REPORTABLE

CASE NO: LCA 22/2014

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

METHEALTH NAMIBIA ADMINISTRATORS (PTY) LTD **APPELLANT**

And

BARTO MATUZEE **1ST RESPONDENT**

ZENOBIA FORBES **2ND RESPONDENT**

GERSHON DAUSAB **3RD RESPONDENT**

Neutral citation: *Methealth Namibia Administrators (Pty) Ltd v Matuzee* (LCA2/2014) [2015] NALCMD 5 (18 March 2015)

CORAM: **UEITELE, J**

Heard on: 06 MARCH 2015
Order handed down 18 MARCH 2015
Reasons released on: 10 APRIL 2015

Flynote: *Labour law* - Section 89(1) (a) of the Act restricts an appellant's right to appeal to this court against an arbitrator's award made in terms of section 86, to questions of *law only.*

Summary: On 18 November 2013, the respondents (who are all employees of the Appellant) purported to jointly refer a dispute of unfair labour practice (the allegations being amongst others that Methealth Namibia Administrators (Pty) Ltd (the employer and who is the appellant in this matter) unlawfully made deductions from the respondents' remuneration. On 18 December 2013 unsuccessfully conciliation

conciliated the dispute. After the unsuccessful conciliation the arbitrator proceeded to arbitrate the dispute.

The arbitration hearing proceeded as scheduled on 13 March 2014, after the hearing the arbitrator found that the deductions from the respondents' salaries were in contravention of s12 of the Labour Act, 2007 and thus unlawful. He also found that the refusal by the appellant to pay to Gershon Dausab subsistence and travelling allowance when he travelled from outside his duty station to attend to his duties as shop steward was unfair. The arbitrator ordered the appellant to pay to the respondents the amounts which it deducted from their remuneration and to pay to Mr Gershon Dausab the amount of N$ 3 000 in respect of accommodation and N$ 2400 in respect of subsistence allowance. It is against that order that the appellant appeals.

Held that s89(1) (a) of the Act restricts an appellant's right to appeal to this court against an arbitrator's award made in terms of section 86, to questions of *law only* and that in so far as the Notice of Appeal purports to appeal against the whole of the arbitration award it is defective, because the award also deals with finding of facts.

Held further that the arbitrator did not err in law when allowed the respondents to participate in the arbitration proceedings despite the provisions of Rule 5 (3) of the Arbitration Rules.

Held furthermore that the question as to whether or not the arbitrator was correct to deny the appellant the opportunity to be legally represented at the arbitration proceedings involved a factual enquiry and thus not appealable.

Held furthermore that the arbitrator did not err in law when he found that in the present matter the appellant did not have the sanction of the law, a court order or an agreement with the employees when it deducted moneys from their remuneration and as such the arbitrator was correct in in his interpretation and application of Section 11(1), 12 and 76(1) of the Labour Act, 2007.

ORDER

1 That the appeal is dismissed.

2 There is no order as to costs.

JUDGMENT

UEITELE, J

Introduction and Background

[1] In this matter the appellant is Methealth Namibia Administrators Pty (Ltd) (I will in this judgment refer to it as the appellant). The three respondents are employees of the appellant and I will collectively refer to them as the respondents except where the context require otherwise, in that event, I will refer to a respondent by his or her surname. The appellant appeals against the entire award issued under s 89 of the Labour Act[1], by the Arbitrator under arbitration case CRWK 861-13 handed down on 23 April 2014. The appeal is opposed by the respondents.

[2] On 18 November 2013, the respondents purported to jointly refer a dispute of unfair labour practice to the Labour Commissioner. The summary of dispute annexed to Form LC 21 amongst others sets out the basis of the referral as follows (I quote verbatim):

> '3. At all relevant times hereto applicants were duly elected workplace union representatives of NAFINU at the respondent's workplace, elected in terms of section 67 of the Labour Act, 11 of 2007.

[1] Act No 7 of 2011.

4 The applicants were duly recognized members of the negotiating committee which consisted of NAFINU and Methealth representatives.

5 The negotiation committee reached a deadlock and NAFINU referred a dispute of interest to the Office of the Labour Commissioner. This dispute was not resolved and a certificate of unresolved dispute was issued.

6. Upon being issued with the certificate of unresolved dispute a ballot process was done on the 20 September 2013 for the employees in the bargaining unit and the majority voted in favour of a strike.

7. After the ballot the parties agreed on the ground rules which required that members of the negotiation committee stay sided for any possible meeting.

8. It is prudent to state that the applicants in this matter are not part of the bargaining unit as defined in the recognition and procedural agreement and as such did not participate in the ballot process.

9. Furthermore is it prudent to state that the applicants were not on strike during the strike period but only stay sided for any possible meetings as agreed. However on the particular day of commencement of the strike were all of them refused access to the employers premises without any due process of lock out been followed.

10. As a result of the strike the respondent have embarked upon vicious campaign harassment and intimidation by amongst other:

10.1 Deducting money from the remuneration of the applicants:

10.2 Refused to pay 2nd applicant who is employed at Walvisbay his travelling cost and accommodation cost which he normally claim and been paid when coming to Windhoek for his workplace union representative responsibilities.

11. The deductions from the applicants' remuneration is unlawful as it did not comply with section 12 of the Labour Act, it is arbitrary and without any legal basis.

12. Attempts to resolve the dispute:

    12.1 The applicant has engaged the respondent in various ways in an attempt to persuade the respondent not to violate the rights of applicants as employees, but to no avail.

    12.2 As a result applicants have exhausted all remedies at their disposal.

13. When making the deductions the concerned applicants were not consulted nor did they consent to the deductions being made from their remunerations. I also need to pause here and inform the Labour Commissioner that the deductions made exceeds the one third of the applicant's' remuneration, which is prohibited by Labour Act.'

[3] On 25 November 2013 the Labour Commissioner gave notice, in terms of s 86(4) of the Act read with Regulation 20(2) of the Labour General Regulations[2] (I will in this judgment refer to these Regulations simply as the Regulations), that the complaint referred to him by the respondents was set down for conciliation/arbitration hearing on 18 December 2013 before B M Shinguadja. On the 18th of December 2013 the arbitrator embarked on a conciliation process. Conciliation failed and the arbitrator postponed the dispute for arbitration before him to 26 February 2014. On 14 February 2014 the arbitrator gave the parties notice that the arbitration hearing scheduled for 26 February 2014 will not proceed as scheduled and he postponed the proceedings to 13 March 2014.

[4] On 28 February 2014 the appellant, in terms of ss 82(13) & 86(13) read with Regulation 21, applied to arbitrator for permission to be represented by a legal practitioner at the arbitration hearing. The arbitrator refused the appellant's application, he gave his reasons for refusing permission to the appellant to be legally represented as follows:

> 'No good reasons advanced for legal representation. The other party/ies are not legally represented and they are likely to suffer prejudice if legal representation is granted for the respondent…'

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[2] Published by Government Notice 261 in Government Gazette No 4151 of 31 October 2008.

[5] The arbitration hearing which was initially scheduled for 26 February 2014 proceeded on 13 March 2014. At the arbitration hearing the respondents testified in their own case and the appellant did not lead any evidence. After the hearing the arbitrator found that the deductions from the respondents' salaries were in contravention of s 12 of the Labour Act, 2007 and thus unlawful. He also found that the refusal by the appellant to pay to Mr Dausab subsistence and travelling allowance when he travelled from away from his duty station to attend to his duties as shop steward was unfair he accordingly ordered the appellant to pay to:

(a) Bartho Matuzee the amount N$ 13 705-29;

(b) Zenobia Forbes the amount N$ 17 035-65;

(c) Gershon Dausab the amount N$ 15 903-91 plus the amount of N$ 3 000 in respect of accommodation and N$ 2400 in respect of subsistence allowance.

The Appellant's Notice of Appeal

[6] The appellant now appeals against the award made by the arbitrator. As I have indicated above, the notice of appeal states that, the appellant intends to appeal against the whole of the award of the arbitrator made on 14 April 2014. On 14 May 2014 the appellant served its Notice of Appeal on the respondents, the Labour Commissioner and the Registrar of this Court. On 21 May 2014 the Labour Commissioner, in terms of s 89 of the Act read with Rule 23 (4) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (I will in this judgment refer to these Rules simply as the Arbitration Rules), dispatched a duly certified record to the Registrar. On 12 December 2014 the appellant applied to this court for leave to amend its Notice of Appeal. The application is not opposed and I therefor grant the appellant leave to amend its Notice of Appeal.

[7] Section 89(1) (a) of the Act restricts an appellant's right to appeal to this court against an arbitrator's award made in terms of section 86, to questions of *law only.* Section 89(1)(a) of the Act, 2007 in material part provides as follows:

> '89 (1) A party to a dispute may appeal to the Labour Court against an Arbitrator's award in terms of Section 86-
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> (a) on any question of law alone; or
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> (b) in the case of award in a dispute initially referred to the Labour Commissioner in terms of Section 7 (1) (a) on question of fact, law or mixed fact and law'.

[8] The provisions of s 89 of the Act were considered by this Court in the unreported judgment of ***Shoprite Namibia (Pty) Ltd Appellant v Faustino Moises Paulo:*** **Case No: LCA 02/2010** where Parker, J said:

> 'The predicative adjective 'alone' qualifying 'law' means 'without others present'. (*Concise Oxford Dictionary*, 10th edn) Accordingly, the interpretation and application of s 89(1)(a) lead indubitably to the conclusion that this Court is entitled to hear an appeal on a question of law alone if the matter, as in the instant case, does not fall under s. 89(1)(b). A 'question of law alone' means a question of law alone without anything else present, e.g. opinion or fact. It is trite that a notice of appeal must specify the grounds of the appeal and the notice must be carefully framed, for an appellant has no right in the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal. In this regard it has also been said that precision in specifying grounds of appeal is 'not a matter of form but a matter of substance … necessary to enable appeals to be justly disposed of (*Johnson v Johnson* [1969] 1 W.L.R. 1044 at 1046 *per* Brandon J).'

[9] It thus follows that in so far as the Notice of Appeal purports to appeal against <u>the whole of the arbitration award</u> it is defective, because the award also deals with findings of facts. I am, however, of the view that the defect is ameliorated by the fact that the appellant tabulates the different grounds on which the appeal is based. The question

which I thus need to answer is whether each ground of appeal is within the ambit of s 89?

[10] Before I evaluate the different grounds of appeal, I find it appropriate to briefly set out how, this Court has dealt with the vexed question as to how one determines whether an appeal is on a question of law or fact. In considering whether an appeal is on a question of law or fact O'Linn, J (As he then was) said in the matter of ***President of the Republic of Namibia and Others v Vlasiu***:[3]

> 'It would appear that we are required to determine whether, on the facts found by the Labour Appeal Court, it made the correct decision and order. That is a question of law. If it did then the appeal must fail. If it did not, then this Court may amend or set aside that decision or order or make any other decision or order according to the requirements of the law and fairness. It will be convenient therefore to determine the facts which were common cause or not in issue before the Court *a quo* and then to determine what relevant findings of fact were made by that Court. It is upon the basis of all those facts that the correctness or otherwise of the decision and order of the Court *a quo* must then be considered.' It is clear from this judgment that:
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> 1. It was a question of law to determine whether, on the facts found by the Labour Appeal Court, it made the correct decision and order.
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> 2. For the purpose of determining such a question of law, the facts as found by the Court from which an appeal is desired, are the facts on which the question of law must be argued.'

[11] The full bench of the High Court per Mtambanengwe, J (with Strydom, JP and Teek, J concurring) in ***Rumingo and Others van Wyk***[4] stated the following on the issue of a question of law:

> 'The test in appeals based on a question of law, in which there has been an error of fact was expressed by the South African Appellate Division in *Secretary for Inland Revenue*

[3] 1996 NR 36 (LC) at 43.
[4] 1997 NR 102 at 105D – E.

> *v Guestyn Forsyth & Joubert* 1971 (3) SA 567 (A) at 573 as being that the appellant must show that the Court's conclusion 'could not reasonably have been reached'.

[12] The full bench of the High Court per Hannah, J (with Gibson, J and Silungwe, J concurring) in ***Visagie v Namibia Development Corporation***[5] stated that, the Labour Court (in this matter the arbitrator) was the final arbiter on issues of fact and that it was not open to this Court on appeal to depart from a finding of fact by that Court (in this matter the arbitrator). Hannah, J referred with approval to the decision of the Supreme Court of Appeal in South Africa in the matter of ***Betha and Others v BTR Sarmcol, A Division of BTR Dunlop Ltd***[6] where Scott, JA said the following:

> "In the present case, of course, this Court, by reason of the provisions of s 17 C(1)(a) of the Labour Relations Act 28 of 1956, is bound by the findings of the LAC. According, the extent to which it may interfere with such findings is far more limited than the test set out above. As has been frequently stated in other contexts, it is only when the finding of fact made by the lower court is one which no court could reasonably have been made, that this Court would be entitled to interfere with what would otherwise be an unassailable finding. (See *Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd* 1959 (1) SA 469 (A) at 475 *et seq*; *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666 B – D). The enquiry by its very nature is a stringent one. Its rationale is presumably that the finding in question is so vitiated by lack of reason as to be tantamount to no finding at all. The limitation on this Court's ordinary appellate jurisdiction in cases of this nature apply not only to the LAC's findings in relation to primary facts, i.e. those which are directly established by evidence, but also to secondary facts, i.e. those which are established by inference for the purpose of establishing a secondary fact is no less a finding of fact than a finding in relation to a primary fact. (See *Magmoed v Janse Van Rensburg and Others* 1993 (1) SA 777 (A) at 810H – 811G). It follows that it is not open to this Court to depart from a finding of fact by the LAC merely on the grounds that this Court considers the finding to be wrong or that the LAC has misdirected itself in a material way or that it has based its finding on a misconception. It is only where there is no evidence which could reasonably support a finding of fact or where the evidence is such that a proper

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[5] 1999 NR 219 at 224.
[6] 1998 (3) SA 349 (SCA).

> evaluation of that evidence leads inexorably to the conclusion that no reasonable court could have made the finding that this Court will be entitled to interfere.'

[13] This Court is, on the strength of these authorities, required to determine as a question of law whether on the material placed before the arbitrator during the arbitration proceedings, there was no evidence which could reasonably have supported his findings or whether on a proper evaluation of the evidence placed before the arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings. Hoff, J[7] put it as follows:

> 'The question is therefore whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances'.

Consideration of the different Grounds of Appeal

First ground of Appeal

[14] The appellant in its Notice of Appeal formulated the first question of law which I have to decide on appeal as follows: *Whether the arbitrator erred in law in not adhering to Rule 5 (3) of the Con/Arb rules allowing respondent to proceed with arbitration*?' and the ground of appeal is formulated as follows:

> 'The arbitrator erred in law in allowing the arbitration to continue in the absence of proof that there was compliance with Rule 5. The Rule states that it is peremptory that if more than one applicant is part of the dispute, such employees must sign a statement, which was not done and one respondent signed the LC 21 resulting in that non-compliance with Rule 5(3) renders the whole proceedings invalid as there was no mandate from the other respondents to sign the referral form on their behalf.'

[15] I have no difficulty in accepting that the first question that I am asked to determine is a question of law. Ms. Heydenreich who appeared for the appellant argued

[7] In the matter ***House and Home v Majiedt and Others*** (LCA 46/2011) [2012] NALC 31 (22 August 2012) at para [7].

that the decisions in the matters of ***Agribank of Namibia v Simana & Another***,[8] ***Purity Manganese (Pty) Ltd v Katjivena and Others***[9] and ***Springbok Patrols (Pty) Ltd t/a Namibia Protection Services v Jacobs and Others***[10] have the effect that if a joint referral is not signed by all applicants and the parties are not represented by legal practitioners, the arbitration proceedings are invalid and a nullity. She thus submitted that in the present matter the referral order Form LC 21 was not signed by any of the respondents and that the statement authorising Mr Vries to act on their behalf and sign the complaint form on their behalf was not attached to Form LC 21 thus rendering the award a nullity and must be set aside.

[16] Rule 14(1)*(b)* of the Rules Relating to the conduct of Conciliation and Arbitration before the Labour Commissioner[11] provides that a party that wishes to refer a dispute to the Labour Commissioner for arbitration must do so by delivering a completed form (Form LC 21) (I will in this judgment refer to the Form LC 21 simply as the 'referral document') whilst Rule 14(2)*(a)* provides that the referral document must be signed by a party in accordance with Rule 5. Rule 5 provides as follows:

'5. Signing of documents

(1) A document that a party must sign in terms of the Act or these rules may be signed by the party or by a person entitled in terms of this Act or these rules to represent that party in the proceedings.

(2) If proceedings are jointly instituted ... by more than one employee, the employees may mandate one of their member to sign documents on their behalf.

(3) A statement authorising the employee referred to in subrule (2) to sign documents must be signed by each employee and attached to the referral document ..., together with a legible list of their full names and addresses.'

'

[8] An unreported judgment of this Court case number LCA 32/2013 delivered on 17 February 2014.
[9] An unreported judgment of this Court case number LC 86/2011 delivered on 26 February 2014.
[10] An unreported judgment of this Court case number LCA 70/2012) delivered on 31 May 2013.
[11] Published by Government Notice No 262 in Government Gazette No 4151 of 31 October 2008.

[16] It is indeed correct that in the ***Agribank of Namibia v Simana & Another*** matter this court held that the non-compliance with the provisions of Rule 5 is fatal to a party's case. But in the ***Purity Manganese (Pty) Ltd v Katjivena and Others*** Smuts, J (as he then was) reviewed the legal position with respect to the effect of statutory provisions which are classified as peremptory. He thereafter stated as follows:

> 'Whilst the use of the term 'must' may indicate an intention on the part of the lawgiver or rule giver that a provision is mandatory or peremptory and that non-compliance may result in invalidity (*Schierhout v Minister of Justice* 1926 AD 99 at 110), this is not the end of the enquiry and may not necessarily arise. The labeling of provisions as peremptory or directory and ascribing consequences by virtue of that labeling exercise has, with respect, been correctly characterized by the Supreme Court (In *Rally for Democracy v Electoral Commission* 2010 (2) NR 487 (SC) at par [36]) as an 'oversimplification of the semantic and jurisprudential guidelines pragmatically developed by the courts and distilled in a long line of judgments to differentiate between – what they are conveniently labeled as – peremptory and directory provisions.'

[17] The learned Judge after revisiting the survey and summary of applicable principles, in considering whether a term (such as 'shall' in that case) is to have a mandatory meaning in the sense that a failure to comply would result in a nullity, done by Van Niekerk, J in the matter of *Kanguatjivi and Others v Shivoro Business and Estate Consultancy and Others*[12] and concluded as follows:

> '[30] Applying the approach and guidelines so usefully summarized by Van Niekerk, J, I turn to the legislative purpose and context of the rules. The statutory context of these rules, as already set out, is the conciliation and determination of labour and employment disputes 'in a manner' which the arbitrator considers appropriate to determine the dispute fairly and quickly as is required by s86 (7) (a). Arbitrators are also enjoined by s86 (7) (b) to deal with 'the substantial merits of the dispute with the minimum of legal formalities.'
>
> [31] The purpose of the rule requiring that referral documents are to be signed, as set out in rules 14 and 5, would to be ensure that a referral is authorized by a complainant. I enquired from Mr. Dicks in argument whether the applicant's point would have been

[12] 2013 (1) NR 271 (HC) at par [22] – [25].

addressed if the third respondent had merely signed the referral form when the point was taken. He responded in the affirmative. That would in my view appear to be correct, given the fact that the requirement of the rules would then have been met, even though the referral document had not been signed when it had been delivered. The failure to sign can thus be cured in the course proceedings. This is because of the doctrine of ratification in the context of the purpose of the requirement. In view of the purpose of the requirement (of signature to the referral form), it would be for the office of the Labour Commissioner to reject a referral and avoid an unauthorized referral. In that instance, a referring party would then be required by that office to sign the form to ensure that the referral was authorized. But once a referring party participates in conciliation and thereafter in arbitration, without an objection to that participation, it would seem to me that the requirement of a signature had at that stage become redundant. This is because of the fact that the participation by the referring party has resulted in a ratification of the referral.

[32] I cannot accept that the rule giver could have intended by this rule that the failure to have signed a referral form can, after participation, result in an ensuing award being a nullity for that reason alone. There is support for this proposition in a judgment by a full bench in South Africa where there is also a requirement of a signature to a referral form for conciliation, mediation and arbitration. See *ABC Telesales v Pasmans* (2001) 22 ILJ 624 (LAC); CF *Rustenberg Platinum Mines v CCMA and Others* (1998) 19 ILJ 327 (LC). A contrary position had been taken previously by a single judge in an earlier matter, holding that the failure to have signed a referral form resulted in the CCMA in South Africa not having jurisdiction to proceed with conciliation, mediation and arbitration.'

[18] In the present matter the arbitrator considered that the process, which had been commenced by the referral document, had reached an advanced stage when the arbitration started. This is because there had been conciliation (which also requires a signed referral document in terms of Rule 14) which had immediately preceded the arbitration and which had also been chaired by him. The appellant and the respondents participated in the preceding conciliation process. It would appear that during the conciliation process the appellant did not raise the failure on the part of the respondents to have signed the referral document and joint statement during conciliation. The point was then taken, after conciliation had been contemplated (and failed) and the arbitration

had got under way. The arbitrator in his award dealt with the preliminary objection as follows.

> 'It is important to take note that the parties met first on 18th December 2013 in conciliation. During the conciliation meeting the respondent did not raise the issue which it now wanted to raise as preliminary on 11 March 2014. Even if they were to be permitted to be raised at the arbitration, this must be done right at the beginning and not in the middle of the testimony.
> On 11 March 2014, all applicants and their representative were present precisely at 09H30. One of the respondent's representatives Ms. Olichea Mukuve was also on time.
>
> At that time, I enquired whether the arbitration should start as it was time, all the parties in attendance agreed to proceed. Suprisingly at about 09H58, way in the first applicant/witness' testimony the other two respondent's representatives arrived. It was at that point that Mr. Florian Amulungu, Acting Human resource Manager wanted to introduce the points *in limine*.
>
> This was not only unprocedural but also inappropriate to do so. I am now declining to entertain these points by the representative of respondent as preliminary for the reasons I advance hereinabove. I respectfully refer to the case *Purity Manganese (Pty) Ltd v Katjivena and Others* LC 86/2011 the court in that case rightly held as follows "..the failure to have signed the referral forms in this instance where there had been participation in conciliation would not result in the award being a nullity.'

[19] I am therefore of the view that on all the available evidence, in respect of a specific finding (namely that 'the failure to have signed the referral document in this instance where there had been participation in conciliation would not result in the award being a nullity), when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the arbitrator's finding was a reasonable one in the circumstances. The present case is distinguishable from both the ***Springbok Patrols*** case, where the parties did not sign the referral document and were not identified on the referral document and the ***Agribank v Simana*** case where, the party signing the referral document did so well before he was authorized to represent the complainant and the complainant did not ratify the representation by his legal representative.

[20] I further find that the arbitrator did not err when he found that once a party participated in the conciliation proceedings then it would not be open to the other protagonist in the proceedings to take this point (the failure to sign the referral document or the failure to attach a statement in terms of Rule 5 (3) to the referral document. I am fortified in this view by the fact that, when I perused the record of proceedings before the arbitrator I discovered that, during the arbitration hearing the respondents confirmed that all three of them authorized Mr. Vries to sign the referral document on their behalf to that extent they submitted a document which was marked as Exhibit K. I am thus of the view that, on the facts of this matter the respondents ratified their failure to have signed the referral document or to attach the statement contemplated in Rule 5(3) of the Arbitration Rules to the referral document. I furthermore endorse the reasoning of Smuts, J (as he then was) when he said that, once parties have participated in proceedings which are the consequence of the submission and delivery of a referral form, then it would not be open to the other protagonist to take the point of the failure to have signed form because the question of authority would then not arise. I accordingly answer the first question in the negative and find that the arbitrator did not err in law when he allowed the respondents to participate in the arbitration proceedings.

Second ground of Appeal

[21] The second question of law which the appellant wants this court to resolve is formulated as follows: '*Whether the arbitrator was correct in law not to allow the appellant legal representation'.* The appellant formulated this ground of appeal as follows *'The arbitrator is compelled by law to allow legal representation when the matter is complex but did not allow legal representation for reasons not covered by Section 86 (13) of the Labour Act, 2007, which constitutes an error in law'.* Ms. Heydenreich argued that the arbitrator has a discretion which must be judicially exercised to allow legal representation when the matter is complex and the other party to the dispute will not be prejudice, but in this matter the Arbitrator did not allow legal representation <u>for reasons not covered by Section 86 (13)</u> of the Labour Act, 2007. She further argued that there was no indication whatsoever on the record that the arbitrator adhered to the strict and

peremptory requirements of s 86 of the Act and that the nature of the dispute was complex but the arbitrator did not allow legal representation.

[22] Firstly the appellant does not set out the reasons (advanced by the arbitrator) which are not covered by the s 86(13) of the Act, secondly the appellant reaches the conclusion that the nature of the dispute was complex and therefore the arbitrator had to allow legal representation. The appellant does not set out the factual basis on which it alleges that dispute was complex. In my opinion these are not grounds of appeal at all but are conclusions drawn by the draftsman of the notice of appeal without setting out the reasons or basis of the conclusion. Such grounds do not inform this Court of the grounds on which the award is attacked. Thirdly the question whether or not the complaint, referred to the Labour Commissioner by the respondents, is complex involves a factual enquiry and thus not appealable. I thus find that the second ground of appeal is in this matter not a ground of appeal at all.

Third ground of Appeal

[23] The third question of law which the appellant wants this court to resolve is formulated as follows: '*Whether arbitrator was correct in his ruling by his interpretation and application of Section 11(1), 12 and 76(1) of the Labour Act, 2007.'* The appellant formulated this ground of appeal as follows:

> 'The arbitrator concluded, in essence that Respondents, who were all workplace union representatives and who participated in strike action were entitled to remuneration for the period of the legal strike action, while Section 76 (1) of the Labour Act, 2007 read with Section 11(1) and 12 of the Labour Act, 2007 provides otherwise and as such made an error in law by wrong or incorrect interpretation of section 76(1) of the Labour Act.'

[24] Ms. Heydenreich argued that the crux of the appeal is that the Arbitrator erred in law by his interpretation and application of ss 11, 12 and 76 of the Labour Act, 2007. In order to determine whether the arbitrator's finding is one which no reasonable arbitrator would have found and thus erred in law, I first have to determine the facts which were common cause or not in issue before the arbitrator and then determine what relevant

findings the arbitrator made and then ask the question whether on the facts found by the arbitrator he made the correct decision.

[25] I have indicated above that the appellant did not lead any evidence at the arbitration hearing. The arbitrator, on the evidence produced by the respondents thus found the following facts:

(a) That the respondents were not in the bargaining unit (the bargaining unit consisted of employees in job Grades A1 to C1) as defined by NAFINU[13] (I will in this judgment refer to NAFINU as the union) and agreed to by the appellant;

(b) That the respondents were elected shop stewards (trade union representatives) who were representing the employees in the bargaining unit;

(c) That the respondents represented the employees during the wage negotiations with the appellant, during the conciliation meetings at the Labour Commissioner's Office and during the strike;

(d) That the respondents were part of the employees 'negotiating team' which was negotiating with the employer's 'negotiating team' prior to and during the strike;

(e) That prior to the employees of the appellant commencing with industrial action (i.e. a strike) the appellant and the union concluded a 'Memorandum of Action on Industrial Action.' In the Memorandum the parties agreed upon the 'Ground Rules regulating the conduct of industrial action in the dispute of interest between the …parties.' Clause 7.1 of that Memorandum provides that: "The Applicant (i.e. the union) will appoint 3 authorized representatives who shall be responsible for ensuring compliance with the Rules. The respondents were appointed as the three representatives and their names and appointments were communicated to the appellant;

[13]NAFINU is the acronym for Namibia Financial Institutions Union which is the Trade Union to which the respondents belonged.

(f) That when the respondents attended to their responsibilities as the trade union representatives or shop stewards they did not participate in the strike but executed their duties in terms of the Ground Rules;

(g) That when the respondents attended to their duty stations their entrance to the duty stations was blocked and that one of the respondents was escorted from his duty station by the appellant's security guard;

(h) That Mr. Dausab was called for a meeting on 24 September 2013 which was to take place on 25 September 2013 and that Mr. Dausab was on sick leave for a period of two weeks starting on 09 October 2013. That Mr. Dausab travelled with a company (appellant's) car from Walvis Bay to Windhoek during the period of the strike;

(i) That the employees in the bargaining unit embarked on industrial action for the period 25 September 2013 to 09 October 2013. The appellant deducted the amount of:

(i) N$ 13 705-29 from Mr. Matuzee's salary;
(ii) N$ 15 903-91 from Mr. Dausab's salary; and
(iii) N$ 17 035-65 from Ms. Forbes' salary.

[26] Based on the facts set out above the arbitrator made the following finding:

'Section 12 of the Labour Act sets out the parameters within which lawful deductions can be made by an employer. It reads as follows:

"12 Deductions and other acts concerning remuneration

(1) An employer must not make any deduction from an employee's remuneration unless-

(a) the deduction is required or permitted in terms of a court order, or any law;

(b) subject to subsection (2), the deduction is-

(i) required or permitted under any collective agreement or in terms of any arbitration award; or

(ii) agreed in writing and concerns a payment contemplated in subsection (3)."

None of the above instances were complied with by the respondent when it effected the deductions from the applicants' salaries. '

[27] Ms. Heydenreich argued that the arbitrator erred in law when he arrived at the conclusion that the appellant acted unlawfully when it deducted moneys from the respondents' salaries. She submitted that the respondents were all shop stewards [workplace employee representative] when the strike commenced on 25 September 2013 and represented the employees who are part of the bargaining unit, and as such are part of the bargaining unit. She further argued that for the duration of the strike, respondents were not at their duty stations at work and did participate in the strike and picketing as workplace union representatives as such the appellant was entitled to, in terms of s 76(1) of the Act to withhold payment from the respondents for the period that they were engaged in the industrial action. Section 76 of the Act amongst others reads as follows:

'76 Strikes and lockouts in compliance with this Chapter

(1) By taking part in a strike or a lockout in compliance with this Chapter, a person does not commit a delict or a breach of contract, but an employer is not obliged to remunerate an employee for services that the employee does not render during a strike or lockout in compliance with this Chapter.'

[28] The difficulty with Ms. Heydenreich's arguments is that appellant did not testify at the arbitration hearing and as such there was no evidence adduced before the arbitrator that the respondents were part of the bargaining unit or that they participated in the industrial action other than in their representative capacities. Furthermore the respondents' evidence that they were prohibited by the appellant's senior employees to access their work place stations was not controverted by the appellant. In the absence

of evidence to prove that the respondents did participate in the industrial action as part of the employees of the bargaining unit, it will be sheer speculation from the arbitrator or this court to hold that the respondents were participating in industrial action. The dearth of evidence would not have entitled the appellant to the finding contented for by Ms Heydenreich. [14]

[29] A court will usually begin its interpretation of a statute by applying the so-called 'literal rule'[15] that is, that the words of a statute must be interpreted in their ordinary, grammatical meaning:

> '(I)n construing the statute the object is, of course, to ascertain the intention which the legislature meant to express from the language which it employed. By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument . . . as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect.'[16]

[30] In this process regard will also be had to the 'primary' and 'cardinal' rules of construction:

> '(T)he primary rule of construction of Statutes is that the language of the Legislature should be read in its ordinary sense; ...'[17] and 'The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment.'[18]

[31] On application of these general rules it immediately emerges that, given their ordinary and literal meanings, the words employed in the ss 11 and 12 must be interpreted to mean that:

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[14] *Rodgerson v SWE Power and Pumps (Pty) Ltd* 1990 NR 230 (SC).

[15] See for instance the unreported judgment of this Court of The *Prosecutor General v Uuyuni* [2013] NAHCMD 67 (POCA case No 4/2012) delivered on 12 March 2013).

[16] Per Innes, CJ in *Venter v Rex* 1907 TS 910 at 913.

[17] *Union Government (Minister of Finance) v Mack* 1917 AD 731 at 739 per Solomon, JA.

[18] See Stratford, JA in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129.

(a) an employer is obliged to pay to an employee any monetary remuneration to which the employee is entitled on the normal pay day, which may be daily, weekly, fortnightly or monthly;

(b) an employer must not make any deduction from an employee's remuneration unless-

(i) the deduction is required or permitted in terms of a court order, or any law;

(ii) the deduction is-

- required or permitted under any collective agreement or in terms of any arbitration award; or

- agreed in writing and concerns a payment in respect of the payment of rent in respect of accommodation supplied by the employer; goods sold by the employer; a loan advanced by the employer; contributions to employee benefit funds; subscriptions or levies to a registered trade union.

[32] In the instant case, I find that the words – all the words, in ss 11 & 12 are clear, plain and unambiguous and so they should be given their literal and grammatical meaning and, in my opinion that will not lead to any manifest absurdity, inconsistency, hardship or a result that is contrary to the legislative intent and purpose. The legislative purpose behind the sections is as clear as the day, it seeks to ensure that employers must pay the employees timeously for the services that they have rendered and also to disallow employers from deducting moneys from an employee’s remuneration except where the deduction is authorized by law. I thus find that the arbitrator did not err in law when he found that in the present matter the appellant did not have the sanction of the law, a court order or an agreement with the employees when it deducted moneys from the respondents’ remuneration and as such acted in violation of s12 the Act.

[33] I am of the view that the third ground of appeal disposes of this appeal making it unnecessary for me to deal with the fourth, fifth and sixth grounds of appeal. Given the

provisions of s 118 of the Act, which provides that the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings. No order as to costs would arise in this appeal.

[34] The order I accordingly make is:

1 That the appeal is dismissed.

2 There is no order as to costs.

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Judge

APPEARANCES

APPLICANT:	D BUGAN Of HARMSE ATTORNEYS
FIRST RESPONDENT:	A HEYDENREICH Of DE BEER LAW CHAMBERS