

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 32/2016

In the matter between:

FIDES BANK NAMIBIA

FIRST APPELLANT

TRUSTCO BANK NAMIBIA

SECOND APPELLANT

and

SEM SHIPEFI & 92 OTHERS

RESPONDENTS

Neutral citation: *Fides Bank Namibia v Shipefi* (LCA 32/2016) [2017] NALCMD
25 (21 July 2017)

Coram: ANGULA DJP

Heard: 17 February 2017

Delivered: 21 July 2017

Flynote: Labour Court – Appeals – Appellants relying on Rule 5 of the Rules relating to the Conduct of Conciliation and Arbitration – If proceedings are jointly instituted or opposed by more than one person, the employees may mandate one of their number to sign the referral document on their behalf – A statement authorizing the employee mandated to sign documents on their behalf must be signed by each employee and attached to the referral document or opposition, together with a legible list of their full names and addresses – The appellants' complaints in this regard rejected for lack of merit.

Summary: The appellants lodged an appeal against the ruling by an arbitrator whereby the arbitrator dismissed the appellants' point *in limine* that the respondents' referral document (Form LC 21) was defective in that the respondents had failed to comply with the provisions of Rule 5 of the Rules relating to the Conduct of Conciliation and Arbitration. The point *in limine* is twofold: firstly that there were no statements by the rest of the respondents attached to the referral document authorizing the first respondent, Sem Shipefi, to institute the proceedings on their behalf or to sign the documents on their behalf; and secondly that there was no proof that the respondents had given the Union, NAFINU, a mandate to institute the proceedings on their behalf. Several points *in limine* raised and court held as follows:

Held that: the arbitrator was correct in holding that in the absence of evidence by the appellants as to whom of the 92 respondents had not given mandate to NAFINU to institute the proceedings and evidence before him, indicated that such mandate had been given to NAFINU by all the respondents.

Held that: on the issue whether the arbitrator was correct in taking the view that since the appellants had 'indicated' at the conciliation stage of the proceedings that they intended to raise the point of lack of mandate at the arbitration stage that it was not permissible for the appellants to attempt to raise the point at the arbitration. The court held that the arbitrator was correct in this regard. The court reasoned it was not enough for the appellants to have merely 'indicated' that they intended to raise that the point *in limine* at the arbitration proceedings. The appellants ought to have taken the point there and then at the conciliation stage. Failure to do so would result in the inference that the appellants had ratified the alleged defect attendant upon the referral document.

Appeal accordingly dismissed.

ORDER

- (a) The appeal is dismissed. The matter is referred back to the arbitrator to finalise the arbitration proceedings.
- (b) There is no order as to costs.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an appeal against the ruling by an arbitrator whereby the arbitrator dismissed the appellants' point *in limine* that the respondents' referral document (Form LC 21) was defective in that the respondents had failed to comply with the provisions of Rule 5 of the Rules relating to the Conduct of Conciliation and Arbitration. The point in *limine* is twofold: firstly that there were no statements by the rest of the respondents attached to the referral document authorising the first respondent, Sem Shipefi, to institute the proceedings on their behalf or to sign the documents on their behalf; and secondly that there was no proof that the respondents had given the Union, NAFINU, a mandate to institute the proceedings on their behalf.

[2] The notice of appeal reads as follows:

- '1. PLEASE TAKE NOTICE THAT the Appellants (Respondents in the above-mentioned arbitration intend to appeal to the Honourable Court pursuant to section 89 of the Labour Act of 2007 against the whole of the ruling of the arbitrator, Mr Lovemore Mughandira, in case CRWK 135-15 dated 26 April 2016 and delivered on 03 May 2016.

2. The questions of law appealed upon are as follows:

- 2.1 Whether the issue concerning a lack of mandate for the institution of the action/locus standi was fully and conclusively dealt with in his ruling of 12 June 2015.
 - 2.2 Whether the arbitrator failed to take into consideration that the issue that some Respondents herein (Appellants in the dispute), did not give mandate to institution of the action, was raised before him.
 - 2.3 Whether the arbitrator failed to take into consideration the list of signatures attached to the referral document did not comply with the provisions of Rule 5(3).
 - 2.4 Whether the arbitrator failed to properly take into consideration that the issue which underlined the point taken herein, already indicated to be taken at the conciliation proceedings, but that the proper time to raise such point would be at the commencement of the arbitration proceedings.
 - 2.5 Whether the arbitrator failed and/or misdirected himself by dismissing the point *in limine*, whereas on a proper interpretation of the dispute as lodged, and Rule 5 of the Rules relating to the conduct of conciliation and arbitration, he should have upheld the point *in limine*.
3. The grounds of appeal are:
- 3.1 That the issue concerning a lack of mandate for the institution of the action/locus standi was not fully and conclusively dealt with in his ruling of 12 June 2015.
 - 3.2 That the arbitrator failed to take into consideration that the issue that some Respondents herein (Appellants in the dispute), did not give mandate to institution of the action, was raised before him and he was requested to indicate whether he would like to receive written confirmation of such, but declined to take up such invitation and would he have done so, he would have had the relevant evidence before him.
 - 3.3 The arbitrator failed to take into consideration the list of signatures attached to the referral document did not comply with the provisions of Rule 5(3).

3.4 The arbitrator failed to properly take into consideration that the issue which underlined the point taken herein, was already indicated to be taken at the conciliation proceedings, but that the proper time to raise such point would be at the commencement of the arbitration proceedings, which are the formal proceedings, whereas conciliation proceedings are informal, not on record and in respect of which the presiding officer is only a conciliator and as such cannot act in the function as he did herein, being that of an arbitrator and making accordingly appropriate ruling.

3.5 The arbitrator failed and/or misdirected himself by dismissing the point *in limine*, whereas on a proper interpretation of the dispute as lodged, and Rule 5 of the Rules relating to the conduct of conciliation and arbitration, he should have upheld the point *in limine*.’

[3] Mr Mueller appeared for the appellants whereas Ms Katjipuka appeared for the respondents. Counsel filed comprehensive heads of arguments. The court wishes to express its appreciation for their diligence.

Factual Background

[4] It is common cause that the first appellant’s business operation was taken over by the second appellant and that the first appellant no longer exists. On 10 February 2014, the first appellant informed the Namibian Financial Institutions Union (‘NAFINU’) of its decision to retrench its employees. NAFINU has been the recognized trade union for the employees of the appellants. It is alleged that the respondents are all members of NAFINU. On 17 February 2015, the respondents referred their dispute to the Labour Commissioner claiming that they had been unfairly dismissed.

[5] The matter started off with conciliation proceedings, which failed. Thereafter arbitration proceedings commenced. The proceedings were bogged down by applications on a series of points *in limine* raised by the appellants. I will recount the various points *in limine* raised by the appellants culminating in the point *in limine* which forms the subject matter of this appeal.

[6] On 29 April 2015, the arbitrator delivered a preliminary ruling on certain points raised by the appellants, including a request for discovery of certain documents, a request to subpoena some 86 (eighty six) witnesses, and a request to be allowed legal representation.

[7] The arbitrator granted the appellants' application regarding the discovery of certain specified documents and ordered the applicant to make the discovery of such documents specified and requested by the appellants. Both applications for leave to subpoena witnesses and to be legally represented were dismissed due to non-compliance with the rules governing arbitration proceedings.

[8] Thereafter, on 6 May 2015, the appellants filed yet another application repeating their application to be allowed legal representation contending *inter alia* that the matter is complex. The arbitrator delivered his ruling on the 12 June 2015 holding that the matter is complex as envisaged by section 86(13) of the Labour Act, Act No 11 of 2007 ('the Act'), and ordered that the appellants be represented by Mr Richard Mueller of Mueller Legal Practitioners.

[9] On or about 13 April 2016, the appellants raised yet a further point *in limine* that the appellants' referral document, (Form LC 21) was defective for want of compliance with the provisions of Rule 5 relating to the conduct of Conciliation and Arbitration proceedings. Having heard and considered the parties' submissions, on 26 April 2016, the arbitrator ruled that the dispute had in fact been properly referred and dismissed the appellants' point *in limine*. That ruling is the subject matter of this appeal.

[10] The notice of appeal pursuant to section 89(1) of the Act states that this appeal is directed against the whole ruling of the arbitrator dated 26 April 2016 and delivered on 3 May 2016. As mentioned earlier, the appellants had raised a point *in limine* that respondents referral document in the Form LC 21 was defective for want of compliance with the provisions of Rule 5. In particular, there were no statements by the rest of the respondents attached to the referral document authorizing the first respondent, Sem Shipofi, to institute the proceedings on their behalf or to sign the referral document on their behalf nor was there proof indicating that the representative of NAFINU was authorized to sign the documents on behalf of the

respondents. Accordingly, so the argument goes, the dispute was not properly referred to the Labour Commissioner and therefore the proceedings constitute a nullity.

[11] The respondents opposed the appeal on two grounds. The first ground is that the arbitrator's ruling in question was preliminary in nature. It is therefore not appealable and accordingly this appeal is premature. The second point of opposition is that the question as to who may sign the referral document and the consequences of non-compliance has been authoritatively and conclusively determined by the courts in case law. What the case law says will be elaborated upon later in this judgment.

Questions of Law

Question 2.1.1

[12] The first question of law is whether the issue concerning a lack of mandate for the institution of the action (*locus standi*) was fully and conclusively dealt with (by the arbitrator) in his ruling of 12 June 2015. It would appear that this question is aimed at the arbitrator's statement at paragraph 3 of his Ruling of 26 June 2016 where he said the following:

'These issues were dealt with in my ruling dated 12 June 2015 and the matter was set down for Conciliation meeting on 29 June 2015 which was held and subsequently Conciliation meeting we arranged for 8th, 14th and 21st day of July 2015. Furthermore Conciliation meeting was set down and held on 14 day of August 2015.'

[13] Furthermore the arbitrator stated at paragraph 8 of his Ruling as follows:

'Non-existent appellants

The respondents specifically queried the *locus standi* of the Appellants' representatives. Essentially the Respondents seek to advance the legal argument that there is no mandate from some of the Appellants to institute the current claims made against the Respondents. A number of the members on the lists are employed in Trustco Group, upon enquiring they informed they know nothing about the

complaint. There is a further argument made by the Respondents that the list of Applicant is of is fabricated; Ad paragraph 20 of the Respondents sworn affidavit of Ryan McDougall.

I accept that these legal issues pertaining to mandate could be of some sufficient complexity however again the Respondents fail to lay a basis as to which of the 92 Appellants have not given proper mandate for the institution of the current proceedings.(My underlining for emphasis)

[14] Counsel for the respondents submits in her heads of argument that the appellants' ground of appeal in this regard is so vague that it renders a meaningful response thereto, impossible. I agree with Counsel's predicament. I must confess that I have the same challenge in comprehending this ground of appeal. To the extent I understand the question, I will endeavour to deal with it and provide an answer.

[15] In my view, on the proper reading of the arbitrators Ruling of 12 June 2015, in particular the portion I have underlined, by stating that the respondents had failed to lay a basis as to which of the 92 Appellants have not given proper mandate for the institution of the current proceedings, the arbitrator had made a finding that the respondents were properly before him. This conclusion is, in my view, supported by the arbitrator's own statement at paragraph 3 of his 26 June 2016 ruling that he considered that aspect in his 12 June 2015 ruling having been dealt with and disposed of or concluded.

[16] It is necessary to keep in mind that that this appeal is directed against the arbitrator's ruling of 26 April 2016 and not against the ruling of 12 June 2015. For that reason, I find it unnecessary to dwell further on the arbitrator's ruling of 12 June 2015.

[17] Furthermore, upon proper scrutiny of the appellants' ground or question of law in this regard, the appellants appear to have accepted that the arbitrator had made a finding regarding the issue of mandate/ *locus standi*. The appellants gripe is that the issue was not '*fully and conclusively dealt with*'. In my view, the firmness or sufficiency of a finding cannot constitute a ground of appeal. In terms of the rules, the ground of appeal must be directed against a specific finding of the court or

tribunal. The conclusiveness of a finding cannot constitute a ground for appeal. The appellants' complaint in this regard could perhaps be addressed through review proceedings, but not appeal proceedings.

[18] I have therefore arrived at the conclusion that the legal question posed by the appellants in this regard must be answered in the affirmative, namely that the arbitrator's ruling must be understood to have held that in the absence of evidence by the appellants as to whom of the 92 respondents had not given mandate to NAFINU to institute the proceedings, the arbitrator had accepted, on the information before him, that such mandate had been given to NAFINU by all the respondents. It would appear thus that the arbitrator was satisfied that the information before him established *prima facie* that the respondents had given a mandate to act on their behalf and it was upon the appellants to disprove that *prima facie* evidence.

Question 2.1.2

[19] The next question to be considered is whether the arbitrator failed to take into consideration the issue that some of the respondents did not give a mandate for the institution of the action. In my view, this question is almost the same as the preceding one, but rephrased slightly differently.

[20] In support of the foregoing question, appellants point out that they were in possession of written information indicating that some of the respondents did not give a mandate for the institution of the action, but that the offer by the appellants to hand into evidence the documents was not taken up by the arbitrator. The appellants contend that should the arbitrator have taken up the offer, he would have had the relevant evidence before him.

[21] At page 262 of the record, the legal representative for the appellants is recorded as having said the following while addressing the arbitrator regarding the appellants' contention of lack of mandate:

'For respondents: I raised in the context that I said we've got doubts and that is the reason that we are challenging it, about the consent to have instituted the action; the signing of documents, the consent to have instituted, the mandate call it whatever you want to call it.

The two people I cannot remember Asnath. It could be; it could not be, I cannot remember. I think the two people Mr Vries, I think it is correct, that was mentioned when we analysed the employees and I think I said two people were dismissed, they were not part of the retrenchment group. I think so. I don't know whether I remember a number. But it is just to get that, from my perspective.

Chairperson: Okay.

For respondents: I don't have to disclose that I can call them to come and testify if need be, but that is for the next round.'

[22] What is significant from the above extract, in my view, is the fact that counsel for the appellants (respondents *a quo*) accepted the responsibility to call those employees as witnesses to prove that they did not give mandate to the Union to institute the action.

[23] Furthermore, the reason or ground upon which the appellants were challenging the respondents mandate to NAFINU was based on mere doubts. In addition, the appellants did not know the number of employees who allegedly did not sign the consent or mandate documents. Counsel for the respondents, correctly in my view, observed that it is difficult to see how NAFINU could be expected to address the appellants' challenge in this regard which is based on doubts or for that matter how the arbitrator could be expected to make a finding based on mere doubts rather than evidence. If one have regard to how the ground of appeal has been framed, read in the context of the extract from the record of the proceedings (quoted above), it is clear that the ground of appeal has been framed in such a way as to shift the blame from the appellants to the arbitrator. The ground of appeal gives the impression that the arbitrator declined to accept the document with information about the respondents who allegedly did not sign the consent or mandate document. However, upon reading the extract from the record, it is clear that it was the responsibility of the appellants to produce the evidence before the arbitrator. Indeed, the legal practitioner for the appellants accepted the responsibility to call such employees as witnesses and in fact undertook to do so at 'the next round'. As it will appear later in this judgment, the respondent had submitted a document signed by all of the appellants giving NAFINU the mandate to represent them.

[24] This issue was touched upon when dealing with the previous question. It is to be noted that the arbitrator took the view, correctly in my view, that it was incumbent upon the appellants to prove whom of the 92 respondents had not given the proper mandate for the institution of the proceedings, and that the appellants failed to do so. In the course of analysing the evidence, the arbitrator said the following at paragraph 10 of the Ruling of 26 April 2016:

'In this case the referral document states that the Applicant is 'Sem Shipefi & Others'. The Other applicant per list attached to the referral document are in fact 92 Appellants who affixed their signatures on a list authorizing NAFINU to represent them in the Conciliation and Arbitration proceedings in this matter.'

Furthermore at paragraph 22 of the Ruling the arbitrator said the following:

'Insofar as the respondents take the point in limiting that the referral documents when not properly authorized for the reason that some of the cited appellants on the Referral Form declined to partake in the proceedings, alternatively never gave any mandate to NAFINU to institute action on their behalf, I must mention that no such evidence has been placed before me notwithstanding the fact that the respondents had mentioned this aspect in their previous preliminary points and the Application for legal representation.'

[25] It appears to be common cause that the respondents were 92 in total. From the statement by the arbitrator above, it appears that all 92 respondents signed the document authorizing NAFINU to represent them. The appellants appeared to be unable to say how many respondents should have signed the referral document given their contention, based on mere doubts, that not all retrenched employees had signed the referral document and the list giving NAFINU the mandate to represent them.

[26] In the circumstances the appellants' question whether the arbitrator failed to take into consideration the issue that some of the respondents did not give a mandate to the institution of the action must be answered in the negative. The arbitrator considered the issue and concluded that it was for the appellants to place evidence before him, to prove who of the respondents did not give a mandate to NAFINU to institute the action. Furthermore, as a matter of fact, as pointed out earlier in this judgment, the appellants had accepted that it was their responsibility to

produce such evidence by calling the employees who were allegedly listed as respondents but did not sign the referral document mandating NAFINU to represent them. For the foregoing reasons, the legal question must be answered in the affirmative, namely that the arbitrator did indeed consider the issue of mandate, and found that, on the information before him, a mandate had been given to NAFINU by the respondents.

Question 2.1.3

[27] The next question to be considered is whether the arbitrator failed to take into consideration that the list of signatures attached to the referral document did not comply with the provisions of Rule 5(3).

[28] In bolstering the weight of this question counsel for the appellants submits that the lists attached to the referral document are not in full compliance with Rule 5(3) since most of the names only give the physical address of a town, some indicate an erf number, none of them indicate a postal address, email address, fax number or even a telephone number. Counsel further submits that there is no proof that the lists actually relate to the institution or the authority to institute the action. Furthermore, Counsel contends that there is no proof that those stated as 'the former employees' are indeed the names that appear on the list and that those names are members of NAFINU. Counsel further points out that NAFINU was indicated as the applicant in the Form LC 21 whereas the dispute that was lodged indicates the Applicant as Sem Shipefi & 92 Others.

[29] It is the respondents' case that the arbitrator was correct when he found that the dispute had been properly referred to the Labour Commissioner, and that, in terms of the provisions of the Act, the Union officials are authorized to automatically represent employees at Conciliation and Arbitration proceedings.

[30] Rule 5 of the rules relating to the Conduct of Conciliation and Arbitration reads as follows:

'Rule 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 the Act or these rules to represent that party in the proceedings.
- (2) If proceedings are jointly instituted or opposed by more than one employee, the employees may mandate one of their number to sign documents on their behalf.
- (3) A statement authorizing the employee referred to in subrule (2) to sign documents must be signed by each employee and attached to the referral document or opposition, together with a legible list of their full names and addresses.'

[31] The arbitrator in his Ruling of 26 April 2016 at paragraph 26 found that reading Rule (5) and Rule 14 together with section 86(12) leads to the conclusion that *ex facie* the Form LC 21, in the proceedings before him, were properly signed pursuant to the aforementioned Rules by the respondents' representative. The arbitrator, correctly in my view, reasoned that Rule 14 on its own, stipulates that the party must sign the form. However, Rule 14 provides that the form must be signed in accordance with Rule 5. The arbitrator further reasoned that this means that the form must be signed either by the party or by the Union representative who is entitled to represent a party at the proceedings, and furthermore that section 86(12) makes it clear that only a Union representative has an automatic right to represent a party to a dispute.

[32] The foregoing exposition appears to have been accepted by counsel for the appellants who stated in his heads of argument that a Union is by law entitled to sign a referral document and to represent its members. I agree with counsel for the respondents that, in view of the fact that the respondents are represented by the Union, all services of processes and communication have to be effected or conducted through the Union's office as the representative of the respondents. On the other hand, failure to provide information such as erf numbers or fax and email might just be a true reflection of the real situation prevailing in some parts of our country such as communal rural areas where there are no erf numbers or telephone

lines. In any event, even accepting for the sake of the argument that such information has not been provided as stipulated by the rules, the appellants do not indicate what prejudice, if any, they may suffer as a result of the absence of such information. Counsel for the respondents submits, correctly in view, that even if it were to be found that the referral document is defective for non-compliance with Rule 5(3), such non-compliance would not render the referral document a nullity for the same reason that non-compliance with Rules 5(1) and (2) do not render the referral, subsequent proceedings and ensuing award, a nullity. This submission finds support in the judgments of *Purity Manganese* and *Simana*, to which reference will be made later in this judgment.

[33] Regarding the appellants' complaint that there is no proof that the lists relate to the institution of the action or the giving of authority to NAFINU to institute the action, it would appear to me that this is a matter for evidence. The documents must be accepted for what they profess to be. Its veracity and how it correlates to each other will be established at the hearing through witnesses and cross-examination of such witnesses. This also applies to the appellants' complaint that there is no proof that the respondents are indeed 'former employees' nor that they are members of NAFINU. Proof of the veracity of the information contained in those documents will and can only be verified at the oral hearing of the matter. The appellants' complaints are thus misplaced, and are therefore rejected for lack of merit. In any event, one would reasonably expect the appellants, as former employers of the respondents, to have records of the respondents, including membership in NAFINU. After all the appellants had a recognition agreement with NAFINU by which NAFINU was recognized as representative of the appellants' employees in the bargaining unit.

Question 2.1.4

[34] The next question of law posed by the appellants is whether the arbitrator failed to properly take into consideration that the appellants had already indicated at the conciliation proceedings that they intended to take the point of authority or mandate to institute proceedings, but that the proper time to raise such point would be at the commencement of the arbitration proceedings. As with other questions, the question is rephrased into a ground of appeal, namely that the arbitrator failed to properly take into consideration that the issue of authority or mandate was already

indicated at the conciliation proceedings, but that the proper time to raise such point would be at the commencement of the arbitration proceedings. In this connection Counsel points out that arbitration proceedings are formal, whereas conciliation proceedings are informal and not on record. In conciliation proceedings, the presiding officer is only a conciliator and as such cannot act in the function as he did herein, as an arbitrator in making an appropriate ruling.

[35] The issue for decision here is at what stage of the proceedings a party should raise the issue of defective referral. As noted in the preceding paragraph, appellants submit that the defect should be raised at the commencement of arbitration proceedings, which are formal, whereas conciliation proceedings are informal. Counsel for the respondents, on the other hand, submits that defective referral should be raised prior to participation in the proceedings.

[36] Counsel for the respondents supports the arbitrator's dismissal of the appellants point *in limine* when he held that the appellants had participated in the conciliation proceedings without raising objection of defective referral. In doing so, the arbitrator relied on a number judgments of this court starting off with *Purity Manganese v Katjivena*¹.

[37] In the *Purity Manganese* matter, the applicant and the third respondent had participated in the conciliation proceedings. The third respondent had failed to sign the referral form, but the applicant did not take a point during the conciliation proceedings that the referral form had not been signed. After the conciliation had failed and the arbitration proceeding had commenced, the applicant raised the point of defective referral. This is exactly what happened *in casu*. In that matter, the court held that once parties have participated in the proceedings that 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 defective referral because the question of authority would then not arise. The arbitrator also referred to the matter of *Auto Exec CC v Johan van Wyk*². In that matter, the applicant applied to review and set aside the award on the ground that the referral form (LC 21) had not been signed by the referring party. The court followed the *Purity Manganese* judgment holding that the

¹ (LC 86/2012) [2014] NALCDM 10 (26).

² (LC 150/2013) [2014] NALCMD 16 (16 April 2014).

rule giver had not intended that proceedings would result in nullity where the referral form had not been signed and where the parties had participated in the proceedings. The participation amounted to a ratification of the unsigned referral form. Finally, the arbitrator also referred to the matter of *Katjotjo v Ministry of Home Affairs*³. In that matter the respondent took the point that the referral form LC 21 had not been signed by the appellants herself but had been signed by a Union representative. As a result, there was no referral because the dispute had not been properly referred resulting in nullity. The court held that the Union representative was entitled to sign the referral form on behalf of the appellants. Referring to the respondents' approach to the matter, the court remarked at paragraph 33 of the judgment as follows: '*Conciliation proceedings were also proceeded with. Respondents had ample opportunity to raise this point at the outset, and if am wrong in my interpretation of the Rules and the Act on this point, I find that the respondents' participation in the earlier proceedings vitiated any irregularity, following the reasoning in Purity Manganese.*' The court accordingly held that any non-compliance would not have vitiated the proceedings in the circumstances of that case.

[38] In the face of the authorities cited above the appellants persist in their stance that the appropriate stage to raise the point *in limine* regarding defective referral was at the arbitration stage and not earlier at the conciliation stage. Counsel for the appellants points out that what happened in this matter is distinguishable from what had happened in the matter of *Methealth Namibia Administrators (Pty) Ltd vs Matuzee*⁴. In that matter, the point *in limine* relating to the respondents failure to have signed the referral form or to attach statements as contemplated by Rule 5(3) was not raised at the conciliation proceedings but was only raised at the arbitration proceedings after the evidence had already been led. By contrast, in the present matter, the applicant had 'indicated' during the conciliation proceedings that the point would be raised at the commencement of the arbitration proceedings and it was indeed so raised. Counsel further points out that both in the matters of *Waterberg Wilderness Lodge v Uses and Others*⁵ and *Agribank v Simana & Another*⁶, the point was raised on appeal and not during the preceding proceedings and was upheld.

³ (LCA 14-2015) [2016] NALCMD 1 (18 January 2016).

⁴ (LCA 22/2014) [2015] NALCMD 5 (18 March 2015).

⁵ (LCA 16/2011) [2011] NAHC 322 (20 October 2011).

⁶ (SA 17-2014) NASC 915 (July 2016).

[39] First of all my reading of the *Agribank (supra)* matter does not show that the point was upheld by the Supreme Court. The court held at para 21 of the judgment that the point taken by *Agribank (supra)* was bad and should have been disallowed by the court *a quo*. Earlier in the course of the judgment at paragraph 18, the court observed that there was no issue raised in *AgriBank* either before or during the arbitration about the non-compliance with Rule 5(1). The court further held that the arbitrator had assumed jurisdiction, heard the parties and determined the matter, and that even if one accepts that there was non-compliance, there clearly was no prejudice suffered by *AgriBank*. Moreover, the court noted that that the issue would only arise if the rule maker intended non-compliance to be visited with nullity, thus confirming the court's ruling in the *Auto Exec CC* matter.

[40] In respect of the matter of *Waterberg Wilderness Lodge (supra)*, counsel is correct that the point that the referral of the dispute was not properly referred and consequently the proceedings and the award were a nullity was raised for the first time on appeal and was upheld. It is to be noted, however, that even though the *Waterberg Wilderness Lodge* judgement was referred to in the matter of *Purity Manganese*, it would appear the court chose not to follow it. The Supreme Court in the matter of *Simana (supra)* referred to both the *Waterberg Wilderness Lodge* and the *Springbok Patrols* matters, which are authority for the proposition that non-compliance with Rules 5(2) and (3) would result in a referral being a nullity and setting aside of the award. The Supreme Court endorsed the Labour Court conclusion in *Auto Exec CC (supra)* that in respect of Rule 5(1) it was not the rule maker's intention that non-compliance would be visited with nullity. In light of that conclusion the Supreme Court found it unnecessary to consider the effect of non-compliance with Rules 5(2) and (3).

[41] Between the two conflicting views, I prefer to follow the judgments in the matters of *Purity Manganese*, *Methealth*, *Katjotjo* and *Auto Exec CC*. I do not do so merely because of preference but because of the convincing reason expounded by Smuts J (as he was then) in the matter of *Purity Manganese*, namely that once a party had participated in the proceedings without objection at the conciliation stage, it will not be open to such party to take the point at a later stage.

[42] The answer to the legal question posed by the appellants as to whether the arbitrator was correct in taking the view that since the appellants had indicated at the conciliation stage of the proceedings that they intended to raise the point of lack of mandate at the arbitration stage that it was not permissible for the appellants to attempt to raise the point at the arbitration stage of the proceedings because they failed to raise the point and the Conciliation stage of the proceedings. The conclusion I have reached is that the arbitrator was correct. It was not enough for the appellants to have merely 'indicated' that they intended to raise the point *in limine*. The appellants ought to have raised the point there and then at the Conciliation stage of the proceedings. Failure to do so would result in the inference that the appellants had ratified the alleged defect attendant the referral document. It follows from the foregoing that this ground of appeal fails.

Question 2.1.5

[43] The last and final question of law posed by the appellants is whether the arbitrator failed and/or misdirected himself by dismissing the point *in limine*, whereas on a proper interpretation of the dispute as lodged, and Rule 5 of the Rules relating to the conduct of conciliation and arbitration, he should have upheld the point *in limine*. In my view, this question has already been answered, but for the sake of completeness I will briefly deal with it and try to provide an answer thereto.

[44] As will become apparent, the argument advanced by counsel in support of this ground that the arbitrator failed to properly appreciate the legal position in dismissing the point *in limine* does not relate or speak to this point but relates rather to the issue of proof: either absence of proof or adequacy of proof.

[45] Counsel submits that NAFINU failed to prove that the respondents in this matter are indeed its members, and that it failed to prove that the members have authorized it to institute the action. Counsel submits further in this context that the facts in this matter are analogous to the facts in the *Waterberg Wilderness Lodge* matter (*supra*). In that matter, the court found that, except for Ms Uses who had signed the referral documents, the rest of the respondents had not signed the referral document. In this matter, so the argument continues, there is no statement

indicating authorization that either Sem Shipefi (the first respondent) or NAFINU's officer bearer was authorized to sign the referral document.

[46] In his Ruling on 26 April 2016 the arbitrator dealt and analysed the information before him at paragraphs 7 and 8 as follows:

'The referral document as submitted by the Appellants an on record states as follows:' 'We the former employees of Fides Bank Namibia herewith give authorization to NAFINU to represent us during the conciliation/arbitration proceedings. THANK YOU'.

[8] This is then followed by a list of names of the Appellants and signature per referral document list (i), (ii), (iii) and (iv). On the face of it all the Appellants affixed their signatures to the list of Appellants so attached to the referral document.'

[47] The arbitrator thus found that the respondents had authorized NAFINU to represent them. In my view, this is a finding of fact and not of law. This court can only interfere in a finding of fact if such a finding is one which no arbitrator could reasonably have made in that such finding is vitiated by lack of reasons tantamount to no finding at all⁷. This court cannot say that the finding of the arbitrator in the present matter is of such a nature. In my view, the arbitrator's ruling was based upon proper and indeed unassailable reasoning.

[48] The next complaint by the appellants is that NAFINU had failed to prove that the respondents are its members.

[49] In his Ruling of 29 April 2015 following an application for discovery by the appellants, the arbitrator ordered the respondents to make discovery of the certain documents *inter alia* (ii) *proof of membership of each Applicant of the Union* (iii) *proof of paid up membership of each Applicant of the Union*. The arbitrator further ordered that such documents must be produced within a reasonable time. It is not clear from the record whether or when those documents were produced. In my view, and as a matter of procedure, the documents have not yet been admitted into evidence. It could only have been produced at the trial stage when submitted into evidence either by agreement or through witnesses. The proceedings had not reached that stage at the time the point *in limine* which forms the subject matter of this appeal was raised

⁷ See *Visagie v Namibia Development Corporation* 1999 NR 219 at 224.

and dismissed. This approach to resolution of labour disputes is to be discouraged. Counsel for the respondents referred to the judgment in the matter of *NAFINU v Nedbank Namibia Limited*⁸ where the Supreme Court by the mouth of Smuts J analysed the scheme of the Labour Act and concluded that the statutory intention behind the arbitration of dispute is to determine all labour disputes with due speed. The arbitrator in his ruling remarked, correctly in my view that the appellants decided to raise the points in limine ‘*in instalments*’. This is should not allowed. The hearing on merits has not yet commenced almost two years and half after the claim was lodged. Such approach would only result in peace-meal litigations of labour disputes, and thus hamper the speedy resolution of labour disputes before the Labour Commissioner.

[50] The fact that some of the respondents might not be members of NAFINU would not operate as a bar to NAFINU representing such respondents. Section 64(14) of the Act provides that a trade union which has been recognized as an exclusive bargain agent in respect of the bargaining unit in question, has a duty to represent, for the purpose of sub-section (1), the interest of every employee falling in that bargaining unit, whether or not the employees are members of that trade union. The appellants’ argument appears to have lost sight of the legal position that once a Union has been recognized by an employer as a representative for its employees, it has a right to represent all the employees in that bargaining unit. The Union cannot only represent those employees in the bargaining unit who are its registered members⁹.

[51] In my view the provisions of section 64(14) read with sections 86(12) and rules 5 and 14 completely destroy the appellants’ argument in this regard.

[52] It was common cause that NAFINU is the recognized trade union at Fides Bank at the time of the alleged dismissal of the respondents and therefore NAFINU has the right to represent all the employees in the bargaining unit. It follows, in my view, that even if it were to be found that some of the respondents were not registered members of NAFINU, they would be entitled to be represented by NAFINU by the mere fact that NAFINU is the recognized Union for the bargaining

⁸ See *Namibia Financial Institutions Union (NAFINU) v Nedbank Namibia Ltd & Another* (SA 26/2015) [2015] NASC 18 (23 March 2016).

⁹ See *Pep Stores Namibia (Pty) Ltd v Iyambo* 2001 NR 211 at page 215 A-B and page 221 A-B.

unit to which the respondents belong. In my view, having recognized NAFINU as representative of its employees in that bargaining unit, it is impermissible for the appellants to raise this point. The point is accordingly rejected as bad in law. In any event even if I am not correct in this finding, I have already found that the arbitrator was correct in his finding that on the information before him, the respondents had mandated NAFINU in writing to represent them.

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

- (a) The appeal is dismissed. The matter is referred back to the arbitrator to finalise the arbitration proceedings.
- (b) There is no order as to costs.

H Angula
Deputy-Judge President

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