *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363A where Holmes JA said the following concerning the late filing of a notice of appeal:
>
> > "The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his appeal – the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns' Executors v Gaarn* 1912 AD 181 at p. 193, in which Solomon JA, said:
> >
> > "After all the object of the Rules is to put an end to litigation and to let parties know where they stand."'

[32] The order in this case was granted on 22 October 2012. The appeal was noted on 13 November 2012. Mr Mueller, the appellant's legal representative who deposed to an affidavit for the condonation application, states that he was under the erroneous impression that the appeal record had to be filed, by the latest,

within a period of three months from the date on which the appeal was noted. He was not certain whether an appeal record had to be filed at any stage prior to the furnishing of reasons for an order in circumstances where an order of court contained no reasons for such order. His uncertainty is due to the provisions of Rules 5(5)(*c*)(i), 5(13) and 5(16). Rule 5(13) provides that 'the copies of the record shall include the reasons given by the judges of the court appealed from . . .' and 5(16) provides that 'the registrar may refuse to accept copies of records which do not in his or her opinion comply with the provisions of this rule'. Rule 5(5) provides:

> '(5) After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice –
>
> (a) in cases where the order appealed against was given on an exception or an application to strike out, within six weeks after the date of the said order or, in cases where leave is required, within six weeks after the date of an order granting leave to appeal;
>
> (b) in all other cases within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required, within three months after an order granting such leave;
>
> (c) within such further period as may be agreed to in writing by the respondent,
>
> lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary: Provided that –
>
> (i) whenever the decision of a matter on appeal is likely to turn exclusively on a question of law the parties or their attorneys may, by mutual consent, submit such question in lieu of lodging copies of the record and type such parts of the record as may be necessary for the discussion of the same; and

(ii) the court, if it thinks fit, may order the full discussion of the whole case.'

[33] I cannot see why Mr Mueller could have been under an erroneous impression that the appeal record had to be filed within a period of three months from the date when the appeal was noted, when Rule 5(5)(*b*) provides for a period of three months from the date of the judgment or order. Rule 5(5)(*c*)(i) has no application in the circumstances of this case. Rules 5(13) and (16) could not have caused uncertainty as Rule 5(5) and (c) makes provision for two exceptions where a record may be filed outside the 3 months, namely, any special directions issued by the Chief Justice and 'within such further period as may be agreed to in writing by the respondent'. Rules 5(5)(*c*)(i), (13) and (16) do not provide exceptions in the present circumstances.

[34] It follows that the explanation offered is unacceptable or wanting more so because the present appeal appears to be without merit, but nevertheless condonation and reinstatement should be granted with costs. The first reason for this is that the order of the court *a quo* in its present form does not include reasons for the order, and the parties are uncertain whether the dismissal of the appellant's application in that court and the making of no order on the counter applications of the second and third respondents meant that the appellant was liable to the first respondent for the pension benefits of the second and third respondents. This is notwithstanding Mr Mueller's answering affidavit stating that the reliefs sought by the second and third respondents in their counter applications were superfluous as the relief sought by the appellant in its application would determine the rights of the

second and third respondents. The second reason for this is that the second and third respondents did not cross-appeal the ‘no order’ on their counter applications.

[35] I now turn to consider the principal issue before this Court.

Submissions

[36] Counsel for the appellant reiterated the appellant’s case that the second and third respondents were not retrenched, alternative positions within the appellant were made available to them, and they voluntarily resigned from the employment of the appellant. Counsel for the appellant heavily relied on excerpts from the award of the arbitrator, to the effect that second and third respondents were offered redeployment which they declined.

[37] Counsel also contended that the denials of the second and third respondents that redeployment offers were made in good faith, or at all, are contrary to crucial evidence presented by the appellant, which is that the second and third respondents were given the choice to be redeployed within the appellant or to accept a retrenchment package. They indicated a preference for the second option (i.e. retrenchment) but before the details of the retrenchment packages were finalised or the retrenchments were implemented, the appellant withdrew the retrenchment offers.

[38] Counsel further contended that retrenchment in modern terminology refers to a dismissal due to operational requirements, and that central to the concept of retrenchment is the prerequisite that an employee must be dismissed for

operational requirements before it may be said that the employee was retrenched. Counsel also submitted that the terms of the complaint filed with the Labour Commissioner excluded any suggestion of prior dismissal. Retrenchment, as understood by the man in the street, counsel argued, is simply that he has lost his job because there is no longer a job.

[39] Counsel recorded three grounds for dismissal, namely, for misconduct, incompetence/incapacity/incompatibility, and for operational requirements. Central to the notion of a dismissal 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. It follows that 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 therefore no longer constitutes a dismissal. Counsel made reference to *Jones v Retail Apparel* [2000] 6 BLLR 676 (LC) in his argument on this point.

[40] Counsel then turned to the collateral attack directed at the arbitrator's award reiterating the case for the appellant, particularly the part of the award that suggested that the employees had been retrenched. Counsel argued that those findings were clearly *ultra vires* of the powers of the arbitrator and made in the forum where the arbitrator had no jurisdiction to pronounce on the issue of retrenchment and make the award. Counsel concluded by stating that para 1 of the order of the court *a quo* should be set aside and substituted with an order that the appellant was not liable for the pension benefits of the second and third

respondents, and that the respondents were jointly and severally liable to pay the costs of the appellant.

[41] Mr Marcus for the first respondent commenced by addressing the argument put by counsel for the appellant that the proceedings before the arbitrator were a nullity on the bases that, first, the relief sought by the second and third respondents in the arbitration proceedings was ‘unattainable relief’, and, second, that the relief granted by the arbitrator had not been requested by the second and third respondents. Mr Marcus said that this argument was without merit when considered with reference to, first, the relevant provisions of the Labour Act 11 of 2007, which sets out the jurisdiction of the arbitrator, and second, the relevant facts of the dispute between the appellant and the second and third respondents, which arose in terms of s 34 of the Labour Act of 2007.

[42] Counsel further contended that based on the evidence before him, the arbitrator ordered the appellant to pay retrenchment packages to the second and third respondents. The fact that the first and second respondents sought ‘unattainable relief’ could not limit the powers of the arbitrator if the subject matter fell within his jurisdiction. Counsel also submitted that appellant’s argument ignores the fact that what appellant describes as ‘unattainable relief’ was not the only relief sought by second and third respondents, but that they also prayed that appellant be ordered to pay all monies due and owing to the second and third respondents in terms of their retrenchment. That is what the arbitrator ultimately ordered, and that it was incorrect to argue that the arbitrator made orders not sought by second and third respondents.

[43] Counsel further contended that appellant's acceptance of the award meant that it waived any right to challenge the award, whether directly or collaterally in later proceedings. Counsel pointed out that initially the appellant argued that the arbitration award was 'all inclusive', meaning that Rule 3.4 did not apply. However, when that argument was exposed to be wrong, the appellant changed its argument and submitted that the second and third respondents were not retrenched. Counsel further pointed out that appellant offered nonsensical explanations when it was faced with its own description of the termination of employment, as reference was made to the retrenchments in NWR documents and correspondence directed to GIPF. When the appellant realized that the award was conclusive on the question of retrenchment, the appellant mounted the collateral attack on the award which counsel submitted is not permissible.

[44] Counsel also argued that the arbitration award is conclusive on the question of retrenchment, and that Rule 3.4(*b*) was applicable. The appellant is therefore responsible for any additional liability incurred by GIPF, and the appeal should be dismissed with costs. Mr Kamanja for the second and third respondents shared the submissions by counsel for the first respondents.

[45] It is common cause that due to structural reorganisation in the appellant in terms of s 34(1) of the Labour Act 11 of 2007, the second and third respondents' jobs in the internal audit department of the appellant were declared redundant or retrenched by the board of the appellant. The second and third respondents were informed as such in identical letters dated 12 November 2009. It is also common cause that in the same letters, NWR offered to redeploy the second and third

respondents if they showed interest in pursuing their careers with the appellant. In the event that they showed no such interest, they would be compensated in line with the Labour Act. Both opted for the second option, but before the details of the retrenchment packages were finalised or the retrenchments were implemented, the appellant withdrew the retrenchment offer (as stated the deponent on behalf of the appellant in the founding affidavit).

Issues for determination

[46] Two issues arise for determination in this case:

1. Whether the appellant could unilaterally withdraw the offers of compensation under the Labour Act 11 of 2007 set out in the letters dated 12 November 2009, which were validly accepted by the second and third respondents; and
2. Whether the second and third respondents were retrenched or voluntarily resigned from the employment of the appellant.

Could the appellant unilaterally withdraw the offers of compensation under the Labour Act 11 of 2007?

[47] This is a question that arises within the main dispute between the parties. The appellant's letters abolishing the jobs of the first and second respondents made it clear that their jobs were no longer in existence, but that they could be redeployed upon showing interest to work for the appellant. If they were not interested, they would be compensated according to the terms of the Labour Act. It is also clear from the record that if the two respondents had accepted

redeployment, they would have been required to enter into new contracts of employment with reduced benefits. They opted to be retrenched.

Could the appellant withdraw the offers of compensation under the Labour Act 11 once the option was communicated and validly accepted?

[48] Coetzee J in *Anglo Carpets (Pty) Ltd v Snyman* 1978 (3) SA 582 (T) at 585G held:

> 'It is trite that an offer can at any time before acceptance be revoked and that the mere statement that it is irrevocable or not revocable for a certain period is ineffective. The only way in which this result can be achieved is if there is indeed a binding agreement on this aspect. Such an agreement is usually referred to as an option or a *pactum de contrahendo*.'

See also *University of the North v Franks and Others* [2002] 8 BLLR 701 LAC) par 48.

[49] In the *University of the North* matter, as part of a rationalization process necessitated by a drastic reduction of its government subsidy, the appellant (the University) offered staff members of 55 years or older the option of taking voluntary early retirement and severance benefits. After the offer had been accepted by more than 100 staff members, including the respondents, the appellant withdrew the offer. The appellant contended that it was entitled to withdraw the 'open ended' offer because it had been drafted contrary to instructions, and was unauthorized.

[50] At p 720, para 56 the court held:

> 'It must therefore be held that the offer could not be revoked before its expiration date. The acceptance of the offer by the second respondent after 5 September 2000 and before 15 September 2000 was therefore valid.'

[51] In *Wiltshire and Others v University of the North* [2006] 1 BLLR 82 LC, the respondent University offered voluntary retrenchment, but withdrew the offer after acceptance. The applicants sought a declaration to the effect that they had accepted a valid offer and an order that it was therefore legally binding on the respondent.

[52] The court at p 92, para 69 held:

> 'I accept the evidence of the applicants that they had accepted the offer made by the respondent, that they had communicated their acceptance in accordance with the respondent's requirements and that therefore a valid agreement was entered into.'

[53] It follows necessarily from these authorities that once the second and third respondents had opted to be retrenched, a valid agreement (retrenchment) had accordingly been concluded and no further action was required on their part. The negotiations for their severance monies and the payment thereof should have followed. The arbitrator was correct to have held that the appellant should honour the option exercised by the second and third respondents. That being the case, the provisions of Rule 3.4 would have fallen in the schedule of things without question.

[54] In this case, worse still, there is no evidence on record other than the appellant's assertions from which one can deduce that the option to be retrenched was in fact actually withdrawn. The second respondent in his opposing affidavit stated at para 20: 'I would thus challenge the deponent to produce a resolution which confirms a withdrawal of an offer for retrenchment'. In the replying affidavit of Ms Zelna Hengari, a company secretary of the appellant, she stated, 'ad paragraph 13 to 21 thereof, the contents hereof are noted'. She failed to show that the board of directors that passed a resolution to retrench the second and third respondents withdrew this decision or the option to be retrenched.

[55] In the *University of the North* matter, the court at 713 para 35 said:

> 'A body corporate does not act through mere discussions by its members. It acts through resolutions properly passed. Its decisions are to be sought in its resolutions. If these are clear, *cadit quaestio.* If there is no resolution, there is no decision. The words of Centlivres CJ in *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) at 606 in respect of a company are equally applicable here:
>
> > "A company is an artificial person with no body to kick and no soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended. Their formal acts in the form of resolutions constitute evidence as to the intentions of the company of which they are directors . . . ."'

In the absence of evidence that a resolution was passed to withdraw the retrenchment options, I must therefore accept that no such decision was taken. In any event, even if such a decision were taken, once the retrenchment option was

accepted by the second and third respondents, it gave rise to a binding agreement which had to be honoured.

Were the second and third respondents retrenched, or did they voluntarily resign from the employment of the appellant?

[56] Counsel for the appellant submitted that the second and third respondents resigned from the service of the appellant on the basis that they had the option to be redeployed but refused. Counsel referred to *Jones v Retail Apparel* [2000] 6 BLLR 676 (LC) to support his contention. In *Mafika Sihlali v SA Broadcasting Corporation Ltd* [2010] 5 BLLR 542 (LC), the court said the following of resignation:

> [11] A resignation is a unilateral termination of a contract of employment by the employee. The Courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention (see *Council for Scientific and Industrial Research (CSIR) v Fijen* (1996) 17 ILJ 18 AD [also reported at [1996 6 BLLR 685 (AD) – Ed], and *Fijen v Council for Scientific and Industrial Research* (1994) 15 ILJ 759 (LAC)). Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent (see *Rustenburg Town Council v Minister of Labour & Others* 1942 TPD 220.
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> **Page 547 – [2010] 5 BLLR 542 (LC)**
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> *Potgietersrus Hospital Board v Simons* 1943 TPD 269, *Du Toit v Sasko (Pty) Ltd* (1999) 20 ILJ 1253 (LC) and *African National Congress v Municipal Manager, George & Others* (550/08) [2009] ZASCA 139 (17 November 2009) at para [11] [also reported at [2009] JOL 24612 (SCA) – Ed]. In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the

employer party entitled to refuse to accept a resignation or decline to act on it. (See *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T) [also reported at [1969] 1 All SA 132 (T) – Ed]). If a resignation is to be valid only once it is accepted by an employer, the latter would in effect be entitled, by simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour.

[12] This is not to say that a resignation need not be communicated to the employer party to be effective - indeed, it must, at least in the absence of a contrary stipulation (*African National Congress v Municipal Manager, George & Others (supra)*).

[13] A resignation is established by a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention. The Courts look for unambiguous, unequivocal words that amount to a resignation – see, for example, *Fijen v Council for Scientific and Industrial Research, supra,* where the Labour Appeal Court stated that to resign, the employee had to 'act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract.'

[14] The requirement of a clear and unambiguous intention to terminate the contract may often be more easily stated than applied. As Mark Freedland observes, if a worker utters words seeming to indicate an intention to leave employment, the utterance may be unclear, the product of uncertainty, or a manifestation of anger rather than an expression of a definite intention to terminate the employment relationship. When it is claimed that an employee has decided to terminate his or her employment of his or her own volition, it may be necessary to scrutinise the genuineness of that volition to determine, for example, whether the employee's action is the result of an unacceptable degree of pressure by the employer, or whether the employer has been over-eager to treat an impulsive decision as a settled one.

[57] In *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC) the court said at para 15:

> '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.'

After a careful consideration, I have come to the conclusion that, on balance, the second and third respondents' version of events from the moment they received letters informing them of the abolishment of their jobs by the board of the appellant and thereafter is to be preferred. The evidence in the arbitration proceedings shows that the retrenchment agreement proceeded well and an understanding was reached on a number of issues relating to the packages until it later transpired that the appellant would have to make some substantial payments to GIPF as one aspect of the retrenchment exercise. It was at that juncture that the appellant made a 'u-turn' and attempted to withdraw the second option that the two employees had already selected.

[58] This evidence is corroborated by the following extract from the report of the arbitrator, referring to the representative of the appellant at the proceedings:

> ‘He stressed the issue of the astronomical amount the respondent will have to pay into the Pension Fund if the retrenchment route was followed as the reason why the applicants should accept the redeployment. He did however acknowledge that the redeployment offer made to Mr Ingwapha was inferior, and was unhappy why Mr Ingwapha was unwilling to negotiate a once off payment to compensate for the difference between this current salary and the lower salary package he will get once he was redeployed.
>
> He was thus of the view that it would be unfair if the respondent was ordered to follow the retrenchment route as that would result in huge payments being made to the Pension Fund in addition to the actual retrenchment packages which would be paid to the applicants. He believed retrenchment was no longer an option in this case as the Board of Directors has already pronounced itself on the matter after it was approached. The position of the Board was that the applicant must be redeployed at all costs and no retrenchments must be entertained.’

On 15 July 2010, the appellant’s legal representatives addressed a letter to GIPF confirming that the second and third respondents were retrenched. The position of the appellant at the time was that the retrenchment packages were all inclusive and GIPF could not demand payments falling outside the ‘retrenchment packages’.

[59] The appellant’s version - that the second and third respondents left the employ of the appellant on their own accord and volition - finds no support on the papers before the Court. The appellant admits to having retrenched the second and third respondents with the options to be redeployed if they showed interest in pursuing their careers with the appellant or compensated according to the

provisions of the Labour Act. The second and third respondents opted for retrenchment. The appellant further alleges that the retrenchment option was withdrawn. In my view, this assertion is false, as there seemed to be no resolution by the board to that effect notwithstanding the fact that the second respondent challenged the appellant to produce such a resolution. In relation to the redeployment option, other than the appellant's assertions there is no evidence of alternative jobs that were offered to the second and third respondents. The appellant claims that the second and third respondents knew what jobs were offered to them and that they declined, but this argument takes the appellant's case no further. It only raises a dispute on a point that should be decided in favour of the second and third respondents. In the case of both respondents, the offers of redeployment were divorced from their career paths, and in the case of the third respondent the possibility was raised that a new job was offered for the purpose of dismissing her eventually for non-performance. I accept that the arbitrator stated in his/her award that the second and third respondents declined the offer of redeployment within the appellant, a fact the appellant relies on. However, the question remains: what alternative jobs were offered to the respondents?

[60] The arbitrator referred to the redeployment option as the 'closed option', which he said, 'could be easily manipulated, as by accepting it, it could easily expose the applicants (second and third respondent) to accepting something which they did not know whether it was good or not' which if accepted 'would be difficult to return it later once you realized that it was not good for you or what you expected'. The arbitrator also said of the redeployment option, 'was in a closed envelope', which could only be opened after the employee had exercised that

option, that is, accepted redeployment. The arbitrator found that s 34 of the Labour Act obliged an employer acting in terms of that section to ‘play open cards.’ Further, the arbitrator criticized the conduct of the appellant in withholding the redeployment information until the two employees accepted to be redeployed, and said that this was inconsistent with s 34 and amounted to a non-disclosure, as well as unfair labour practice.

[61] Counsel for the appellant has compared the circumstances of this case to the facts of *Jones v Retail Apparel* [2000] 6 BLLR 676 (LC). In that case, after a merger of a company in which the applicant was employed as a training manager and another company (which formed 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 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 complained 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 if she did not accept the position, apply for another, or apply for early retirement. The applicant then accepted early voluntary retirement. She then commenced a dispute asserting that she had been unfairly dismissed due to operational requirements. The court noted that it was not the applicant’s case that she had been compelled to retire or to

terminate her services. She had not been dismissed because dismissal was merely one of several options that she had been given by the respondent. The case was in reality not about retrenchment, but about changes to the applicant's conditions of employment. When these changes proved unacceptable to the applicant, she elected to terminate her services. The applicant had accordingly failed to prove that she was dismissed for operational requirements, or at all.

[62] In my opinion, *Jones v Retail Apparel* was correctly decided. However, its facts are substantially different from those presented in the matter presented before the Court. In this case, the jobs were abolished due to structural reorganisation in the appellant. The letters of 12 November 2009 state in no uncertain terms that 'henceforth the position you occupy in NWR no longer exists…..'. The decision by the board of the appellant to declare the positions of the second and third respondents redundant was taken in terms of s 34 of the Labour Act, which provides for 'dismissal arising from collective termination or redundancy' in Part F entitled 'Termination of Employment'. The arguments in relation to redeployment become ridiculous when regard is had to the fact that the two positions were abolished to reduce the workforce to increase efficiency through reorganization in the appellant. If this were the case, how could the appellant still keep the two persons employed on the same benefits they had in their previous jobs?

[63] Despite the arguments put forth by appellant, this case could be decided simply on the fact that appellant accepted that the two employees were retrenched. The appellant argued that it could ignore the arbitrator's award as a nullity because

the arbitrator decided on an issue he was not invited to decide upon, and that it was therefore not necessary to take the award on review or appeal. This argument is without substance. The appellant was seriously ill-advised on this point, as s 87 provides that:

> 'An arbitration award made in terms of this Part –
>
> (a) is binding'

[64] Section 89 provides for appeal and reviews of arbitration awards where a party disputes the award. The appellant in its letters dated 20 April 2010 to the second and third respondents stated, 'the company has decided to abide by the arbitration award dated 25 March 2010, in which the payments to be done to you were set'. It was argued that the extent to which the appellant indicated it would abide by the arbitration award only related to the amount that was required to facilitate the amicable departure of the employees from the employment of the appellant, and could certainly not be construed as an admission on the part of the appellant that all the arguments it had raised before the arbitrator were incorrect, and/or without legal or factual foundation. With due respect to counsel, this argument ignores the facts of this case. Appellant could not abide by the award just to facilitate the departure of the second and third respondents from the company. The award was not arrived at in a vacuum, it was related to the retrenchment of the two employees. The arbitrator referred to retrenchment in so many words, for example, he made reference to a reply of appellant in its letter dated 9 December 2009 scheduling a meeting to negotiate retrenchment packages and he stated: '. . .

only one option was on the table then, namely, negotiating a retrenchment package'.

[65] The evidence before the Court points overwhelmingly to the following conclusions:

1. The appellant through its board of directors intended to and did retrench the second and third respondents.
2. The redeployment option set out in the letters of 12 November 2009 constituted a ploy to trick the second and third respondents into accepting offers they would have regretted accepting. In any case, offers of that nature are in my opinion inconsistent with the provisions of s 34 of the Labour Act under which the decision to abolish the jobs of the two employees was made.
3. The so-called redeployment offer was made with the sole purpose of avoiding the provisions of Rule 3.4 of the GIPF Rules.
4. There is no evidence that the second and third respondents resigned or left the employ of their employer on their own accord or volition.

[66] It follows that the appeal should fail.

Costs

[67] The appellant should pay costs of this appeal. In my opinion, the appellant's case was an opportunistic exercise to avoid the provisions of Rule 3.4 of the GIPF Rules.

Order

[68] I accordingly make the following orders:

1. The application for condonation and reinstatement of the appeal is granted.

2. The appellant is ordered to pay the costs of the condonation application.

3. The appeal is dismissed.

4. It is declared that appellant is liable in terms of the provisions of the GIPF Rules, specifically Rule 3.4, to make payment to the first respondent on behalf of the second and third respondents in the amounts of N$1 941,971.99 and N$1 033,785.30 respectively in addition to any interest that might have accumulated, if so required by the first respondent being benefits arising from the retrenchment of the second and third respondents.

5. The payment is to be made to GIPF within 14 days from the date of this judgment.

6. The costs of the appeal, including the costs of the application for condonation for the late filing of the appeal record and for the reinstatement of the appeal, are to be paid by the appellant on the basis of two instructing counsel.

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MAINGA JA

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MTAMBANENGWE AJA

_____

HOFF AJA

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