

DISTRIBUTABLE: (5)

CUTHBERT ELKANA DUBE
v
(1) PREMIER SERVICE MEDICAL AID SOCIETY (2)
PREMIER SERVICE MEDICAL INVESTMENTS

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & CHITAKUNYE JA
HARARE: 15 OCTOBER 2021 & 24 JANUARY 2022

L. Madhuku, for the appellant

F. Mahere, for the first and second respondents

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

MAKONI JA: This is an appeal against the whole judgment of the Labour Court (the court *a quo*) which allowed two appeals filed in that court by the first and second respondents in terms of s 98 (10) of the Labour Act [*Chapter 28:01*]. It set aside the two awards made in favour of the appellant and in their place substituted them with an order dismissing the appellant's claims before the arbitrator.

FACTUAL BACKGROUND

The first respondent is a medical aid society registered in terms of the Medical Services Act, [*Chapter 15:13*]. The second respondent is the investment vehicle of the first respondent. Both respondents are managed by two separate boards of directors.

It is common cause that the appellant was the Chief Executive Officer of the first respondent in terms of a contract of employment. He also drew a salary from the second respondent in unclear circumstances. He attained the retirement age of (60 years) in December 2013 in terms of the Retirement Policy of the Society 4/2003 of the first respondent.

On 14 March 2013, both boards of directors of the respondents unanimously extended the appellant`s tenure of office by a further ten years. The new contract commenced from 1 January 2014 and would end on 31 December 2024. At the beginning of 2014, the appellant commenced the extended employment contract. The parties also reached an agreement that the appellant`s monthly salary would be US\$60 000.00 per month effective January 2014 along with other benefits. It was later reduced to US\$43 000.00.

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

2

Following allegations that the appellant was taking an exorbitant salary of US\$92 000.00 every month before allowances without the knowledge of the full board, other than two of its members, the boards withdrew their earlier decision of extending the appellant`s contract of employment. They relied on the provisions of the Retirement Policy to rescind the extension of the employment contract. The appellant was thus requested to take a pre-retirement paid leave.

In response, the appellant, through a letter dated 20 February 2014 addressed to the first respondent, claimed that he had a subsisting contract of employment for a period of ten years which commenced on 1 January 2014. He insisted that the contract had not been terminated in any way and consequently he would abide by it and continue to execute his

duties in terms of the same until its expiry. No such letter was written to the second respondent. Consequently, a dispute arose between the appellant and the first respondent.

On 17 February 2015, the dispute between the appellant and the first respondent was referred to compulsory arbitration. The terms of reference were as follows:

- a. “To determine whether or not the claimant`s (the appellant in this matter) contract of employment was lawfully terminated;
- b. The appropriate remedy”

On 14 March 2015, a dispute in the matter between the appellant and the second respondent was referred to compulsory arbitration. It is not clear from the record how the dispute had arisen. The terms of reference were as follows:

- a. “Whether or not the appellant`s contract of employment was enforceable against the second respondent;
- b. If so, whether or not the claimant`s contract of employment was lawfully terminated and the remedy thereof.”

Judgment No. SC 5/22
Civil Appeal No. SC 02/20

3

On 14 April 2015 the arbitrator issued awards in respect of both matters.

In the matter between the appellant and the first respondent the arbitral award was to the effect that the contract of employment between the appellant and the first respondent still subsisted and thus remained in force. He further ordered that the first respondent pay the appellant all salaries and benefits from the date these were last paid at the salary scale of US\$92 000.00 per month.

In the matter between the appellant and the second respondent the arbitral award was to the effect that the appellant's contract of employment was enforceable against the second respondent and that the contract was never terminated thereby rendering the appellant entitled to payment of salaries and benefits as claimed.

Aggrieved, the first and second respondents independently appealed against the two arbitral awards to the Labour Court under LC/H/348/15 and LC/H/349/15 respectively. The two appeals were consolidated for the sake of convenience.

PROCEEDINGS IN THE COURT A QUO

The first respondent, in its heads of argument before the court *a quo*, in which it was the first appellant, argued that the arbitrator made a determination that ran foul of the issue presented before him. It submitted that the issue before the arbitrator was whether or not the employment contract between the first respondent and the appellant was lawfully terminated. Thus, it insisted that the arbitrator fell into error when he determined that there was a valid and enforceable contract between the parties whereas it was common cause between the parties that no contract still existed. The first respondent contended that the arbitrator was bound by the terms of reference and had no authority to reformat the issues as presented to him by the parties. It was also the first respondent's case that no evidence was tendered to justify the amount of US\$92 000.00 per month which was awarded to the appellant by the arbitrator.

The second respondent largely associated itself with the arguments made by the first respondent regarding the arbitrator straying from the terms of reference. In addition to

that, the second respondent submitted that the arbitrator missed the import of the issues referred to him and came to the conclusion that there existed a contract of employment between the appellant and the second respondent. The second respondent further submitted that it was simply the investment vehicle of the first respondent and used to contribute to the appellant`s salary at the request or on the instructions of the appellant. Thus it was the second respondent`s submission that these remittances did not make it the appellant`s employer.

Per Contra, the appellant submitted that the arbitrator correctly determined the issues before him. He submitted that the issues referred to the arbitrator were whether or not the appellant`s contract of employment was lawfully terminated and to determine the appropriate remedy. He further submitted that determining whether or not the contract was valid was the first stage of inquiry which would then lead to the conclusion of whether or not the same was lawfully terminated.

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

5

Regarding the second respondent, he submitted that the evidence placed before the arbitrator of termination of the contract in the form of a letter was not sufficient enough to prove that the same was terminated in terms of the law. The appellant insisted that a contract of employment could only be terminated by mutual consent, death, dismissal through a formal disciplinary hearing or resignation. Thus he proffered that a valid contract still existed as the second respondent failed to prove termination. The appellant further submitted that the second respondent was his employer by extension as management of the same reported directly to him. It followed that his contract of employment with the second respondent was valid and enforceable.

DETERMINATION OF THE COURT A QUO

The court *a quo* examined the terms of reference as placed before the arbitrator by the parties. With respect to the first respondent, the court reasoned that it was clear in the parties' minds that the contract of employment had been terminated and what required determination was whether or not such termination was lawful. The court further reasoned that the arbitrator fell outside the terms of reference by making a determination that the contract of employment still subsisted and remained in force. The court relied on the case of *C Kambuzuma and Ors v The Athol Evans Hospital Home Complex* SC 118/04 in its reasoning that the arbitrator ought to have confined himself to the terms of reference and not go further than that.

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

6

In addition, the court *a quo* held that the arbitrator, by making a finding that there was still a valid contract in existence between the parties, effectively made a new employment contract for the parties contrary to the Supreme Court decision in the matter between *Kundai Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397.

With respect to the second respondent, the court *a quo* made a finding that, as was apparent from the record, the second respondent did not extend the appellants tenure. It effectively concluded that there was nothing to enforce between the appellant and the second respondent as there was never an employment contract between them. Consequently, the court found that there was nothing to terminate and therefore the appellant was not entitled to anything from the second respondent. In the result it allowed the appeals and set aside the arbitral awards.

This prompted the appellant to note the present appeal on the following grounds:

GROUND OF APPEAL

- “1. The court *a quo* misdirected itself and erred at law in finding that the decision of the arbitrator that there was still a subsisting contract of employment between the appellant and the first respondent was outside the arbitrator’s terms of reference.
2. The court *a quo* erred by making a determination that there was no binding contract of employment between the appellant and the second respondent.”

SUBMISSIONS ON APPEAL

In addressing the first ground of appeal Mr *Madhuku* for the appellant made the following submissions; the issue before the court was a question of interpretation of the terms of reference. The terms of reference were quite straightforward and had inherent in them two questions namely:

1. Has the contract of employment been terminated?
2. If so was the termination lawful?

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

A term of reference in terms of the Labour Act [*Chapter (28; 01)*] (the Act) is statutorily regulated and must be interpreted in terms of the scheme under Part XII of the Act. What has to be resolved is the dispute that was referred to conciliation. The court *a quo* fell into error by treating this as voluntary arbitration in which the terms of reference were as a result of the meeting of the minds of the parties. To the contrary this was a compulsory arbitration in terms of the Act where the labour officer formulates the terms of reference after taking into account the nature of the dispute between the parties. A labour officer referring a dispute to compulsory arbitration cannot create a new dispute for the parties as was held in *Tafadzwa Sakarombe & Anor v Montana Carswell Meats* SC 44/20.

As regards the appellant's second ground of appeal, Mr *Madhuku* made the following submissions: a resolution by one party to terminate its contractual obligations cannot bind the innocent party to the contract. It was a serious misdirection by the court *a quo* that the appellant was bound by the decisions of the respondents in respect of the contract between the parties. Further, a contract need not be in writing. There is no doubt that an oral contract of employment existed between the appellant and the second respondent. The court *a quo* relied on the absence of a written contract to determine that there was no contract between the appellant and the second respondent. From the circumstances, including the payment of salary and the duties of the appellant *vis a vis* the second respondent there is no doubt that a contract existed between the parties.

Ms. *Mahere*, for the respondents, submitted; in respect of ground one, that the issue before the arbitrator was to determine whether or not the contract of employment was lawfully terminated. The arbitrator went on to determine that there was a valid contract of employment between the parties, which was not an issue placed before him. The conduct of the arbitrator was tantamount to making a contract for the parties, which he or any court or tribunal cannot do as a matter of law.

As regards the purported contract of employment between the appellant and the second respondent, that the appellant could not point to a single document that suggested that there was a contract between him and the second respondent. The only contract produced was the one between appellant and first respondent. The argument by the appellant that there is an oral contract is startling. He failed to present evidence before the Court *a quo* and this court

to prove that there was an oral contract. Thus, there was nothing to enforce between the appellant and the second respondent.

ISSUES FOR DETERMINATION

1. Whether or not the court *a quo* erred in finding that the arbitrator acted outside his terms of reference in concluding that a contract of employment between the appellant and the first respondent still subsisted.
2. Whether or not the court *a quo* erred in finding that the appellant did not have a binding contract with the second respondent.

THE LAW

The matter before this Court pertains to compulsory arbitration which derives from statute. It only arises after the failure of conciliation and the issuing of a certificate of no settlement (*L Madhuku, Labour Law in Zimbabwe* at p 362). This was provided for in terms of s 93 (5) of the Labour Act [*Chapter 28.01*] before the amendment to the section.

The author *L Madhuku*¹ puts it this way:-

“This new scheme focuses on the nature of the dispute in determining whether or not to refer it to compulsory arbitration. Disputes of interest depend on whether or not an essential service is involved... a dispute of interest outside the essential service cannot be referred to compulsory arbitration in the absence of agreement by parties.”

Crucial to mention are provisions of s 98 of the Labour Act. The relevant parts read as follows:

¹ Labour Law in Zimbabwe p 363

“93 Effect of reference to compulsory arbitration under Parts XI and XII

- (1) In this section, “reference to compulsory arbitration”, in relation to a dispute, means a reference made in terms of paragraph (d) of subsection (1) of section *eighty-nine* or section *ninety-three*.
- (2) Subject to this section, the Arbitration Act [*Chapter 7:15*] shall apply to a dispute referred to compulsory arbitration.
- (3) Before referring a dispute to compulsory arbitration, the Labour Court or the labour officer, as the case may be, shall afford the parties a reasonable opportunity of making representations on the matter.
- (4) In ordering a dispute to be referred to compulsory arbitration, the Labour Court or labour officer, as the case may be, shall determine the arbitrator’s terms of reference after consultation with the parties to the dispute.”

In *Ballantyne Butchery (Pvt) Ltd t/a Danmeats v Edmore Chisvinga & Ors SC*

2015 (1) 335 6/15 at p 5 of the cyclostyled judgment, this Court held that:

“Where a dispute is referred to compulsory arbitration by a labour officer, s 98(4) of the Labour Act [*Chapter 28:01*] enjoins the officer to determine the arbitrator’s terms of reference after consultation with the parties to the dispute.”

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

10

The same point was made in *Metallon Gold Zimbabwe (Pvt) Ltd & Anor v Collen*

2015 (1) 509 *Gura* HH 263/16 at p 5 where it was held that:

“However, the procedure for submission is that the matter commences with conciliation before a labour officer in terms of s 93 of the Labour Act. When conciliation fails, the labour officer then refers the dispute to compulsory arbitration in terms of s 98. In doing so, the labour officer consults the parties for the arbitrator’s terms of reference to be drawn. The arbitrator is confined to the agreed terms of reference during the arbitral process...if the arbitrator goes beyond the terms of reference that may be a ground for objection to the registration of the arbitral award.”

It thus follows that in settling the terms of reference for compulsory arbitration the parties have a role to play. They are consulted by the Labour Court or the labour officer as the case maybe.

It is an established principle that an arbitrator is not allowed to venture outside the terms of reference when making a determination. The law on arbitration and terms of references was succinctly captured at pp 10 to 11 in the case of *Munchville Investments (Pvt) Ltd t/a Bernstein Clothing v Chiedza Mugavha* SC 62/19 as follows:

“As regards the jurisdiction and powers of arbitral tribunals, it must be emphasised that the arbitration process generally is a voluntary and consensual process, both at common law and under the Arbitration Act [*Chapter 7:15*]. This is made clear by s 4(1) of the Act which stipulates that “any dispute which the parties have agreed to submit to arbitration may be determined by arbitration”. Moreover, by virtue of s 4(3) of the Act, “the fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration”. According to Brand: *Labour Dispute Resolution* (2nd ed. 2008) at p. 163:

“In private arbitration the arbitration agreement plays a pivotal role. It embodies a description of the dispute to be referred to arbitration, it names the arbitrator, it specifies the terms of reference and arbitrator’s powers, it sets out the process before the actual hearing and finally, it describes the process to be followed during the hearing.”

In similar vein, as was stated in *Total Support Management (Pty) Ltd & Anor v Diversified Health Systems (SA) (Pty) Ltd & Anor* 2002 (4) SA 661 (SCA) at 673 H-I, Judgment No. SC 5/22 Civil Appeal No. SC 82/20

“The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.

It is thus axiomatic that the jurisdiction and powers of an arbitrator are determined by agreement between the disputant parties. The terms of reference define the dispute to be resolved and the manner in which it is to be resolved. The arbitrator’s mandate flows from and is limited by the terms of reference. To put it differently, the arbitrator derives his jurisdiction and powers from the arbitration agreement between the parties.

The position is no different under s 93(1) of the Labour Act. The jurisdiction and powers of an arbitrator are established and assumed by dint of the agreement of all the parties involved and their voluntary submission to the arbitral process and its jurisdiction. The arbitrator is not endowed with jurisdiction by the labour officer or conciliator. It is the disputant parties themselves who vest the arbitrator with jurisdiction, notwithstanding any preceding or parallel *lis* or *contestatio* between them. In other words, it is the voluntary and consensual nature of arbitration that determines the scope of the arbitrator’s jurisdiction and powers where any matter is referred to arbitration in terms of s 93(1) of the Labour Act.” (my underlining)

The above-cited case establishes that the principles applicable to private or voluntary arbitration are the same as those applicable to compulsory arbitration in terms of the Labour Act. However it must be noted that there is a slight difference in that in respect of private arbitration there is complete party autonomy with no room for intervention by the arbitrator. Section 93 (2) of the Act however gives the Labour Court or the Labour Office the right to intervene and determine the terms of reference in consultation with the parties.

The arbitrator ought not to mischaracterise the disputes between the parties. In *Alliance Insurance v Imperial Plastics (Pvt) Ltd* SC 30/17 at p 8 of the cyclostyled judgment, the learned MALABA DCJ (as he then was) cited with approval the case of *Inter Agric (Private) Limited v Mudavanhu & Ors* SC 9/15 wherein the respondent, alleging unfair dismissal, filed a grievance with a labour officer, and failing conciliation between the parties, the labour officer referred the matter to compulsory arbitration. MALABA DCJ opined:

“Article 34(2)(a)(iii) of the Arbitration Act states that an arbitral award can be set aside if it contains submissions on matters beyond submissions for arbitration. In *Inter-Agric (Pvt) Ltd v Mudavanhu & Ors* SC 9/15 at p 3 of the cyclostyled judgment GOWORA JA said:

‘In addition, at law, the arbitrator was only competent to determine the dispute between such parties as had been referred to him by the labour officer. Thus, he was confined to his terms of reference. He had no mandate beyond that which had been referred to him.’”(my emphasis)

See also *Augur Investments OU v Fairclot Investments (Private) Limited t/a T & C Construction & Anor* SC 8/19.

What emerges from the above authorities is that the arbitrator, in determining the dispute referred to him, is confined to the terms of reference settled for him or her by the

Labour Court or the labour officer in consultation with the parties. He is not allowed to stray outside those terms of reference. For emphasis, he has no mandate beyond that which has been referred to him or her.

APPLICATION OF THE LAW TO THE FACTS

- 1. Whether or not the court *a quo* erred in finding that the arbitrator acted outside his terms of reference in concluding that a contract of employment between the appellant and the first respondent still subsisted.**

In essence, the principal issue to be addressed is whether or not the arbitrator exceeded his terms of reference and thereby arrived at the wrong conclusions. Flowing from this is the correctness or otherwise of the decision of the Labour Court in not upholding the arbitrator's award.

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

13

The appellant submits that the court *a quo* took a simplistic and fundamentally wrong approach in interpreting the terms of reference. He avers that it is implicit in the terms of reference that what was before the arbitrators were two issues and these are:

1. Has the contract of employment been terminated?
2. If so, is the termination lawful?

Before considering the attack on the arbitrator, that he misconceived the nature of the inquiry and his duties or exceeded his jurisdiction by venturing outside the terms of reference, it is necessary to determine the nature of the inquiry, which was before him. As

mentioned at the outset, the arbitrator had to determine whether or not the contract between the appellant and the first respondent had been lawfully terminated and the remedy thereof.

In my view what was implicit in the terms of reference is that:

- a) There had been a contract of employment between the appellant and the first respondent.
- b) That the contract was terminated by the employer and that;
- c) The appellant's issue was whether or not the same was lawfully terminated.

This is what the arbitrator had to relate to. The court *a quo* was therefore correct in finding that the arbitrator had misinterpreted the terms of reference. Indeed, the arbitrator erred given the specific terms of reference in proceeding to make the finding that:

- Judgment No. SC 5/22
Civil Appeal No. SC 62/20
- “1. That the contract of employment between the respondent and the claimant still subsists and remains in force.”

14

The court *a quo* correctly opined that:

“What seems to be coming out of the arbitral award is that, firstly, the arbitrator was not sure of the position of the respondent's employment status. Secondly, the arbitrator was not sure of the propriety of the respondent's salary apart from commenting that the employee was entitled to continue working while the Board made its deliberations. His position was that the contract was never terminated...

When parties presented the above as a term of reference, it was clear on their minds that the respondent's contract of employment with the first appellant had been terminated. What required determination was whether or not such termination was lawful.”

Mr *Madhuku* had this to say about the above finding, in para 9 of the appellant's Heads of Argument:

“The above misdirection was the source of the court *a quo*’s error. Parties never presented any terms of reference. This was compulsory arbitration. It was the labour officer who formulated the terms of reference after taking into account the nature of the dispute between the parties,”

He further contended that instead of taking into account the nature of the dispute after conciliation, the court *a quo* applied the wrong principle, namely taking into account a non-existent ‘intention of the parties’. The dispute was referred to the labour officer for conciliation as follows:

“(i) Whether or not our client’s contract of employment was terminated and if so, when?”

He concluded by submitting that taking into account the nature of the dispute the arbitrator was correct to include a determination of whether or not the employment had been terminated.

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

15

What Mr *Madhuku* over-looked is the role of the parties to the dispute, in the settlement of terms of reference to be referred to an arbitrator. S 98 (4) makes provision for the labour officer ‘to determine the arbitrator’s terms of reference after consultation with the parties to the dispute.’ Whilst it is the function of the labour officer to determine the terms of reference, he or she does not do it by himself or herself. He has to do so in consultation with the parties. The parties input in the final product. See *Ballantyne Butchery (Private) Limited (Supra)*.

There is no indication on the record that the appellant objected to the terms of reference as presented to the arbitrator at the beginning of the arbitration process. The

arbitrator, in his award, captures the terms of reference as referred to him by the labour officer. It is during the analysis stage that he changes course and starts to deal with whether the appellant's contract had been terminated.

The arbitrator clearly fell outside the terms of reference contrary to the settled position of the law which states that arbitrators should confine themselves to the presented terms of reference. See *Munchville Investments (Private) Limited (Supra)*. He could not go behind what was before him to ascertain what it is that was referred to the labour officer as was suggested by Mr *Madhuku*. The arbitrator was not asked to determine whether or not the contract between the parties still subsisted but was required to determine whether or not the contract between the parties was lawfully terminated. In light of the foregoing, the court *a quo*'s finding cannot be faulted.

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

16

The court *a quo* further found that equally disturbing is that the arbitrator's conduct was tantamount to making a contract for the parties which neither he nor any court or tribunal can do as a matter of law. It remarked as follows:

“Making contracts for parties is not the duty of an adjudicating authority. An adjudicating authority deals with disputes arising from contracts or indeed interprets terms of contract where parties need interpretation of the terms thereof in the context of disputes between them. They do not make contracts for parties. In the *Kundai Magodora case* (above) at 403 C-D the Supreme Court stated as follows: ‘In principle, it is not open to courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted even if they are shown to be onerous or oppressive.’”

As is appositely cautioned by Christie: *The Law of Contract in South Africa* (5 ed.) at p. 366:

“The fundamental rule that the court may not make a contract for the parties is a salutary one, the principle of which has probably never been seriously questioned. It is unthinkable that the courts should not only tell the parties what they ought to have done but then make them do it by enforcing the court’s idea of what the contract ought to have been.”

Indeed, the arbitrator misdirected himself by concluding that the contract was never terminated. It was not within his remit to exceed his mandate. The arbitrator misconceived the whole nature of the inquiry or his duty in connection therewith.

Thus, the first ground of appeal has no merit and must fail.

2. **Whether or not the court *a quo* misdirected itself and erred in finding that the appellant did not have a binding contract with the second respondent.**

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

17

The appellant argues that the misdirection in this regard is two-pronged:

1. That the resolution by one party to terminate its contractual obligations cannot bind the innocent party to the contract and that it was a serious misdirection to say that the appellant was bound by the decisions of the respondents in respect of the second contract between the parties.
2. That a contract of employment need not be in writing and thus, it was a misdirection by the court *a quo* to find that since there was no written contract of employment, between the appellant and the second respondent there was no contract to speak of.

It was Mr *Madhuku*'s contention that the appellant was employed by the two respondents. He further submitted that the court *a quo* did not lay a basis for interfering with the factual findings made by the arbitrator.

Per contra, Ms *Mahere* submitted that the appellant did not have a contract of employment with the second respondent. He could not point to a single document which indicated that he had a contract with the second respondent. Further, she submitted that this was a factual finding correctly made by the court *a quo*.

It is thus necessary yet again to refer to the terms of reference as placed before the arbitrator. These were:

1. Whether or not the Claimant's contract of employment is enforceable against the Respondent.
2. If so, whether or not the Claimant's contract of employment was lawfully terminated and the remedy thereof.

The arbitrator found that the contract was enforceable, that it was never terminated and that the claimant is entitled to payment of salaries and benefits as claimed.

The court *a quo* made a finding that there was a contract of employment between the first respondent and the appellant and not between the second respondent and the appellant. It further found that what was clear from the correspondence between the appellant

and the board, regarding his retirement and extension of the retirement age, were between the appellant and the first respondent. The court *a quo* in reaching its finding that there was no contract of employment between the appellant and the second respondent made reference to letters and correspondence filed of record and remarked:

“What is important to note is that the appellant’s Board observed that the respondent had reached retirement age. The Board then resolved to extend the respondent’s (appellant in this matter) tenure with the society (PSMAS) (1st appellant) for a further ten years. The extension contract was not with the 2nd appellant. That Board thereafter reversed its decision and decided to abide by the provisions of the enabling Retirement Policy of the Society 4/2003”.

Further down the court stated;

“From what is on record, there was a contract between respondent and the Society i.e. the first appellant and the respondent but not between 2nd appellant and the respondent.

That being the position, there was nothing to enforce between respondent and the 2nd appellant. Nothing was terminated. Under the circumstances, it is my respectful view that the Learned Arbitrator fell into error when he determined that there was an enforceable contract of employment between the parties i.e between respondent and the second appellant. My finding is that there was no separate binding contract of employment between the 2nd appellant and the respondent.”(my own underlining)

I find nothing to confirm the existence of a contract of employment with the second respondent either, and there are strong indications that there was no such agreement. Indeed, appellant has not set out what the terms of this agreement with second respondent are. I opine that if there was a written contract between the appellant and first respondent, then there would have been a written contract between the appellant and the second respondent as well. As already alluded to earlier on, not a single letter was written by the appellant seeking to enforce a contract of employment against the second respondent. Thus, the court *a quo*’s finding that there was no contract of employment between the appellant and

the second respondent and consequently that there was no entitlement for payment of the alleged salary due to him, cannot be faulted.

It is an established principle in our law that an appellate court cannot interfere with the exercise of discretion by the court *a quo* and the factual findings made by it unless those findings were grossly unreasonable and the decision is so outrageous in its defiance of logic that no sensible person who would have applied his mind to the question to be decided could have arrived at it. This position was discussed and justified in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at p 670, where KORSAH JA remarked:

“...an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion.”

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

20

It is my view that the court *a quo* had a basis to interfere with the factual findings of the arbitrator. From what is on record there is nothing to indicate that there was a contract between the appellant and the second respondent, written or otherwise. The appellant in the “Claimant’s Address” to the arbitrator did not state whether he had a contract with the second respondent. He did not plead the terms of the oral contract if indeed it existed. He did not complain about unlawful termination of his contract with the second respondent. He just claimed non-payment of salaries. The arbitrator arrived at a decision without regard to the evidence before him, which is a ground for interference with a factual finding. Thus, the decision of the court *a quo* is unassailable.

In light of the above, the second ground of appeal being unmeritorious, must fail.
Costs will follow the cause.

In the result, I make the following order:

It is ordered that:

The appeal be and is hereby dismissed with costs.

MATHONSI JA:

I AGREE

CHITAKUNYE JA:

I AGREE

Judgment No. SC 5/22
Civil Appeal No. SC 82/20

21

Venturas and Samukange, appellant's legal practitioners

Muzangaza, Mandaza and Tomana Legal Practitioners, 1st and 2nd respondent's legal practitioners.