REPORTABLE (50)

ZIMBABWE OPEN UNIVERSITY
v
PERPETUAL JOY NDEKWERE

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & MAVANGIRA JA
HARARE; NOVEMBER 21, 2017 & JUNE 13, 2019

A. *K. Maguchu*, for the appellant

Z. Zhuwarara, for the respondent

GARWE JA

[1] At the conclusion of the hearing of an appeal noted to the Labour Court by the appellant, the Labour Court upheld the point in *limine* taken by the respondent that the appeal was improperly before the court as it sought to impugn findings of fact rather than law. As a consequence of that finding, the court *a quo* dismissed the appeal with costs. It is against that order that the appellant has now approached this Court seeking an order setting aside that finding and remitting the matter to the court *a quo* for a determination of the matter on the merits.

FACTUAL BACKGROUND

[2] The respondent was employed by the appellant as its finance director. Although both the arbitrator and the court *a quo* say that she was employed on fixed term contracts which were periodically renewed, the record, in fact, shows that she was employed in that capacity on a fixed three - year contract which commenced on 8 June 2009 and was set to expire on 7

June 2012. For the duration of the contract period, either party had the right, in terms of the contract, to terminate the contract upon giving six months' notice in writing of such termination.

[3] On 27 March 2012, less than three months before her contract was set to expire, the appellant's Human Resources Committee held a meeting at which all the members present (excluding the respondent who had been asked to recuse herself) recommended that her contract be renewed, subject to approval by the Council of the appellant. A special executive committee of the council met two days later and also "strongly and unanimously" recommended that the respondent's contract of employment as finance director be renewed for a further period of three years, on the same terms and conditions, subject to approval by the Minister.

[4] On 7 June 2012, the date on which her contract was set to expire, the Vice-Chancellor of the appellant, a Dr P. Kurasha, wrote to the respondent advising that the Council of the appellant had decided to appoint her in an acting capacity from 9 June 2012 "until further notice". Pursuant to that communication, the respondent continued offering her services as finance director until 27 June 2013, over a year later, when she received a letter from the chairman of the council. The letter advised that the council was now in a position to make a substantive appointment of a finance director. In the letter, the chairman gave the appellant notice of termination of her contract of employment, effective 30 September 2013. It bears mention at this stage that, as a matter of fact, the chairman of council gave her three calendar months' notice of the termination of her employment. The letter also requested that she vacates her office immediately and that she carries out a handover-takeover of assets and records with the Acting Finance Manager.

[5] Unhappy with the sudden turn of events, the respondent lodged a complaint of unfair dismissal with a labour officer. Having failed to conciliate the dispute between the parties, the Labour Officer (then) referred the matter to an arbitrator to determine whether she had been unlawfully dismissed and, if that was the case, the appropriate remedy.

[6] In proceedings before the arbitrator, the appellant disputed that the respondent could have entertained a legitimate expectation of her contract being renewed. It argued that the respondent could not rely on a mere recommendation of a committee of the council. Appellant also argued that the respondent had accepted her termination and, pursuant thereto, had vacated her office and accepted her terminal benefits.

[7] In his findings, the arbitrator rejected the contention that the respondent had waived her right to appeal. The arbitrator agonised over the status of the respondent between 7 June 2012 and 27 June 2013 when her employment was formally terminated. He noted that the acting appointment did not "mention an extension of the fixed term contract … nor does it specify the basis for such acting appointment or the duration of the same." He concluded that this was a contract without limit of time as there could not be an employment relationship "on a temporary basis." He expressed the view that the nature of the employment relationship that subsequently subsisted between the parties was one of a contract without limit of time.

[8] Notwithstanding that conclusion, the arbitrator proceeded to determine whether the respondent had a legitimate expectation of being re-engaged. He noted that the position that she had previously occupied had been filled by someone else in an acting position. He concluded that the respondent may have had a legitimate expectation of her contract being renewed, taking into account the favourable recommendation made by both the Human

Resources Committee and the Special Executive Committee of Council and the fact that she was appointed to act in the same position, albeit for an indefinite period. Consequently he determined that the respondent had been unfairly dismissed and that she should be reinstated to her position without loss of salary or benefits or, alternatively, that the appellant pays damages in *lieu* of reinstatement.

PROCEEDINGS BEFORE THE LABOUR COURT

[9] Aggrieved by the above arbitral determination, the appellant appealed to the Labour Court. It did so on a number of grounds of appeal. As the determination of the Labour Court was predicated on the validity of those grounds of appeal, it is necessary to set these out in full. I cite them verbatim.

> "1. The Honourable Arbitrator erred at law in exploring and making a finding on the nature of the contract entered into between the parties with effect from 9 June 2012 when such was not an issue before him.
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> 2. The Honourable Arbitrator erred grossly on the facts in finding that the contract entered into between the parties with effect from 9 June 2012 was a contract without limit of time. The Honourable Arbitrator's findings in this respect is not supported by any evidence and is so grossly unreasonable such that no reasonable person properly applying his mind to the matter would have arrived at such a decision.
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> 3. The Honourable Arbitrator made a finding to the fact that the respondent had legitimate expectation of renewal of a contract based on recommendations made during Council meetings. The Honourable Arbitrator erred at law in relying on the proceedings and resolutions in those meetings.
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> 4. The Honourable Arbitrator erred grossly on the facts in finding that respondent was legitimately entitled to expect the renewal of her contract. The Arbitrator's findings in this regard are so grossly unreasonable such that no reasonable person properly applying his mind to the matter would have arrived at such a decision.
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> 4.1 The Honourable Arbitrator also made a finding that the fact that the Executive Committee made its decision subject to the approval of full Council or the Minister did not deny respondent a legitimate expectation since her appointment on 7 June 2012 was not blessed with Council or ministerial approval. The Arbitrator's finding in this regard is grossly unreasonable as:-

(a) Whether or not the consent of Council or the Minister was asked for and / or obtained for the 7 June 2012 appointment was never an issue;
(b) In any event, the 7 June 2012 appointment was a temporary appointment (*sic*) while the appointment allegedly expected is a three (3) year appointment;
(c) Further and any event it is the employer's prerogative to choose which appointment to subject to approval and which not. Once one is informed that a specific appointment is subject to approval, then without such approval, no legitimate expectation can arise.

4.2 The Arbitrator also made a finding that a year's delay in obtaining Council or Ministerial approval entitled respondent to legitimately expect that her three year (3) fixed term contract will be renewed. This finding by the Arbitrator is so grossly unreasonable such that no person properly applying his mind to the matter would arrive to such a decision.

4.3 The Arbitrator also held that no proof of a negative decision from the decision maker was furnished and as a result respondent was entitled to legitimately expect that her contract will be renewed. The Arbitrator's decision in this respect is so grossly unreasonable such that no person properly applying his mind to the matter would arrive at such a decision."

[10] In its submissions *a quo*, the appellant stated as follows. First, that the arbitrator made a finding on an issue that was not before him and in respect of which no evidence had been led. In particular the appellant submitted that the nature of the contract that subsisted between the parties from 7 June 2012 was not an issue before the arbitrator and, therefore, his finding that there existed a contract without limit of time was irregular. Second, that the crux of the matter revolved around the question of legitimate expectation. The recommendation to extend her contract had not been communicated to her. It had been made by appellant's executive committee of Council, not to her, but to the appellant. The respondent could not, therefore, rely on a representation that was never made to her. In any event, no representation was ever made by the appellant so as to induce her to legitimately expect that her contract was to be extended. Third, the recommendation made by Council was subject to acceptance or rejection by the appellant. That recommendation was therefore "not clear, unambiguous and devoid of relevant qualifications" as required by the law. Lastly, the submission was made that criminal conduct involving abuse of trust had been unearthed in the finance department and the

respondent's innocence was therefore questionable. She could not therefore have expected her contract to be extended given that circumstance.

[11] In her submissions before the Labour Court, the respondent argued that the arbitrator had correctly found that she had a legitimate expectation to be re-engaged as finance director. It being common cause that another person had been engaged in her place, she had therefore been unlawfully dismissed. The respondent also took the point that the appeal had been noted against findings of fact and not law. No real question of law had been ventilated. She therefore prayed that the appeal should fail on that basis and that costs be awarded in her favour.

[12] At the hearing of the appeal, the court *a quo,* quite correctly, decided to determine the point in *limine* raised by the respondent that the appeal was not properly before the court as it did not implicate any issues of law. The first and second grounds of appeal were abandoned by the appellant at the commencement of the hearing. The court *a quo* accordingly confined its enquiry to the remaining grounds of appeal.

[13] The court found that the third ground of appeal raised a factual finding since no allegation had been made that the arbitrator's reasoning was so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided would have arrived at such a conclusion. It also found the fourth ground to have been similarly afflicted. Whilst in this ground the appellant had alleged that the arbitrator's finding had been grossly unreasonable, the court found that, on a perusal of the record, it was apparent that the issue whether or not the recommendation had been communicated to her had not been raised before the arbitrator. It accordingly found that it was improper for the appellant to have raised this issue for the first time on appeal, the issue raised before the arbitrator having been whether the

respondent could rely on a recommendation made by a Committee of Council to found a claim for legitimate expectation.

[14] The court also considered the submission by the appellant that the Executive Committee of Council had made its decision to recommend the re-appointment of the respondent subject to approval by the full Council and the Minister and that, in the circumstances, no legitimate expectation could have arisen. The Court accepted the respondent's submission that a legitimate expectation can arise from a representation made by, or the conduct of, the employer. It determined that the placement of the respondent in an acting position, coupled with the recommendation by the Executive Committee of Council that her contract of employment be extended, gave rise to that expectation. Therefore the arbitrator could not be faulted for relying on previous conduct by the appellant, regard being had to the fact that the two meetings that recommended her re-engagement were held before she was re-appointed in an acting capacity. It found that the arbitrator's reasoning in this regard could not be termed outrageous or irrational.

[15] The court also considered the attack against the arbitrator's finding that a year's delay in obtaining a determination from the Council or the Minister on the recommendations previously made was a basis for legitimate expectation. It considered that in the absence of a further averment that the finding was so grossly unreasonable that no person properly applying his mind to the fact would have arrived at such a decision, the attack remained one on a factual finding.

[16] Lastly, the court *a quo* found that the attack against the finding by the arbitrator that "no proof of a negative decision from the decision maker was furnished" and, consequently,

that the respondent legitimately expected that her contract would be renewed, did not elaborate in what way the finding was grossly unreasonable. Merely stating that the decision was grossly unreasonable does not suffice. The court accordingly found, as it had done with the other grounds, that the appeal was improper as it sought to impugn factual findings.

[17] Having found that all the grounds of appeal were impugning factual findings, the court *a quo* upheld the point in *limine.* Consequently, it dismissed the appeal with costs. Hence the appeal to this Court.

GROUNDS OF APPEAL

[18] The appellant seeks an order setting aside the judgment of the court *a quo* and remittal of the matter to the Labour Court for a determination of the dispute between the parties on the merits. Its grounds of appeal are:-

1. "The court *a quo* erred in finding that the grounds of appeal relied upon by appellant did not raise points/issues of law either in the primary or secondary sense of the expression,
2. The court *a quo* erred in finding that grounds of appeal which attack factual findings made by a Labour Arbitrator fail by that circumstance to disclose points/issues of law as required by statute.
3. The court *a quo* erred in failing to appreciate the distinction between the validity of grounds of appeal on the one hand and the sufficiency thereof on the other and so erred in finding that there were no valid grounds of appeal based on the view it took to the effect that the grounds were meritless,
4. Having found at any rate that there were no valid grounds of appeal, the court *a quo* erred in,
    a. Relating to the substantive issues raised in the grounds which it had found to be non-existent, and,
    b. In dismissing the appeal instead of striking it off the roll.
5. Alternatively, the court *a quo* erred in finding that the Arbitrator had properly come to the conclusion that respondent had a legitimate expectation of continued employment with appellant and that appellant's failure to so employ her constituted unfair dismissal."

APPELLANT'S SUBMISSIONS ON APPEAL

[19] In its submissions before this Court, the appellant has argued that, in large part, the determination of the court *a quo* was predicated on a finding that the grounds of appeal had no merit. This, the appellant submitted, was an incorrect approach. The court *a quo* was limited to an assessment of the phraseology of the grounds of appeal, without reference, at that stage, to the merits. Instead the court assessed the merits of the grounds of appeal in order to determine whether or not they properly raised issues of law. It was for that reason that the court *a quo* remarked at one stage that it found "… the arbitrator's reasoning cannot be termed outrageous or irrational." The merits were not a relevant consideration in determining the validity of the grounds of appeal. Therefore the court *a quo* conflated the two processes, namely the assessment of the validity of the grounds of appeal and their sufficiency.

[20] Further, the appellant submitted that if, indeed, there were no valid grounds of appeal before the court *a quo,* the court should have found that there was no valid appeal before it. Consequently, it should have simply struck the matter off roll instead of dismissing it. A dismissal would ordinarily suggest that the matter was considered on the merits and was then dismissed.

[21] The appellant has further argued that there was no legitimate expectation that the contract would be renewed. No evidence of the expectation was given. Moreover the resolution on which the respondent's claim was predicated was never officially communicated to her by the full Council of the appellant. In any event, the resolution remained a mere recommendation which meant that Council was at liberty either to accept or reject it.

[22] Lastly, the appellant submitted that, having found that the respondent was not on a fixed term contract but was on a contract without limit of time, the question of legitimate expectation did not, therefore, arise. Since the acting appointment did not provide for the duration of the contract, she became a permanent employee whose tenure could be terminated on notice as enunciated in the case of *Nyamande & Anor v Zuva Petroleum* SC 43/15. The arbitrator could not, therefore, apply Section 12 B of the Act which applies to a person on a fixed term contract.

RESPONDENT'S SUBMISSIONS ON APPEAL

[23] In her response, the respondent has submitted that the court *a quo* was correct in finding that the grounds of appeal were impugning factual findings and that they were, therefore, not valid. It is not sufficient, in formulating grounds of appeal, to merely assert that a judicial officer erred at law. The particular mistake of law should be stated and, unless substantiated, such a ground remains one of fact.

[24] The respondent further argued as follows. Since the sole issue for determination before the court *a quo* was whether the arbitrator's findings on the issue of legitimate expectation could be impugned, that issue could only be dealt with by considering the merits. In any event, a court can interrogate the record of the proceedings in order to resolve the question whether there is substance to the grounds themselves. Having found that the grounds raised factual issues and that the grounds had no merit, the court *a quo* correctly dismissed the appeal. Further, the court *a quo* was correct in finding that the respondent had a legitimate expectation that her contract would be extended. Lastly, the submission made by the appellant that the contract was terminated on notice was not an issue before the court *a quo* and cannot, therefore, be an issue before this Court.

ISSUES FOR DETERMINATION

[25] On a consideration of the record of the proceedings and the submissions made by both parties before this Court, it seems to me that three issues arise for determination by this Court. The first relates to the correct approach in determining whether a ground of appeal raises an issue of law and whether, in so determining, it is permissible for a court to have regard to the merits of the matter in order to make that determination. The second is whether the grounds of appeal before the Labour Court raised questions of law, i.e. whether they were valid grounds of appeal. The third is whether the court *a quo* was correct in dismissing the appeal once it found, as it did, that the grounds of appeal were not valid.

I consider each of the issues in turn.

DETERMINATION OF THE VALIDITY OF GROUNDS OF APPEAL

[26] There is a dispute in this matter on the correct approach by a court in determining whether a ground of appeal raises an issue of law. There is, therefore, need to clarify the correct approach in assessing whether a ground of appeal complies with the legal requirement that it must be predicated on an issue of law.

[27] The term "question of law" is used in three distinct, though related, senses. First, it means a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit. Second, it means a question as to what the law is. And third, any question which is within the province of the judge instead of the jury or assessors – *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S), 220 D – F; *Sable Chemical Industries Ltd v David Peter Eastenbrook* SC 18/10.

[28] Used in the three related senses referred to above, the term causes no difficulty. It is, however, used in a fourth sense, that is, where the finding complained of is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at such a conclusion. The nature and circumstances of the case must be such that it is reasonably probable that the tribunal would not have determined as it did had there been no misdirection; in other words that the determination was irrational. A serious misdirection on the facts amounts to a misdirection in law - *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (SC), 670D.

[29] The dispute in this case centres around how an appellant, who alleges a misdirection on the facts, should formulate such a ground in his notice of appeal. To answer this question, I proceed to look at cases previously decided by this Court on the subject.

[30] In *Reserve Bank of Zimbabwe v Granger & Anor* SC 34/01, MUCHECHETERE JA remarked as follows:-

> "An appeal to this Court is based on the record. If it is to be related to the facts there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding that is contrary to the evidence actually presented …"

[31] In *Zvokusekwa v Bikita Rural District Council* SC 44/15, this Court further added:

> "(22)… the remarks in Granger's case (*supra)* need to be qualified, to the extent that they may be interpreted as saying that, to constitute a point law, in all cases where findings of fact are attacked, there must be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. One must, I think, be guided by the substance of the grounds of appeal and not the form …. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner."

[32] The pertinent question in the present case is this. In determining whether a ground of appeal raises an issue of law, should a court be confined to the wording of the ground of appeal only or should it, additionally, have recourse to the record or the merits of the case?

[33] In *Chinyange v Jaggers Wholesalers* SC 24/04 GWAUNZA JA (as she then was), writing for the court, stated at page 2 of the cyclostyled judgment:-

> "… . The appellant must in other words not only allege, but also show, that the Labour Court misdirected itself on a point of law."
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> At page 3, the learned judge continued:-
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> "The appellant has not alleged nor shown, that the Labour Court misdirected itself, nor that such misdirection, being based on findings of fact, was so unreasonable that no sensible person applying his mind to the facts would have arrived at such a conclusion."

[34] In *Mutsuta and Anor v Cagar (Private) Limited* SC 47/09, SANDURA JA stated at page 6 of the cyclostyled judgment:-

> "Applying the principles set out in the three cases cited above, I have no doubt in my mind that the appeal raises questions of law. There are allegations in the grounds of appeal that the Labour Court committed misdirections on the facts which are so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. The appeal is, therefore, properly before the court."

[35] In *Sable Chemical Industries Limited* (*supra),* this Court remarked at page 5 of the judgment:-

> "The first ground of appeal is that the Labour Court erred on a question of law in holding that the disciplinary committee was improperly constituted. It is the respondent's submission that this question is one of fact and not law. I agree with the respondent's submission in this regard."

And at page 7:-

> "There is no suggestion by the appellant that the court *a quo* misdirected itself on the facts in coming to the conclusion that the committee was not properly constituted and that such misdirection constitutes a question of law. I would agree with the respondent that this ground of appeal raises a question of fact and not law."

[36] It is correct that, in the *Sable Chemical Industries Limited* case (*supra),* the impression was created that a court can have regard to the merits in order to determine the validity of a ground of appeal. It is clear, however, on a proper reading of the case that, in fact, the court determined the validity of the grounds of appeal based only on the specific allegations made in the grounds of appeal and not the merits of the matter.

[37] Everything considered, therefore, the correct approach, in my view, is that in determining whether a ground of appeal raises an issue of law, a court will confine itself to the wording of the ground of appeal only and not to the merits of the matter. The merits of the matter only become relevant if a ground of appeal is found to be valid. Whether or not an appellant's case has merit and whether or not the appeal should succeed are issues to be determined separately and only after a finding on the validity of the grounds of appeal.

[38] A ground of appeal which attacks findings of fact must, therefore, not only allege that the lower court misdirected itself on the facts but must go further and show how that misdirection came about. Merely alleging a misdirection without further substantiation would not be enough as the attack would remain one against a factual finding. In other words, in alleging a misdirection on the facts, the ground of appeal must also show in what way those findings of fact are irrational. To the extent therefore that the decision of this Court in the *Sable Chemical Industries Limited* case (*supra)* may have created an impression to the contrary, it does not reflect the correct approach and should therefore, to that extent, not be followed.

THE GROUNDS OF APPEAL BEFORE THE COURT A QUO - WHETHER VALID

[39] This is really the crux of the matter. To answer the question it is necessary to look at the individual grounds that were considered by the court. The judgment of the court *a quo*

reflects that grounds one and two were abandoned at the hearing of the matter. Essentially, therefore, there were three grounds of appeal before the court *a quo.* The court *a quo* found that these attacked factual findings. I proceed to consider each of these in turn.

[40] The third ground of appeal before the Labour Court was couched in the following manner:

> "3 The Honourable Arbitrator made a finding to the fact that the respondent had legitimate expectation of renewal of the contract based on the recommendations made during council meetings. The Honourable Arbitrator erred at law in relying on the proceedings and resolutions of these meetings."

Whilst the ground could have been more elegantly phrased, there is no doubt in my mind that it did, in fact, raise the question whether the arbitrator could base his finding that the respondent had a legitimate expectation of re-engagement on proceedings and resolutions of a council meeting. As stated in the *Zvokusekwa* case (*supra),* one should be guided by the substance rather than the form. I am satisfied that the court *a quo* was wrong in treating this ground as one attacking a finding of fact.

[41] The fourth ground of appeal before the court *a quo* read as follows:-

> "The Honourable Arbitrator erred grossly on the facts in finding that the respondent was legitimately entitled to expect the renewal of her contract. The arbitrator's findings in this regard are so grossly unreasonable such that no reasonable person properly applying his mind to the matter would have arrived at such a decision."

The gross aberration on the facts was not articulated. It remained a bald allegation impugning findings of fact. It did not state how and in what way the arbitrator grossly erred in reaching the conclusion that was sought to be impugned. In these circumstances, it remained an attack against a simple finding of fact and, clearly, does not raise any issue of law.

[42] *Ground 4.1 read:-*

> "4.1 The Honourable arbitrator made a finding that the fact that the Executive Committee made its decision subject to the approval of full council or the Minister did not deny respondent legitimate expectation since her appointment on 7 June 2012 was not blessed with council or ministerial approval. The arbitrator's finding in this regard is grossly unreasonable as:
>
> a) Whether or not the consent of council or the Minister was asked for and/or obtained for the 7 June 2012 appointment was never an issue;
>
> b) In any event, the 7 June 2012 appointment was a temporary appointment while the appointment allegedly expected is a 3 (three) year appointment;
>
> c) Further and any event it is the employer's prerogative to choose which appointment is subject to approval and which not (*sic).* Once one is informed that a specific appointment is subject to approval, then without such approval, no legitimate expectation can arise."

[43] The difficulty with this ground was its lack of particularity and precision. It sounded argumentative. Unlike in appeals from the High Court, there has not been a requirement, in labour cases, that the grounds of appeal must be clear and concise. However, the Labour Court Rules, 2017, in LC 4, now require grounds to be clear and concise. This was not a requirement at the time the present appeal was argued before the Labour Court. In my view, the ground, though not formulated with precision, did indeed raise an issue of law. What the ground says, in a nutshell, is that, whilst the recommendation that the respondent's contract be renewed was subject to approval by both the Council and the Minister, this did not affect the decision of the appellant to appoint her in an acting position for an indefinite period. The appellant was further saying that the issue whether or not the consent of the Council or Minister was sought and obtained was not an issue before the arbitrator and that, in any event, the appointment was temporary. Lastly that, once an employee is advised that a re-engagement is subject to approval, then, without such approval, no legitimate expectation of re-engagement can, in this situation, arise.

[44] I am satisfied that, properly considered, ground 4.1 did in fact raise issues of law and that the court *a quo* was wrong in reaching a contrary conclusion.

[45] *Ground 4.2* stated and I quote:-

> "4.2.The arbitrator also made a finding that a year's delay in obtaining council or ministerial approval entitled respondent to legitimately expect that her three (3) year fixed term contract will be renewed. This finding by the arbitrator is so grossly unreasonable such that no person properly applying his mind to the matter would arrive at such a decision.
> 4.3 The arbitrator also held that no proof of a negative decision from the decision maker was furnished and as a result respondent was entitled to legitimately expect that her contract will be renewed. The Arbitrator's decision in that respect is so grossly unreasonable such that no person applying his mind to the matter would arrive at such a decision."

What the appellant sought to challenge in the court *a quo* was the conclusion reached by the arbitrator on the facts which were before him. The appellant was saying delay, on its own, could not have led the respondent to believe that her employment would be extended by a further three years and that a conclusion to that effect would be irrational. The court *a quo* was therefore wrong in coming to the conclusion that grounds 4.2 and 4.3 did not raise any questions of law.

[46] In all the circumstances, therefore, I am satisfied that, save for the fourth ground of appeal, the court *a quo* was not correct when it non-suited the appellant on the preliminary point raised that the appeal before that court was not predicated on issues of law. Having made that decision, the court *a quo* went on to dismiss the appeal in its entirety. That this was also improper goes without saying.

COURT A QUO SHOULD HAVE STRUCK THE MATTER OFF THE ROLL

[47] One of the complaints by the appellant is that once the court *a quo* had come to the conclusion that the appeal before it was a nullity on account of defective grounds of appeal, it should not have dismissed the appeal but rather struck the matter off the roll. I agree entirely with this submission. Once the court had determined that all the grounds of appeal before it were attacking factual findings and not issues of law, it should have found that there was, therefore, no proper appeal before it. And if there was no proper appeal before it, there was, in fact, nothing before it. And if there was nothing before the court, there was therefore nothing to dismiss. The only appropriate course of action, in these circumstances, would have been to strike the matter off the roll. An appellant whose matter is struck off would not be without a remedy. He can still apply for condonation and extension of time in which to appeal. But if a matter is dismissed, then, in reality, that is a final determination.

DISPOSITION

[48] I am satisfied that the court *a quo* was wrong in determining, as it did, that the grounds of appeal did not, in their entirety, raise issues of law. The appeal must therefore succeed. The appellant has largely been successful and is, therefore, entitled to an award of the costs of this appeal.

[49] In the result, it is ordered as follows:-

1. The appeal succeeds in part, with the respondent paying the costs of the appeal.
2. The judgment of the court *a quo* is set aside and in its place the following is substituted:-

   "Save in respect of ground 4, the preliminary point raised by the respondent in respect of the remaining grounds is dismissed."

3. The matter is remitted to the Labour Court for a determination on the merits.

GUVAVA JA: I agree

MAVANGIRA JA: I agree

Dube, Manikai & Hwacha, appellant's legal practitioners

Messrs Chambati, Mataka & Makonese, respondent's legal practitioners