

register, dishonesty, and fraud. The appellant was found guilty on all three counts and was dismissed on 22 December 2010.

[2] On 28 December 2010 the matter was referred in terms of sections 82(7) and 86(1) of the Labour Act 11 of 2007 for conciliation or arbitration on the basis that the appellant had been unfairly dismissed by the respondent.

[3] In a notice of appeal dated 11 January 2011 the appellant advanced the following grounds of appeal: that he had been incorrectly found guilty of aforementioned offences, that the sentence was inappropriate, that the disciplinary hearing was unprocedural, and that the chairperson did not consider certain evidence. The appellant further stated that he appealed against the entire finding of the chairperson of the disciplinary hearing on the basis of the following:

“(a) the chairperson failed to apply his mind on the facts in issue,;
(b) the chairperson misdirected himself on the law applicable to the matter and therefore erroneously applied inappropriate authority on the matter before him;
(c) the chairperson admitted highly irrelevant and seriously prejudicial evidence in the matter; and
(d) the hearing failed to show cause justifying the finding.”

[4] On 28 March 2011 the matter was heard by the arbitrator (second respondent) who in her ruling on 11 May 2011 dismissed the claim of the appellant. It is against this ruling of the arbitrator that the present appeal lies.

On 28 October 2011 an amended notice of appeal was filed on behalf of the appellant on the ground that the second respondent had misdirected herself and erred in law and fact by allowing first respondent's legal representative to testify and hand in certain exhibits during the arbitration proceedings.

[5]When this appeal was heard on 11 November 2011 Mr Horn who appeared on behalf of first respondent informed the Court that since the record was incomplete in the sense that certain annexures had not been translated into the official language an agreement was reached with Mr Kasuto who appeared on behalf of the appellant to give him an opportunity to rectify the record and that the issue of costs would be argued on the date of the hearing of the appeal.

[6]I then indicated that since a legal point was taken by Mr Horn in his heads of argument that even if a postponement is granted to rectify the record this Court would still have to deal with this legal point and that having regard to the nature of the incomplete record (referred to afore-mentioned) that I was prepared to hear submissions by counsel on the legal point. Both counsel agreed to this .

[7] The legal point is the following:

Section 89 of the Labour Act 11 of 2007 reads as follows:

“(1)A party to a dispute may appeal to the Labour Court against an arbitrator’s award made in terms of section 86 -
(a) on any question of law alone; or
(b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law.”

Section 7(1)(a) reads as follows:

“Any party to a dispute may refer the dispute in writing to the Labour Commissioner if the dispute concerns -

a matter within the scope of this Act and Chapter 3 of the Namibian Constitution.”

[8]Chapter 3 of the Namibian Constitution, consists of 20 Articles, and deals with fundamental human rights and freedoms.

[9]The submission in the heads of argument of the first respondent was that the appellant has laid no ground upon which he is entitled to appeal on both law and on the facts of this matter.

[10] It was submitted that the matter has been referred to the Labour Commissioner on the basis of an unfair dismissal and not on the basis that a fundamental human right or fundamental freedom had been infringed.

[11]Therefore the appellant should have appealed against the arbitrator’s award only on a question of law and not on questions of fact or on questions of mixed fact or law.

[12]In *President of the Republic of Namibia and Others v Vlasiu 1996 NR 36 (LC)*, a matter in which section 21 of the Labour Act 6 of 1992 was referred to which provided that appeals from decisions of the Labour Court were restricted to questions of law, O’Linn J emphasised that when a party wishes to appeal on a question of law such a ground must be properly formulated.

[13]The difference between questions of fact and questions of law were also considered. O’Linn J with reference to *Salmond on Jurisprudence* stated that questions of fact are capable of proof and are the subject of evidence adduced for that purpose, whilst a question of law means a question in which the true rule of law is to be determined.

[14]When one has regard to the grounds as well as the amended grounds of appeal then in my view it should be apparent that these grounds are not concerned with questions of law alone, but also include questions of fact as well as an alleged irregular procedure allowed by the arbitrator.

[15]Since the dispute initially referred to the Labour Commissioner did not concern a dispute regarding a fundamental right or fundamental freedom the appeal is not sanctioned by the provisions of section 89(1)(b) of the Labour Act 11 of 2007. The provisions of section 89(1)(a) are in my view applicable to this appeal.

[16] The notice of appeal of the appellant is accordingly inadequate and defective.

[17]In terms of sections 85 and 86 in proceedings before an arbitrator a litigant is provided with an opportunity afresh to present his or her case. The grounds of attacking the procedural correctness of the disciplinary hearing are therefore suspect and helpful.

The alleged procedural irregularity during the arbitration proceedings referred to in the amended notice of appeal is in my view subject to review proceedings and cannot form a ground of appeal.

[18]Section 89(4) of Act 11 of 2007 provides that a party to a dispute who alleges a defect in any arbitration proceedings may apply to the Labour Court for an order reviewing and setting aside the award within 30 days after the award was served on the party unless the alleged defect involves corruption.

[19]No corruption has been alleged and in terms of this section the appellant is out of time in lodging review proceedings.

[20]The appeal cannot be upheld on the following grounds namely, that the dispute has not been initially referred to the Labour Commission based on an infringement of a fundamental human right or fundamental freedom and for non-compliance with the provisions of section 7(1)(a), and secondly, on the ground of appellant's failure to comply with the provisions of section 89(5)(a) of Act 11 of 2007.

[21] In the result the following orders are made:

(a)The appeal is dismissed.

(b)No cost order is made.

HOFF, J

ON BEHALF OF THE APPELLANT/APPLICANT:

MR E K

KASUTO

Instructed by:

E K KASUTO LEGAL

PRACTITIONERS

ON BEHALF OF THE 1ST RESPONDENT:

MR

HORN

Instructed by:

M B DE KLERK &

ASSOCIATES