REPUBLIC OF NAMIBIA

REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 36/2013

In the matter between:

ALEX KAMWI **APPLICANT**

and

NAMIBIA NATIONAL VETERANS ASSOCIATION **RESPONDENT**

Neutral citation: Kamwi v Namibia National Veterans Association (LCA 36/2013) [2013] NALCMD 46 (20 December 2013)

Coram: SMUTS, J

Heard: 1 November 2013

Delivered: 20 December 2013

Flynote: Appeal against arbitrator's award that the appellant was not an employee of the respondent. Notice of appeal not raising a point of law and appeal dismissed for this reason. The court also finding that, despite the arbitrator misconstruing the incidence of onus and the impact of s128A of Act 11 of 2007 upon the enquiry, the appellant did not establish a sufficient factual basis to bring the presumption of employment in s128A into operation.

ORDER

The appeal is dismissed.

JUDGMENT

SMUTS, J

[1] At issue in this appeal from an arbitrator's award under the Labour Act 11 of 2007 (the Act) is the arbitrator's ruling that the appellant was not an employee of the respondent.

[2] The respondent, the Namibia National Veterans Association (the association) is a voluntary association. It is established under its constitution as a juristic person and a welfare organisation. One of its main objects is to advance the interests of its members in various manners. Membership of the respondent is open to persons who are veterans of the liberation forces who are resident in Namibia.

[3] The applicant became a member of the respondent and served on its interim committee as Vice-President. He was in that capacity tasked to set up structures for the association from 2010 until he was suspended from that position and in his membership of the association on 12 July 2012 on a charge of misconduct alleging that he brought the association's name into disrepute. The suspension was indefinite, pending the investigation of the allegations against him. He disputed his suspension.

Referral of the dispute

[4] On 25 October 2012 the appellant, through his legal representative, referred that dispute for conciliation or arbitration. He indicated on the form that his suspension amounted to comprised an unfair labour practice and a dispute of interest but in a summary attached to the referral, set out the nature of the dispute. In the summary, the appellant through his legal representative, challenges his suspension without pay as being procedurally unfair and amounting to unfair labour practice for the following reasons:

> 'He was not afforded an opportunity to make representation why he should or should not be suspended;
>
> He was not afforded an opportunity to make representation before the decision to suspend him without pay was made;
>
> *Audi alteram partem* rule was not given an opportunity to state his case;
>
> By suspending the applicant without pay he is being punished before any disciplinary enquiry was held to prove his guilt;
>
> Suspending the applicant without pay amounts to breach of the contract of employment concluded between the parties by the by the employer. The employer has a duty to pay the employee his salary. Therefore whatever reason the employer may have for suspending an employee, it does not relieve the employer of its contractual duty to pay the employee.
>
> The suspension without pay of the applicant was not done on accordance with the employer's disciplinary code as the code does not make provision for suspension of employees without pay.' (sic)

[5] In the appellant's short statement of relief claimed by him, he claimed the following:

> '1. to be afforded an opportunity to make representation;
> 2. that his suspension without payment be lifted or cancelled as it amounted to a breach of his contract of employment;
> 3. in the alternative and if it were to be found that his suspension was fair, that it should be with pay.'

[6] The complaint was served upon the respondent on 30 October 2012.

<u>The proceedings before the arbitrator</u>

[7] According to the record filed, the dispute was referred to a conciliation meeting and arbitration hearing before the Labour Commissioner, sitting as an arbitrator on 22 February 2013.

[8] A transcript of the oral proceedings does not form part of the record. It is apparent from the arbitrator's ruling that the respondent raised a preliminary point that the appellant was not an employee as contemplated by the Act and disputed that the arbitrator had jurisdiction to hear the dispute.

[9] According to the arbitrator's award, he then requested the parties, who were both legally represented, to address him on the preliminary point in writing whereupon he would make a ruling. When this appeal was argued, I enquired from Mr Bugan, who represented the appellant at those proceedings (as well as in this appeal), whether this procedure was by agreement between the parties and why no evidence had been led or agreed facts put before the arbitrator. He responded by stating that both parties had agreed to this procedure – to provide written representations for a ruling by the arbitrator.

[10] The parties then proceeded to file written heads of argument to the arbitrator pursuant to this arrangement. The appellant's submissions were not confined to legal argument but also included four annexures attached to the submissions. These constituted the sole factual matter before the arbitrator.

[11] The appellant's submissions included reference to the four annexures and certain statements for which no evidential material was supplied, such as a statement that the appellant 'concluded a contract of employment with the association for a period of 5 years.' This statement would however appear to have been made with reference to an unexplained handwritten inscription upon annexure "A" to the submissions.

[12] Annexures "A", "B" and "C" were all short letters on the association's letterhead, all addressed to no-one in particular but 'to whom it may concern.'

[13] Annexure A is dated 14 October 2011 on the association's letterhead. Its text below the heading 'To whom it may concern', comprises a single sentence:

> 'I am hereby confirming that Mr Alex Kamwi is working with the Namibia National Liberation Veterans Associations, a welfare organisation, getting monthly earning/allowance of N$15 000.'

The author purports to be Lt Gen Roanga Andima, President (of the association). But the letter is signed 'pp' above his name. Inscribed in handwriting upon the letter was the following:

> 'Confirmed with Kefas J. Shipuata. Mr Kamwi will be serving 5 years starting this year as a director.'

This annexure thus does not establish a 5 year 'contract of employment.' There was also no allegation in the appellant's referral that he was a 'director' of the association. This unexplained inscription, in the absence of evidence, has little evidential value.

[14] Annexure "B" is dated 7 December 2011. It likewise has a heading 'To Whom it may concern.' It is slightly longer then annexure "A" and states:

> 'This is to certify that Mr. Alex Mabuku Kamwi is a Vice President – Administration, for Namibia National Liberation Veterans Association as of 1st September 2010. He earns N$15 000 per month. The association has not as yet designed pay-slips therefore accept our apology in this regard.'

It is also signed 'pp' on behalf of Lt. Gen Andima as President. Below his designation is 'cc Treasurer'.

[15] Annexure "C" is dated 27 April 2011. It has the same heading. But, unlike annexures "A" and "B" includes 'Dear Sir/Madam 'and has a further heading 'Re: confirmation of Alex Kamwi Allowance/Salary.' Its text is as follows over the signature of a certain A. D. Ngeama, Deputy Treasurer.

> 'This is to confirm that Alex Kamwi has received a allowance/salary from the association on 20 April 2011 by way of a cheque given to him to cash it himself and deposit it into his bank account as we have not as yet developed pay slips for all our staff members neither have we developed a system of the association paying salaries directly into its staff members' accounts,'(sic)

[16] Annexure "D" is the suspension letter addressed to the appellant in the

following terms:

> 'Re suspension notice; The Namibia National Liberation Veterans Association // Alex Mabuku (Poison) Kamwi
>
> The above matter refers respectively.
> This serves to inform you that you have been suspended as member, and Vice-President of the Namibia National Liberation Veterans Association with immediate effect, effective on the 12th July 2012 in accordance with article 18 of the Association's Constitution.
>
> The reason for your suspension is that the Association is investigating a charge of misconduct against you in that you brought the Association's Good name in disrepute. Note that more charge may later be brought against you once the investigations are completed.
>
> Note further that:
>
> - You are suspended without any payment and/or salary.
> - You are suspended from all the activities of the Association which may be direct or indirect involved.
> - Your suspension is indefinitely until Annual General Conference deliberate and make a decision in accordance with Article 18(4) of the Association's Constitution.
> - You are required to hand in all keys or any Association's property in your possession on the effective date of your suspension, which items must be handed over to the Association's Secretary-General.
> - You are not allowed to enter or visit any of the Association's premises (including Regional Offices) during the period of you suspension.'

[17] It is apparent from the appeal record that the respondent's constitution was also provided by the parties to the arbitrator and served before him in making his award.

[18] That was the extent of evidential matter which served before the arbitrator. As I have already pointed out, there was no oral evidence led to shed

further light on the nature of the relationship, the nature of services which the appellant performed for the association, his hours of work, the degree of control exercised over him (save for the letter of suspension) and the purpose and context of the letters (annexures A, B, and C). Nor was any given concerning the context in which annexures 'A', 'B' and 'C' were provided and the inscription on annexure 'A'.

[19] The appellant's case before the arbitrator and on appeal was that he was an employee with reference to the 3 letters and the letter of suspension. Reliance was placed upon the reference to him as 'a staff member' and the reference to payment of 'salaries' and the term 'pay-slips' in annexures "C" and "B" and the reference to a salary in annexure "D".

[20] The respondent however contended that it is an association established by its constitution and that the appellant was a member who received an allowance and not an employee as contemplated by the Act. The submission was also advanced that the appellant was an independent contractor and that the arbitrator had no jurisdiction to hear the dispute because he was not an employee.

The arbitrator's award

[21] The arbitrator referred to the contentions by the two opposing parties, the arbitrator referred to the association's constitution and particularly article 12 which established the management committee comprising members and not employees. The arbitrator also referred to the functions of Vice-President set out in the association's constitution. He proceeded to refer to s128A of the Act[1] and stated:

> 'Given that legal position taken into account with the parties submissions, I found the following to be lacking in the favour of the applicant;-
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> a) That he was subject to the control or direction of the respondent (e.g. in the absence of proof of attendance register, leave

[1] Inserted by Act 20 of 2012.

application forms, proof of PAYE deductions, social security deductions, instructions of how to do what and when,

b) That the applicant was solely working for or rendering services to the respondent. It was submitted that he was working **with** and **not for** the respondent, and

c) It was not explained as to what tools of trade or work equipment the respondent provided to the applicant that enabled him to render services apart from the office space and furniture.'

[22] After referring to *Engelbrecht and Others v Hennes*[2] as being 'probably the most authoritative', the arbitrator further stated:

> 'When I took all the features of this relationship into account to determine the dominant impression, I found that the scale was moderately tipping more in the favour of the respondent probably because the respondent was in its formative stage as the applicant admitted on the bottom of page 4 of his Heads of Arguments. This persuaded me to arrive at a conclusion that there was no clear cut position on employer/employee relationship. It appeared to me that whatever services the applicant might have rendered to the respondent was a voluntary contribution in comradely style rather than in an employer/employee relationship construction.' (sic)

[23] The arbitrator finally concluded:

> 'It is just fair and appropriate for me to take the approach which was taken by the Court in *Engelbrecht* case to state that in cases of this nature and under the prevailing circumstance the applicant bears the heavier onus to proof to the contrary that he was indeed an employee. In this present case that onus **has not**, on the balance of probabilities, **been discharged** by the applicant.' (Emphasis supplied by the arbitrator)

[24] The arbitrator thus ruled that he did not have jurisdiction to adjudicate the dispute.

The appeal

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[2] 2007 (1) NR 236 (LC).

[25] The appellant appealed against this ruling. The notice of appeal states that the question of law appealed against is 'whether the arbitrator was correct in finding that the appellant was not an employee of the respondent but in fact an independent contractor.' in. The first 2 grounds enumerated in the notice of appeal merely refer to the finding and do not contain grounds. The grounds raised in the notice of appeal are:

'1. The arbitrator erred in finding that the appellant is not an employee as defined in the Labour Act 11 of 2007 of the respondent;
2. The arbitrator finding that the Labour Commissioner has no jurisdiction to hear this matter;
3. The arbitrator failed to take in consideration that the appellant was subject to the supervision and control of the respondent.
4. The arbitrator erred in finding that the appellant was not employed by the respondent;
5. The arbitrator failed to take into consideration the various letters by the respondent indicating clearly that the appellant is an employee of the respondent with a salary of N$15 000 per month;
6. The arbitrator failed to take into consideration the fact that the above letters clearly indicated that payslips, Social Security, PAYE, etc are in the process of being finalised and this indicating an employer – employee relationship;
7. The appellant's hours of work are subject to the control or direction of the respondent;
8. The appellant's work forms an integral part of the organisation;
9. The appellant has worked for the respondent for an average of 20 hours per month over the past three months;
10. The appellant is economically dependent on the respondent;
11. The appellant is provided with tools of trade or work equipment by the respondent;
12. The appellant only works for or renders services to the respondent.'

(These grounds were not numbered in the notice. I have done so to facilitate reference to them.)

The parties' submissions

[26] On appeal, Mr Bugan reiterated much of his argument which served before the arbitrator. He relied heavily upon the 'dominant impression' test

followed by the then South African Labour Appeal Court[3] and further explained by Grogan in his work *Workplace Law*.[4] He also relied upon what was stated by this court[5] in approving the following quotation from Wallis *Labour and Employment Law*:

> 'A contract of employment must disclose the following features. A natural person must have agreed to render services to another in return for a fixed or determinable remuneration. In terms of agreement the employee must to some extent be subject to the control and direction of the employers. Such control need not extend to a right to direct in detail the manner in which the employee performs his or her duties, provided the employee has the right to give directions in relation to at least some aspects of the performance of these duties. In any disputed case the greater aspects of the performance of these duties. In any disputed case the greater the degree of control that is present the more likely that the contract is one of employment. Notwithstanding the importance of the question of control it is always necessary to examine every feature of the relationship in order to determine whether the contract is one of employment. Invariably in such a situation of the contract will have features of both a contract of employment and some other type of contract and in those circumstances it is the dominant impression of the contract having withed all its characteristics which determines in which category it will be placed.'

[27] Mr Bugan appeared to approach the issue on the basis that the enquiry was whether the appellant was an employee or an independent contractor, (as set out in the formulation of the question of law contended for in the notice of appeal) instead of the enquiry posited by the preliminary point – whether the appellant was an employee for the purpose of the protective scheme provided by the Act. It was not particularly instructive to argue, albeit indirectly, that, by excluding the possibility of an independent contractor, that the appellant had established that he was an employee. But this misconception was also evident in the approach of Mr Ntinda who represented the respondent. He submitted that the appellant was not an employee and curiously asserted that he was an

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[3] *SABC v McKenzie* (1999) 20 ILJ 585 (LAC).

[4] (9th ed) at 19.

[5] In *Engelbrecht and Others v Hennes* 2007 (1) NR 236 (LC).

independent contractor as if only these two possibilities could conceptually and in reality exist.

[28] Mr Bugan further referred to the provisions of s128A of the Act and submitted that it placed the onus upon the association to prove that the appellant was not an employee but an independent contractor. He submitted that the arbitrator had erred and misdirected himself by finding that the appellant 'bears the heavier onus to proof (sic) to the contrary that he was indeed an employee' and in finding that 'that onus has not on a balance of probabilities been discharged by the (appellant).'

[29] But this issue was not raised in the notice of appeal. An appellant is confined to the question of law and the grounds raised in the notice of appeal.

[30] Mr Ntinda for the association submitted that the appellant had not discharged his burden to establish an employment relationship. He in turn relied heavily upon *Paxton v Namib Rand Desert Trails (Pty) Ltd*[6] where the court held that, in the absence of a written or oral employment agreement between the parties 'where there is not even a tacit agreement of employment, the circumstances justifying an inference that there was in fact an employment relationship must be exceptional.'[7] Mr Ntinda argued that the appellant, by not establishing a written or oral employment agreement, had not placed facts before the arbitrator to necessitate a finding that the appellant was employed by the association. He also contended with reference to *Engelbrecht and Others v Hennes*[8] that the exercise of control is no longer the determining factor but one of the factors to be considered.

[31] Mr Ntinda also referred to the fact that the appellant had not shown that employee deductions (PAYE) were effected to the appellant's payments as is

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[6] 1996 NR 109 (LC) at p114-5.

[7] Supra at 114-115.

[8] Supra at 2.

required by the Income Tax Act[9] or that the appellant was registered for Social Security, as is also required by the Social Security Act.[10] He pointed out that the appellant received an allowance – and not a salary – for his role as a member of the Association's management committee – which was then in its infancy.

[32] Mr Ntinda also referred to the *Paxton* matter[11], followed by Frank, AJ in the *Engelbrecht* matter[12] to the effect:

> 'It must be borne in mind that an applicant bears the onus of proving on a balance of probabilities that he/she is an employee of the respondent.'[13]

[33] Mr Ntinda referred to the association's constitution which was placed before the arbitrator. He referred to the power of the management committee to suspend one of its members or a member of the association on grounds of misconduct. He submitted that the appellant's remedy was to challenge his suspension by way of common law review. Mr Ntinda contended the facts before the arbitrator, construed as a whole, did not indicate an employment relationship and that he was rather an independent contractor.

Question of law and the notice of appeal

[34] The issue as to whether a person has on the facts established whether he or she is an employee or not as raised by the appellant would in my view not amount to a question of law alone. That finding would in my view ordinarily entail a question of fact as this court found in *Swats v Tube-O-Flex (Pty) Ltd and Another*[14] That matter is currently on appeal.

[35] The grounds raised in the notice of appeal with reference to the question of law raised, with the exception of the first two and the fourth which in essence

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[9] Act 24 of 1981.

[10] Act 33 of 1993.

[11] Supra at 110E-F.

[12] Supra at 237.

[13] Supra at

[14] (LCA 51/2012) [2013] NALCMD 8 (27 March 2013).

paraphrase the finding, and do not contain grounds raising a question of law but, all entail factual questions. There is little or no evidential basis for several of the grounds raised, such as those I have numbered 7, 8, 9, 10, 11, and 12. These were no doubt inserted because of the provisions of s128A of the Act which was inexplicably not even referred to in the appellant's submissions before the arbitrator. The other grounds, namely numbers 3, 5 and 6 essentially raise findings of the fact relating to control (upon which there was no evidence except for the letter of suspension) and that the appellant was an employee with a 'salary' of N$15 000 (which was not unequivocally established by the annexures) and that 'payslip, social security and PAYE etc are in the process of being finalised.' This last ground is also not established by the facts at all. There are only references to 'pay slips' which may have been used for the purpose of proof of an income supported by those letters, as I point out below. There was no reference whatever to Social Security deductions or PAYE. As I also point out below, the obligation to provide for these deductions applies with immediate effect by operation of law.

[36] The question of law referred to with reliance upon the grounds raised in the notice of appeal in my view thus does not constitute a question of law alone as contemplated by s89(1)(a). At best for the appellant, the question as to whether the finding that the appellant was an employee may be one of mixed fact and law, as is referred to in s89(1)(b) (in respect of disputes referred to the Labour Commissioner under s7(1)(a) of the Act). Those disputes concern fundamental rights and protections as set out in Chapter 2 of the Act. It is understandable that the legislature would prefer not to restrict the ambit of appeals on such fundamental issues to questions of law only as opposed disputes defined in s84 where such a restriction applies. Given the formulation of s89(1), it is clear that the legislature intended to confine appeals in respect of disputes under s84 to questions of law alone and exclude those of mixed fact and law, given the differentiation made and the unequivocal use of the language employed in s89.

[37] This dispute, as is clear from both the referral and its nature is one contemplated by s84 and in respect of which appeals against awards are

restricted to questions of law only – as is acknowledged in the notice of appeal where the attempt was made to couch the question raised by this appeal as one of law.

[38] Although this point was not taken by Mr Ntinda for the respondent, this court would not have jurisdiction to hear an appeal against an award if it did not constitute a question of law alone. This court would need to consider and determine this issue at the outset and, if the question raised in the appeal is not one of law alone, the appeal should be dismissed for lack of jurisdiction.

[39] The appellant's grounds did not raise the question which Mr Bugan sought to argue, namely that the arbitrator misdirected himself on the question of the onus with reference to s128A. That would constitute a question of law but as that was not raised in the notice of appeal, it is not open to the appellant to raise it in argument if it is not raised in the notice.

[40] It follows that the question raised in the notice of appeal, not being one of law alone, means that this court does not have jurisdiction to hear the appeal and that it is to be dismissed for that reason alone. I also heard argument on the merits of the appeal and on the impact of s128A upon the incidence of the onus in such enquiries. Even if I were to be incorrect in my conclusion that the question as to whether the appellant was an employee or not is not a question of law alone and is currently under appeal, I am of the view that the appeal would in any event fall to be dismissed upon an application of the test to be applied in an enquiry of the nature raised by the preliminary point.

The test

[41] Although the arbitrator referred to s128A at the outset of his analysis, it would not appear that he appreciated its impact upon the enquiry before him. Nor did counsel in my view appreciate its impact. It provides:

> '**Presumption as to who is employee**
>
> **128A** For the purposes of this Act or any other employment law, until the contrary is

proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:

(a) The manner in which the individual works is subject to the control or direction of that other person;
(b) The individual's hours of work are subject to the control or direction of that other person;
(c) In the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation;
(d) The individual has worked for that other person for an average of at least 20 hours per month over the past three months;
(e) The individual is economically dependent on that person for whom he or she works or renders services;
(f) The individual is provided with tools of trade or work equipment by that other person;
(g) The individual only works for or renders services to that other person; or
(h) Any other prescribed factor.'

[42] Whilst the *Paxton* and *Engelbrecht* matters in my view correctly reflect the state of the law prior to the enactment of s128A in 2012, those cases are now to be read in the light of s 128A. It remains correct that an applicant would need to establish an employment relationship where this is disputed. But such an applicant is considerably aided by the provisions of s128A. Mr Ntinda contended that s 128A was confined to cases involving of labour hire. But that assertion is not correct. It is clear from its wording that it has general application.

[43] Once an applicant shows on a balance of probabilities that he or she works for or renders services to a respondent and can show the presence of one or more of the factors listed in subsections (a) to (h), the presumption embodied in the section kicks in and the onus shifts to a respondent to show that the applicant is not an employee.

[44] The arbitrator was unfortunately entirely incorrect in his approach to the

question of onus by stating that the appellant 'bears the heavier onus to proof (sic) to the contrary that he was indeed an employee.' The *Engelbrecht* case relied upon for this incorrect assertion in any event does not however support that statement at all. The arbitrator's statement certainly does not reflect what was decided in that case. It not only fails to correctly reflect the state of the law prior to 2012, but the arbitrator also failed to appreciate the impact of s128A upon the incidence of the onus in matters of this nature.

[45] Even though the arbitrator failed to appreciate the incidence of the onus, the question remains as to whether the result he arrived at was wrong. An appeal is after all directed at the result in a case and not against the reasoning employed to arrive at it. In other words did the appellant establish that he worked for or rendered services to the association and one or more of the factors referred to on a balance of probabilities for the operation of the presumption of unemployment which the respondent would then need to dislodge.

[46] The difficulty facing the appellant in this regard is the paucity of evidence. This appeal is clearly confined to the record of proceedings and the correctness or otherwise of the result is to be determined upon what served before the arbitrator.[15]

[47] There were only the few letters addressed 'to whom it may concern', the letter of suspension and the association's constitution. It was open to the appellant to give oral evidence in support of his claim of employment. He was legally represented at the hearing and elected not to do so, given his representative's confirmation that the procedure was by agreement. Plainly if that were not the case and the arbitrator compelled the parties to follow such a route in the face of a request to place evidence before the arbitrator, this would give rise a ground to review the award or a ground of appeal if this were to emerge from the record.

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[15] *Benz Building Suppliers v Anna Stephanus and 40 Others* (LCA 18/2013) [2013] NALCMD 40 (19/11/2013.

[48] Was this very meagre evidence sufficient to bring about the presumption of being an employee as contemplated by s128A? In my view, it did not.

[49] Not one of the letters relied upon was addressed to the appellant in the form of a letter of appointment. They would rather appear to be intended to provide proof to a third party – such as a credit provider – of the appellant's earnings, given the way they were addressed. This despite the fact that the terms 'staff' and 'pay slips' were referred to. In the absence of any evidence as to an employment agreement and the nature of an appointment, these terms can only have a limited impact and are to be viewed within the context and purpose of the letters themselves in the absence of evidence as to their context. There was no suggestion of PAYE deductions and Social Security membership. These are both compulsory for employers, at pain of criminal sanction.

[50] The letter of suspension, when viewed within the context of the constitution is a neutral factor. The constitution makes express provision for suspension of management committee members and ordinary members for misconduct. The suspension expressly seeks to suspend the appellant as a member. The basis for the suspension (being misconduct) is specifically raised in the constitution.

[51] It is not uncommon for voluntary organizations to have their own disciplinary regimes. Members would be entitled to challenge disciplinary action by way of common law review as is evident from the line of cases reviewing disciplinary action of voluntary organisations such as those involving the *Jockey Club of South Africa*[16] and other reviews involving ecclesiastical organizations.[17]

[52] The receipt of N$15 000 per month from the respondent would not give rise to the presumption in s128A coming into play, in the absence of any

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[16] *Tuner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).

[17] *Theron v Ring van Wllington van die Sendings Kerk in South Africa* 1976 (2) SA 1 (A).

evidence of the appellant being economically dependent upon the respondent. The correspondence does not unequivocally state that it constitutes a salary. On the contrary, that term is only used in annexure 'C', and even then it is juxtaposed with the term 'allowance' with the latter being placed first. On the contrary, the use of the terms 'earning/allowance' in annexure 'A' and the fact that 'allowance' is used together with 'salary' in annexure 'C' are significant. The term 'employed and employment' are significantly not used in any of the annexures.

[53] It would seem that the purpose of referring to the monthly sum is, as I have said, for credit givers and to reflect the appellant's monthly earnings from the respondent. Those earnings could just as well be by way of stipend, allowance or honorarium paid to an office bearer of the organisation as opposed to a salary, particularly given the manner it was referred to in the correspondence. The use of the term 'pay slip' would also appear to be employed in the context of the letters to be with reference to proof of that earning rather than designating it as an employee's salary.

[54] But the real difficulty facing the appellant in this appeal is the singular absence of evidence to establish that he worked for or rendered services to the respondent and the presence of any one of the factors stipulated in s128A.

[55] It follows in my view that the appellant has not established the above in order to bring about the operation of the presumption embodied in s128A. It further follows that, although the arbitrator misconstituted the nature of the onus, the result he arrived at was not in my view incorrect on the facts before him.

[56] It thus follows that the appeal would also for these reasons fall to be dismissed. Given the provisions of s 118 of the Act, no order as to costs would arise in this appeal.

[57] The order I make is:

The appeal is dismissed.

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D SMUTS

Judge

APPEARANCES

APPELLANT:	D Bugan Instructed by PD Theron & Assoicates
RESPONDENT:	M Ntinda Instructed by Sisa Namandje & Co. Inc.