IN THE SUPREME COURT OF APPEAL

SITTING AT LILONGWE

MSCA Civil Appeal No. 52 of 2016

(Being High Court Civil Appeal No. 37 of 2015, Lilongwe District Registry)

(And also being Matter No. IRC 428 of 2012, Lilongwe Registry)

Between:

JTI Leaf (Malawi) Limited.....Appellant

And

Kad Kapachika.....Respondent

Coram: Honourable Justice R.R. Mzikamanda SC, JA
Honourable Justice A.C. Chipeta SC, JA
Honourable Justice L.P. Chikopa SC, JA
Ngunde/Imran, Of Counsel for the Appellant
Kaphamtengo/Ngwata, Of Counsel for the Respondent
Chimtande (Mrs)/Minikwa, Court Clerks
Pindani (Mrs), Chief Court Reporter

Chipeta SC, J.A. [with Honourable Justice R.R. Mzikamanda SC, JA and Honourable Justice L.P. Chikopa SC, JA concurring]:

JUDGMENT

Industrial Relations Court Origin

The appeal before us has been taken out by JTI Leaf (Malawi) Limited. It is a second-level appeal. Earlier on in the matter the same appellant took up and prosecuted a first-level appeal in the High Court of Malawi. The case had initially been litigated in the Industrial Relations Court (hereinafter in this judgment referred to as the IRC). In that Court of first instance the respondent, one Kad Kapachika, who had been the appellant's employee, emerged successful in a suit he had commenced for unfair dismissal from his employment.

By a judgment the Deputy Chairperson of the Court pronounced on 7th November, 2014 multiple awards were made in favour of Mr Kapachika. These included damages for unfair dismissal, an order for the payment of his severance allowance, and an order for payment to him of three months' salary in lieu of notice. *Vis-à-vis* the awards herein, the Court first asked the parties to agree, *inter alia* in terms of Section 63(5) of the Employment Act (Cap 55:01) of the Laws of Malawi, on how they should be calculated. It, however, also clearly indicated that in the event of the parties failing to so agree on the calculations, it would then have to step in and assess the awards itself. Further than this, the Court additionally ordered, in terms of Section 65 of the Pensions Act (Cap 55:02) of the Laws of Malawi, that Mr Kapachika be paid his pension benefits.

The appeal in the High Court

JTI Leaf (Malawi) Limited, felt aggrieved with the IRC judgment. As a result, it appealed against the same to the High Court of Malawi at the

Lilongwe District Registry, where its appeal was registered as Civil Appeal No. 37 of 2015. It is important that we right away mention the fact that this appeal was taken up both before an agreement had been reached by the parties on the manner the awards the Court had made would be calculated, and before the Court had assessed any of the said awards.

The appeal was based on five grounds, which in amended form, were as follows:

(a) The lower court erred in law in holding that the appellant did not follow the requisite procedure in dismissing the respondent;

(b) The lower Court erred in law in holding that the appellant had no valid reasons to dismiss the respondent;

(c) The lower Court erred in law in holding that the respondent was unfairly dismissed;

(d) The lower Court erred in law in holding that the respondent is entitled to damages for unfair dismissal, severance pay, 3 months' notice pay and Pension dues.

(e) The lower Court's decision was against the weight of the evidence.

The appeal in question was concluded on 3rd September, 2015 with a judgment that was pronounced by Honourable Justice M.C.C. Mkandawire (as he then was). The Honourable Judge dismissed the appeal in its entirety and ordered each party to meet its own costs.

It was the Court's holding in the said judgment that Section 65 of the Labour Relations Act (Cap 54:01) of the Laws of Malawi, which governs appeals that come from the IRC to the High Court, is extremely fundamental. In its observation, this provision first and foremost recognizes decisions of the IRC as being final and binding. Its further observation was that the provision in question only allows appeals to be

taken up against IRC decisions in very limited circumstances as prescribed within it. As such, the Court found it imperative, before it could make any headway in the appeal that was before it, to look into the question whether the said appeal was, as *per* this provision, qualified to be entertained in terms of the applicable prescribed circumstances.

Bearing in mind the prescription in the material provision that makes it only permissible for any party to appeal from the IRC to the High Court if the grievance such party has with that Court's decision either concerns a question(s) of law or a question(s) of jurisdiction, the Court was of the mind that it was incumbent on the appellant, right from the outset of the appeal it had brought up, to clearly point out which law or which jurisdiction was in issue in it.

The Court next went on to say that having both listened to the appellant's arguments in the appeal and gone through its submissions therein, its view was that that party's focus in the appeal was on the factual and evidential issues in the judgment under appeal and not on either points of law or of jurisdiction. This focus, it observed, was on the internal processes of the appellant's disciplinary mechanism, which are not questions of law. Its judgment on these issues was thus that the decision the IRC had reached on the same was final and binding. The Court then further observed that a tendency had emerged of appellants in IRC cases clothing their grounds of appeal as if they were based on law when nothing of the sort can be seen beneath the veil. In consequence, it was the Court's conclusion that the appeal that had come before it did not fall within the scope of Section 65(2) of the Labour Relations Act. It is on this account that the Court then went on to dismiss the appeal in full as earlier mentioned and to direct that each party meet its own costs.

Requirement for leave to appeal in second appeal

As turned out to be the case, following the High Court's pronouncement of the above judgment, the appellant in the matter was once again aggrieved with the outcome that was pronounced. It thus launched the present appeal against the said High Court judgment. This appeal being, so to speak, a second-bite in the process of appeals, the law[1] as we understand it, would not allow us to accommodate it, unless it can be shown that it has been legally sanctioned to be so brought before us. This legal sanction must come by way of the appellant either obtaining the leave of the High Court, or the leave of this Court, to so appeal. Incidentally, we notice that in this case the appellant did take the precaution of looking into this requirement. It is clear from the record of the matter that JTI Leaf (Malawi) Limited, the appellant herein, duly obtained requisite leave to appeal from the High Court.[2] As such, we find ourselves satisfied that the appeal before us has no leave impediments against its being dealt with and determined by us.

Whether appeal should be determined if inchoate

Now, even though the appeal has passed the leave test, and we can from that angle properly proceed to adjudicate on it, we need to observe that there is a development in our jurisprudence that could still operate as a hindrance against us proceeding to so determine this matter. As must by now be common knowledge in legal circles, for a while now we have in this Court adopted a new way of handling civil appeals. We only receive

[1] Paragraph (a) of the second proviso to Section 21 of the Supreme Court of Appeal Act (cap 3:01) of the Laws of Malawi

[2] Formal Order of Leave to Appeal as granted by Hon Justice M.C.C. Mkandawire dated 13th October, 2015 on High Court Record

and entertain appeals on matters that have been dealt with and determined to completion. Our stand is that appeals must only be taken up in matters in which there is a 'final' judgment and nothing less. The language we have generally used is that we no longer deal with 'inchoate' appeals.

In this regard, we have a growing chain of precedents, such as **Aon Malawi Limited vs Garry Tamani Makolo**[3] and **Toyota Malawi Limited vs Jacques Mariette**[4] showing that we have closed the door on what may be referred to as 'piecemeal' appeals i.e having multiple appeals on isolated issues, but all of them arising from one and the same case. It really became tiresome for us to be handling say an appeal on an interlocutory matter in a given case, and then another appeal in it on the Court's determination therein only on the question of liability, and next after that entertaining yet another appeal in the same matter in regard to the assessment of damages in it, etc almost *ad infinitum*. In such instances, by the time we got to the stage when we could say that we were finally done with such a case, we would be wholly exhausted with it. Hence our change to the stance that we should only be handling cases on appeal when they have been fully and finally determined and exhausted in the Court below.

In the present matter, as already indicated above, the appeal the appellant took up in the High court was so taken up before the parties had agreed on how they would calculate the awards the Court had made in favour of the respondent (then plaintiff), as well as before any assessment of the said awards had been done by the Court of first instance. Strictly speaking, therefore, that appeal was inchoate.

[3] MSCA Civil Appeal No.16 o 2016 (unreportd)
[4] MSCA Civil Appeal No. 62 of2016 (unreported)

Likewise, now as can easily be confirmed from the appeal record, when the High Court dismissed the appellant's appeal, the appellant rushed in lodging its second appeal with this Court. Again it did so before the issue of damages and the other due awards had been revisited and concluded either by agreement of the parties or by an assessment of the Court. It in the circumstances naturally follows, therefore, that this appeal too was brought prematurely to this Court by JTI Leaf (Malawi) Ltd. It thus plainly also fits into the category of appeals that we call 'inchoate' in this Court.

This notwithstanding, we have taken the decision to proceed with a determination of this appeal. We have so decided because, even though the appeal is inchoate, it was both filed and argued well before this Court had developed and adopted the jurisprudence not to hear and determine such type of appeals. As such we cannot apply that jurisprudence retrospectively to this case just because we have delayed in delivering our judgment in it. As it is, therefore, this will be one of the last few, if not the very last appeal, that this court will go ahead and determine, despite it being an inchoate or premature appeal.

The framing of the grounds of appeal

The appeal herein having survived the leave to appeal test, and it also having survived the possibility of being rejected on account of its immaturity, we found it important to peruse and vet the grounds of appeal that the appellant has filed in it. As *per* the notice of appeal,[5] initially the appellant raised fourteen grounds of appeal in the matter. In

[5] Pp 165-171 of the record of appeal

our recollection, however, the appellant abandoned six of these grounds at the hearing of the appeal. It thus only remained with eight grounds, which it duly argued. For the record, the abandoned grounds of appeal were the 7th, and then the 10th to the 14th in the notice of appeal.

We need, we must say, to upfront confess that our preliminary survey of these remaining grounds of appeal has given us some anxiety and misgivings about the manner in which the majority of them have been framed. The framing of grounds of appeal is an area governed by rules of procedure. Bearing these rules in mind, we have wondered whether some of the grounds of appeal that have been tabled before us are up to the standard that is set and expected by the law. It is for this reason that we found that it would be prudent for us to go through the process of first vetting each of the argued grounds of appeal against the applicable rules before we can commit ourselves to determining any particular ground(s).

We shall thus have to so proceed because it is our belief that the rules that are available for the framing grounds of appeal were not put into the procedures of this court for decorative purposes. They were meant to be followed, and they were for the purpose of making appeals understandable and thus easing the work of the Court, as well as that of the parties, in the handling of the appeals they relate to. It is this exercise, we trust, that will help us to determine, in a sound and reliable way, whether the *prima facie* anxiety and misgivings we have entertained with some of the appellant's grounds of appeal are, or are not, well founded.

Order III rule 2 of the Supreme Court of Appeal Rules

At this juncture in our judgment, it is important that Order III rule 2 of the Supreme Court of Appeal Rules *(hereinafter referred to as SCA Rules)* be mentioned and highlighted. It is a legal provision that is directly material and relevant in the exercise we are now to undertake. As we had occasion to emphasize and to demonstrate in **Dzinyemba t/a Tirza Enterprise vs Total (Malawi) Ltd**[6], it is vitally important that appellants observe and conform with this provision whenever they are faced with the obligation to draw up grounds of appeal in matters that are to come to this Court. The critical thing is that if appellants choose to ignore the requirements this provision has elaborately laid down, they do so at their own risk. In such event it is open to the Court to find the filed grounds of appeal wanting.

Starting with sub-rule (2) of the Order and rule in question, as sub-rule (1) is merely on how the notice of appeal and its grounds should be formatted, it will be seen that it is a legal requirement that whenever an appellant intends in a ground of appeal to allege a misdirection or an error of law, that such party must clearly state the particulars of such a misdirection or error. The implication of this sub-rule, if we may say so, is that for any appellant to merely assert a misdirection or an error of law, without giving due particulars of such misdirection or error, is to raise an empty, or a vacant, ground of appeal.

Next, looking at sub-rule (3) of this same provision it will be seen that it has been couched in the peremptory words: *"The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any*

[6] MSCA Civil Appeal No. 6 of 2013 (Unreported)

argument or narrative and shall be numbered consecutively" (emphasis supplied). Our view is that in what it demands to be done or not to be done, this sub-rule is so blunt and clear that it does not leave any room for doubt or speculation. An appellant that does not set forth concise grounds of appeal, or who fails to set them under distinct heads, or who imports argument or narrative in his/her grounds of appeal ought to know that he/she is doing what is not permissible, and should therefore be ready for the consequences.

Indeed, as we examine Order III rule 2 a bit deeper, it is to be observed that under its sub-rule (4) save for allowing an exception on issues of weight of evidence, this provision does not permit the filing of any ground of appeal that is vague, or which is in general terms, or one which does not disclose any reasonable ground in an appeal. If an appellant files any such ground, therefore, room exists that it can be struck off either of the Court's own motion or on an application for such a remedy.

Vetting ground one of appeal against OIII rule 2 SCA Rules

We start our vetting exercise with reference to ground one of the appellant's appeal. It reads: *'The learned Judge misdirected himself on what constitutes a "question of law" for purposes of an appeal under section 65(2) of the Labour Relations Act by proceeding on the basis that in order for the appeal to qualify as an appeal "on a question of law or jurisdiction", under section 65(2) of the Labour Relations Act, the appellant had to identify a particular law or jurisdiction and demonstrate that the lower Court had erred on that particular law or jurisdiction when the law required the appellant to appeal on question of law or jurisdiction and not a particular law or jurisdiction.'*

To begin with, this ground of appeal is a mouthful. It is also repetitive in its expression of agony, and it is far from being concise. It in fact more reads like a submission than like a ground of appeal. It is full of argument, and it is also full of narrative. It further appears to us to unduly dwell on semantics. To be quite honest, it more tells us a story of the appellant's grief than it lays down a ground of appeal that could be seen as being in line with the clear requirements that we have seen in Order III rule 2(3) of the SCA Rules. Thus, all we see when we read through this ground of appeal is that it was rather emotively framed against the holding of the Court that it purports to attack. This ground of appeal is, in our view, defiant of the dictates of the provision in the rules that we have just tested it against. It has, as a result of its being so poorly drafted, been quite a struggle for us to make sense out of it.

Be this as it may, we observe that despite the crowded form in which it has been presented, this ground raises the point that the Court below erred in law when it required that beyond merely asserting that the IRC had committed errors of law, it further pronounced that the appellant should have felt duty-bound to identify and particularize the law the IRC had so allegedly erred against. We incidentally notice that the appellant also raises this very complaint, although in shorter form and in slightly different language, in its ground four of the appeal. These two grounds being on one and the same point, therefore, instead of us rushing to condemn ground one for the shortfalls we have just observed in it, when we will definitely be meeting the same grievance it raises by the time we get to ground four, we believe it will make sense for us not to dismiss ground one out of hand, but to instead vet it side by side with ground four. That way we will come to a single determination on both of them

on the question whether or not they at all raise for us a ground worth considering on the merits in this appeal.

Combined vetting of grounds one and four of appeal against OIII rule 2 SCA Rules

Ground four of the appeal is to the effect, and we quote:

"The learned Judge erred in law in imposing a duty on the appellant to point out on the outset which law was in issue when section 65(2) of the Labour Relations Act does not impose such duty on the Appellant."

Upon juxtaposing this ground next to ground one, it becomes plain as we have already observed that although they differ in the sense that ground four has been expressed in shorter and less vocal language, the two of them in reality just carry one and the same complaint from the appellant. The gist of this shared complaint is to the effect that the learned Judge in the Court below went outside the law when he observed in his judgment that in framing its grounds of appeal on errors of law, the appellant ought to have particularized the law or the jurisdiction it was claiming that the IRC had erred on. It is this position of the learned Judge the appellant refers to as an error of law in its understanding of what Section 65(2) of the Labour Relations Act entails.

Looking at ground four on its own, it to us looks relatively well framed. When viewed under the same lens of Order III rule 2(3) as we have done with ground one, the *prima facie* impression we get is that it appears to be a relatively sound ground of appeal. It is concise, it falls under a distinct head, and it appears to be without either argument or narrative. As such, despite the disturbing manner in which the complaint this ground repeats has come out in ground one, it remains a complaint that

does not deserve to be dismissed out of hand because of its Order III rule 2(3) shortfalls in that other ground. It thus needs to be further vetted under the remaining sub-rules of this Order and rule before we can decide whether or not to reserve it for a determination on the merits in the appeal.

Looking more closely therefore at the point these two grounds of appeal jointly raise, it strikes us that the subject they so touch on is well taken care of by Order III rule 2(2) of the SCA Rules. This sub-rule is part and parcel of the procedural rules all appellants ought to be guided by as they draw up their grounds of appeal. In our view this provision is very clear in what it says. It reads: *"If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error* ***shall*** *be clearly stated."* We wonder whether its open meaning would have been lost to the appellant had the said appellant had recourse to it. In the event we very much doubt the appellant could then have persisted in the thought that the Court had acted in error of law when it demanded that the appellant should have given particulars of the errors of law it was asserting. We take it that it really is standard practice in courts that exercise appellate jurisdiction not just to entertain grounds of appeal because they vacantly allege errors of law when they fall short of beefing up such allegations with due particulars of the errors of law alleged. In our judgment, therefore, with the quoted sub-rule being so clear on this issue, the appellant should not even have drawn up this grievance, whether in ground one or in ground four or in both. It purports to attack the learned Judge's decision as an error of law when in fact it is a decision the law overtly supports. As such, this ground of appeal is empty as it seeks to challenge as an error of law what law actually permits. In the circumstances, it is not a ground that can be said to be raising any

reasonable cause for appealing on this point. In the result we find that under Order III rule 2(4), it is not a permissible ground of appeal. It accordingly deserves to be struck out, and we so now strike it out both at ground one of the appeal as well as at ground four.

Vetting ground two of appeal against OIII rule 2 SCA Rules

Ground two of the appeal has been couched in the words: *"The learned Judge erred in law in holding that the appeal did not fall within the scope of section 65(2) of the Labour Relations Act as it was on question of fact."* *Vis-à-vis* this ground of appeal, we think that in general it complies with the rules that govern the drafting of grounds of appeal. It alleges an error of law, it particularizes the error the appellant has issues with, it is concise, and it is neither argumentative nor narrative. It is also neither vague nor general. Its concern, we take note, is with the High Court's interpretation of the expression "question of law" under Section 65(2) of the Labour Relations Act, which interpretation resulted in that Court excluding the appellant's appeal from the scope of that provision. In short, it is our view that the ground in question does properly disclose what can be seen as a reasonable ground for appealing. We thus have no problem in accepting it as a ground of appeal that is compliant with the requirements of Order III rule 2 herein, and as thus being a permissible ground of appeal thereunder. In consequence, we will retain it on the appellant's list of grounds of appeal, and will in due course determine it on the merits. In light of what has so far happened it therefore serially now becomes the appellant's first ground of appeal in this matter.

Vetting ground three of appeal against OIII rule 2 SCA Rules

As for ground three of the appeal, it asserts that;

"The learned Judge erred in law in not finding questions of law in the Notice of Appeal when he should have first looked to the grounds of appeal in the Notice of Appeal for the existence or otherwise of questions of law in the grounds of appeal specified therein."

We have read this ground of appeal over and over a number of times, but have found ourselves struggling to make any sense out of it. We actually see none. Obviously, if what the appellant is suggesting by this ground of appeal is that the learned Judge did not even look at the grounds of appeal that were before him before concluding that they did not raise any questions of law, then to begin with it is just being argumentative for the sake of it. If the appeal from the IRC was called and heard by the Court below, which it was, and if in its judgment the Court below clearly indicated that it had looked at the grounds of appeal and was even able to summarize the contents of the said grounds of appeal, then it was needlessly rude and idle for the appellant to allege in this ground of appeal that the learned Judge had not even bothered to look at the grounds of appeal. Indeed, the judgment goes further to indicate that apart from listening to the appellant in its presentation of that appeal, the Court went through the appellant's submissions in the appeal. We tend to think that in its suggestion that the Court below went through all these steps in its handling of the appeal it was seized of without even looking at the grounds of appeal the appellant had tabled before it, this ground was framed, not for purposes of raising a point of law, but rather for the mere purpose of undermining the integrity of the Court in the discharge of its judicial functions in that appeal.

To us, as we have just hinted above, to insinuate that the Court below heard and determined the appellant's first appeal without even looking at the grounds of appeal is not to suggest that the said Court either committed an error of law or an error of jurisdiction. Rather, doing so simply raises questions about the professional competence of the learned Judge that dealt with the appeal. We honestly do not think that such matters fall within the boundaries of the type of appeals we are meant to deal with. Appeals in a case like this are supposed to be based on the contents of the judgment being challenged, and they must isolate legal or jurisdictional errors therein rather than actions or omissions of the Judge that don't fall within the parameters of legal or jurisdictional error in his manner of handling the matter. For us, therefore, this ground of appeal is empty as it does not appear to us to disclose any reasonable cause/ground for appealing, and it is therefore not permissible under Order III rule 2(4) of the SCA Rules. Short of raising a reasonable ground on which we can meaningfully adjudicate we, in respect of this ground of appeal, also of our own motion strike it out.

Vetting ground five of appeal against OIII rule 2 SCA Rules

Having already vetted ground four of the appeal alongside ground one, we now move from ground three to ground five. The said ground five goes:

"The learned Judge misdirected himself in law when he failed to distinguish between a question of law and a question of fact thereby failing to appreciate that the court in considering a question of law has to consider the same in the context of facts."

Upon examining this ground of appeal, we have found ourselves drawn to it just the way we were drawn to ground two of the appeal, which has

since become ground one in the matter. Like that ground, it alleges an error of law, particularizes the said error, is concise, and is without argument or narrative. Also, it is neither vague nor general, well apart from the fact that it succeeds to disclose what in our view amounts to a reasonable ground for appealing. Indeed, as the parties will recall, we specifically urged them at the hearing of this appeal to ensure that they address us sufficiently on the point raised in this ground of appeal. We, in the result, find this ground to be in line with the requirements of Order III rule 2, and we thus accept it as a ground we should attend to on the merits. As a result, it now serially becomes the appellant's second ground of appeal in this matter.

Vetting ground six of appeal against OIII rule 2 SCA Rules

In ground six of its appeal, the appellant has framed its grievance in the words: *"The learned Judge erred in law by looking at a particular law or jurisdiction in the appellant's submission and concluding that since these only focused on factual and evidential issues and 'on the internal processes on [sic] the disciplinary mechanisms of appellant' (and did not mention a particular law or jurisdiction), the appeal did not raise a question of law when he could not examine the questions of law without considering the facts."*

With all due respect, this ground of appeal, well apart from being expressed in slightly different words, just repeats the complaint that constituted part of what is now the struck out ground one of appeal and the complaint in the also now struck out ground four of the appeal. This aside, it carries these repeated lamentations in submission form by completely disregarding what the rules say about the framing of grounds of appeal. As can be seen, it is not concise, and it is full of argument and

narrative. Being a repeat of grounds of appeal that have been found wanting and been struck out, and being offensive to both sub-rules (2) and (3) of Order III rule 2 herein, our view is that it is equally a ground of appeal that we cannot accommodate for purposes of merit-assessment at a later stage in the judgment. We give it the same fate as we have given earlier to the grounds of appeal that it is related with. Equally, therefore, we strike it out under Order III rule 2(4) of the relevant rules of procedure.

Vetting ground eight of appeal against OIII rule 2 SCA Rules

The next ground of appeal that falls due for vetting happens to be ground eight. This is because, as we have already mentioned above, the appellant abandoned its ground seven at the hearing of the appeal. Ground eight of the appeal reads: *The learned Judge erred in law when he dismissed the appeal on the ground that he did not see a question of jurisdiction when the appellant's appeal was not questioning the jurisdiction of the Industrial Relations Court to determine the dispute between the appellant and the respondent."*

The first observation we have on this ground is that it is very petty in the grievance it purports to raise. From what we see in the judgment on appeal, the origin of this ground appears to emanate from the following series of statements in the High Court judgment. The Honourable Judge started by referring to Section 65 of the Labour Relations Act as providing that *"...(2) A decision of the Industrial Relations Court may be appealed to the High Court on a* ***question of law or jurisdiction*** *within thirty days of the decision being rendered."* Next, after discussing what he understood Section 65 to be saying, and applying that to the appeal of

the appellant in the light of the arguments and submissions presented, the Honourable Judge said: *"...I cannot see the **question of law or jurisdiction** which the Industrial Relations Court had erred on as stated in the appeal"* and he then dismissed the appeal in its entirety.

The way the appellant has put his grievance in this ground, the impression conveyed is as if the Learned Judge dismissed the appeal it was seized of on the sole ground that he could not see in it any question of jurisdiction. This is simply not true. As just quoted above, the Learned Judge said he could not see a question of *law **or jurisdiction.*** Dismissing the appeal on this account is totally different from dismissing it purely on the basis that the court could not see a question of ***jurisdiction*** as the appellant's eighth ground of appeal suggests. The way we see it, therefore, is that to come up with this ground of appeal, the appellant had first to twist what the court said so that it could find a fault. So, in a way, the appellant invented its own version of the judgment by isolating the issue of jurisdiction from the issue of law in the Honourable Judge's expression so as to give birth to this ground of appeal. To us that step is uncouth, and it deprives this ground of the element of reasonableness as a ground of appeal. As such it ceases to be a valid ground of appeal.

Further, looking at the way the Court used the phrase *question of **law or jurisdiction*** in its concluding statement, it is obvious that it was using the same in the very manner in which Section 65(2) of the Labour Relations Act uses that phrase. One might wonder, therefore, whether in writing a judgment a Judge is not free use the phrases the law uses in the very manner they appear in whatever provisions the Judge happens to be dealing with in any given case. From the lamentation the appellant has projected through this ground, it appears to hold the view that because its appeal only cited errors of law then the Judge should never have

alluded to the word 'jurisdiction' in the same breath as the word 'law' when referring to section 65(2) of the LRA, even though in that provision they comfortably appear side by side and are ordinarily read in the same breath. To say the least, the appellant's complaint amounts to absolute pettiness and pedantry. Our conclusion here is that the appellant had run out of what to legitimately complain about against the judgment of the Court below. He must have thus hatched this ground by picking and choosing amongst the words the Honourable Judge used just to increase the number of the grievances it wanted to air in the matter. We cannot accept such an empty and petty ground of appeal to be one presenting us with a reasonable cause for assessment of merit-content as we proceed with the judgment. Accordingly, we under Order III rule 2(4), strike it out.

Vetting ground nine of appeal against OIII rule 2 SCA Rules

We now finally move to ground of appeal number nine, which at present stands in the notice of appeal as the appellant's last ground of appeal. The appellant, we recall, in wholesale fashion abandoned grounds seven, ten, eleven, twelve, thirteen, and fourteen on the day we heard the appeal. Thus our vetting exercise having reached ground eight, it will come to an end once we tackle ground nine. In this ground, the appellant's grievance has been stated in the words: *"The learned Judge erred in law in prematurely dismissing the appellant's appeal in its entirety without reviewing the decision making process of errors of law when his function, on appeal, was to review the administrative decision-making process of the Industrial Relations Court for its legality or errors of law, not the merits of the decision."*

Reading this grievance of the appellant, it is undoubtedly clear to us that it does not raise a reasonable ground of appeal. The legal concepts and principles it espouses are those that guide Courts when they are faced with applications for judicial review. What law permits the appellant to borrow those principles and concepts for use in an appeal arising from an ordinary civil suit is far from clear to us. As we observed at the outset, this matter commenced as an employment suit in the IRC. It then graduated to the High Court as an appeal against the IRC judgment. It is now in this Court, again as an appeal, because the appellant was aggrieved with the High Court's judgment. At no point in time did this matter begin as, or convert to, a judicial review process. How, the appellant in this ground has ended up viewing it as a proceeding in which the High Court was supposed to exercise its judicial review jurisdiction by reviewing the decision-making process of the IRC is something that has come from the blues as throughout the three levels of Court this case has been to it has no foundation. The way we view this ground, therefore, it does not contain any reasonable grievance that would justify the appellant slotting it into this appeal. In the circumstances, we have no difficulties in letting it join the bandwagon of rejected grounds of appeal in the matter. We accordingly so strike ground nine of appeal out for offending Order III rule 2(4) of the SCA Rules.

Summary of the vetting exercise

It emerges from the vetting exercise that we have just concluded that only two grounds of appeal remain for us to deal with on the merits. These are what were initially the appellant's grounds two and five of the appeal. Post the appellant's voluntary withdrawal of six grounds of appeal, which left eight grounds of appeal in existence, we have during the vetting exercise struck out six more on account of their being at

variance with the requirements of different sub-rules of Order III rule 2 of the SCA Rules. In consequence of this, just as happened at the time the appellant withdrew some grounds of appeal, we once again now have had to serially re-arrange the surviving grounds of appeal. Thus, what was ground two of appeal has now become ground one, and what was ground five of appeal has now become ground two of appeal. Our way forward, therefore, is to direct our focus towards the surviving two grounds of appeal, and to determine them according to such merit-content as they may have.

Analyzing and determining the new grounds one and two of appeal

Just to recap, in what is now ground one of appeal, the appellant is claiming that the High Court erred in law when it held that the appeal that had been brought before it only raised questions of fact and not of law, and that it was thus outside the scope of Section 65(2) of the Labour Relations Act. As for the current ground two of appeal, it is the one in which the appellant is asserting that the High Court misdirected itself in law when in its judgement it failed to distinguish a question of law from a question of fact, and that it thereby failed to appreciate that in considering a question of law a Court must do so in the context of facts.

The way we look at these two grounds, they are very closely linked. The grievance ground one starts, the second one compliments or otherwise completes. In doubting the High Court's categorization of its grounds of appeal as raising questions of fact rather than questions of law in the first ground, the appellant in the second ground basically continues with and completes the same complaint. This it does by attributing the alleged erroneous categorization of its grounds of appeal to a failure on the Court's part to appreciate (a) the difference between questions of law

and questions of fact and (b) the role facts must play in the determination of questions of law. Put more simply, the combined question these two grounds raise is whether it was not a legal error for the High Court to conclude as it did that the appellant's appeal was on questions of fact and not of law, and whether in coming to that conclusion it ought or ought not to have taken matters of facts into consideration. It is thus best, we think, that the two grounds of appeal be dealt with simultaneously.

Appellant's arguments on the remaining two grounds of Appeal

In the oral presentation it made in its appeal, the appellant placed reliance on a number of processes that it had filed. These included the grounds of appeal, the skeleton arguments it had filed on 6th September, 2016, and a list and bundle of authorities as well as a notice of two additional authorities that it filed on 18th November, 2016. *Post* the hearing of the appeal, the appellant supplemented its arguments with written submissions, and it also amended its list of authorities. In a nutshell in its arguments, the appellant took issue with the High Court's holding that contrary to Section 65 of the Labour Relations Act the grounds of appeal it had filed were on questions of fact and not on questions of law. It even complained that the learned Judge in the High Court did not even look into the merits of the appeal before dismissing it. On its part, the appellant was insistent that its appeal did raise questions of law, and that it is thus at a loss how the Court could have held that they were not compliant with the requirements of Section 65 of the Labour Relations Act.

Quoting Section 65 in full, the appellant equated its sub-section (2) on appeals being permissible only on questions of law or jurisdiction to

Section 44 of the Administrative Tribunal Act 1975 of Australia. That provision in its sub-section (1) provides for appeals from an Administrative Appeals Tribunal to the Federal Court of Australia in the following terms: *"A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia on a question of law from any decision of the Tribunal in that proceeding."* He then next referred to the case of **Haritos vs Commissioner of Taxation**[7] in which he pointed out a quotation by the full court from the decision in **P vs Child Support Registrar**[8] in the words: *"It is important to emphasize at the outset that the appeal, being instituted under S44(1) of the AAT Act, is confined to 'a question of law'. This does not, of course, mean that the reach of S44 is limited to questions of law divorced from the need to look at facts..."*

Adding on to this, the appellant quoted from paragraph 182 of the **Haritos judgment** the statement: *"The full court has accepted that a determination of a question of fact by the Tribunal may give rise to a question of law".* He further also quoted from paragraph 201 of that same case the dictum: *"It may, however, be the case that in exercising its jurisdiction under S44 of the AAT Act the court has to consider how the Tribunal has gone about its fact finding and the choices it has made in order for the Court to assess, in deciding a question or questions of law, whether the Tribunal has stayed within the zone of discretion. For this purpose, the court does not consider whether the Tribunal should have made a particular finding of fact but whether it may lawfully have done so."* The last judgment he referred to was that of Lord Carnwath in **Jones vs First Tier Tribunal**[9], in which at paragraph 46 is a quotation from an article entitled Tribunal Justice in A New Start [2009] PL 48. The

[7] [2015] FCAC 92
[8] [2014] FCAC 98
[9] [2013] UKSC 19

quotation goes: *"...Accordingly, such Tribunal, even though its jurisdiction is limited to 'errors of law', should be permitted to venture more freely into the 'grey area' separating fact from law, than an ordinary court. Arguably, 'issues of law' in this context should be interpreted as extending to any issue of general principle affecting specialist jurisdiction."*

Building on the similarity between Section 65 of the LRA and Section 44 of the Australian AAT Act on the subject of appeals on questions of law, the appellant submitted that the determination of the Federal Court of Australia in the **Haritos matter** should persuade us on the approach to adopt when determining this appeal. Its view was that there is no local case authority on the subject and its argument, therefore, was that it is plain from that Australian case that a court may consider the facts in order to satisfy itself on whether an appeal raises questions of law. Thus, the appellant asked that the Court should be persuaded that in highlighting the facts to the court below, the appellant did not mean to raise questions of fact, but rather it did so to enable the court to appreciate questions of law in the context of those facts. In conclusion the appellant submitted that the court should not consider questions of law in isolation from the facts.

Respondent's arguments on the remaining two grounds of Appeal

In relation to the appeal, the respondent had skeleton arguments which he filed on 17th November, 2016. He adopted them before orally presenting an abridged form thereof. He supplemented these with submissions that he filed after the hearing of the appeal. On the issues in this appeal, his view was that they are quite narrow. He thus opted to argue all of them together. His first observation was that Section 65 of

the LRA is clear on the point that appeals from the IRC must be on questions of law, and not on questions of fact. In this regard he further observed that it is equally clear that in IRC matters questions of fact exclusively lie within the jurisdiction of the IRC. As for the question whether on a consideration of questions of law in such matters an appeal Court should also consider questions of fact, the respondent preceded his submission with reference to some authorities on the subject.

From **Black's Law Dictionary** 6th edition the respondent extracted the definition of the expression 'a question of law' as being a question that concerns the legal effect to be given to a set of undisputed facts. He then quoted from the Zimbabwe Supreme Court case of **Muzuva vs United Bottlers(Pvt) Ltd**[10], the statements that depict 'a question of law' as *".. a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter ..."*

Next, the respondent acknowledged that when a matter goes from the IRC to the High Court on appeal it necessarily carries with it findings of fact by the IRC, which are final and binding. The said facts, he contended, reach the appellate court as 'undisputed' facts, and as *per* Section 65(1) of the Labour Relations Act, the appellate court cannot interfere with them. In support of this point he then referred to the Malawi Supreme Court of Appeal decision in **Stanbic Bank Ltd vs Tukula**[11], in which he highlighted the point that the Court held that in such cases a finding on a matter of fact falls outside the jurisdiction of the appellate court.

[10] 1994 (1) ZLR 217(S)
[11] [2006] MLR 401

Going further, it was the respondent's argument that even where the appeal is grounded on the assertion that the judgment was against the weight of the evidence, the duty of the appellate Court would be confined to merely examining the trial court's fact-finding process in order to check if the Court took into account relevant evidence before making its findings of fact. Where the trial court duly analyzed the evidence and gave reasons for its preference of the evidence on which to base its decision, his stand was that the appellate court cannot interfere with the resultant findings of fact. In such case too, the respondent argued that on an alleging that the judgment is against the weight of the evidence, an appellant is supposed to point out where exactly the trial court erred. In the instant case, the respondent said the appellant did not do so in respect of that ground.

It is following the above arguments that the respondent submitted that the IRC being the final and binding court on findings of fact, the appeal court had no jurisdiction to interfere with its findings of fact that were analyzed with reasons given for preferring the evidence that influenced the said findings. He further submitted that the appeal Court's only business was to restrict itself to questions of law, i.e questions through which it could have given legal effect to undisputed sets of fact. Questions of fact leading to findings of fact being matters for the exclusive jurisdiction of the IRC, the respondent finally submitted that the appeal court had no jurisdiction at all to consider them, its duty being to interpret and apply the law on the factual findings of the IRC. All in all, the respondent was of the mind that the appellant did not raise any point of law in any of the grounds of appeal it filed in the appeal before the High Court.

Re-hearing feature in the appeal

Having gone through the arguments the parties presented to us with in this appeal, it is high time we reminded ourselves about the procedure we are called upon to follow when hearing appeals. Of cardinal guidance to us is Order III rule 2 (1) of the Supreme Court of Appeal Rules, which among other requirements, provides that all appeals before us should proceed by way of rehearing. A rehearing, as we understand it from existing authorities, consists in us virtually putting ourselves in the shoes of the Court below, and reviewing the material that was before it in the appeal, and then in the light of the grounds of appeal that we must resolve asking ourselves whether or not we would have come to the same conclusions as the court below did. See: **Professor Arthur Peter Mutharika and The Electoral Commission vs Dr Saulos Klaus Chilima and Dr Lazarus McCarthy Chakwera**[12]. It will incidentally be observed that in that case we took benefit of and quoted a *dictum* from earlier decision of this Court in **Steve Chingwalu and DHL International v Redson Chabuka and Hastings Magwirani**[13]. The said passage is at 388 of that judgment, and it reads:

> *"Finally, we bear in mind that an appeal to this Court is by way of rehearing which basically means that the appellate court considers the whole of the evidence given in the court below and*

[12] MSCA Constitutional Appeal No. 1 of 2020 (Unreported)
[13] [2007] MLR 382

the whole course of the trial; it is as a general rule, a rehearing on the documents including a record of the evidence. The case of ***Msemwe v City Motors Limited***[14] *is to that effect. In the case of* ***Coghlan v Cumberland***[15]*, cited by Counsel for the respondents, Lindsey MR, stated:*

> *'Even where... the appeal turns on a question of fact, the court has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge, with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong.'".*

It will be recalled in this case that after hearing the appeal, the High Court found itself unable to delve into its merits and to determine it on that basis. This is because, from a combination of hearing the appeal and a reading of the appellant's submissions in the said appeal, it came to the conclusion that in terms of Section 65(2) of the Labour Relations Act what was before it was not a permissible appeal.

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[14] 15 MLR 302
[15] (1898) 1 Ch 704

It follows, therefore, that in our rehearing of the present appeal, we too cannot go overboard by delving into the merits of the appeal the first appellate court did not delve into. Doing so would in effect be tantamount to us taking over that appeal and virtually deciding it on that court's behalf. We ought, therefore, in the spirit of rehearing the appeal, to just limit ourselves to reconsidering whatever was before the court below, and in light of the arguments we have been presented with to then make up our own minds on whether to agree or to disagree with the conclusions that were reached by the court below.

Whether facts to feature in an appeal on a question of law, and extent of featuring if any

We should like at this juncture to first thank learned Counsel for the appellant and learned Counsel for the respondent for having been very resourceful and industrious in bringing up to us enlightening authorities and detailed arguments on the question whether on a consideration of questions of law in an appeal like this one, matters of fact have any role to play and, if so, to what extent. We do cherish the fact that their efforts have yielded beneficial fruits for us in the

course of preparing our judgment. An observation we have, however, is that much as in their arguments the two sides appear to have come to opposing conclusions, the authorities they each cited to us in support of their opposing stands do not actually disagree with each other. Rather, the way we see it, the authorities from both sides of the appeal answer the question in issue in the same manner *vis-a-vis* what in the circumstances is the correct legal position.

To us, what is clear beyond any doubt in this appeal, and both the opposing parties to the appeal fully agree on it, is that as *per* Section 65 of the Labour Relations Act, decisions of the IRC on the facts are final and binding, and that appeals from that Court are only permitted if they are either on questions of law or on questions of jurisdiction, not otherwise. Indeed, it can be confirmed that this Court has on numerous occasions affirmed this position, including through the case of **ADMARC vs Albert Kuthemba Mwale.**[16]

The only point of divergence we see between the two sides of the appeal is their reaction to the finding of the court below in this matter to the effect that the appeal that was before it was not on questions of law, but on questions of fact. The appellant vehemently disagrees with that conclusion, while the respondent strongly supports it.

[16] [2014] MLR 1

Following on this, it is the finding that the appeal was on factual findings of the IRC, and the fact that the arguments the appellant furnished to that court dwelt on matters of fact, that has bred the question in what is now ground two of the appeal, to wit: whether facts have any role in appeals on questions of law and, if so, to what extent.

In their respective addresses, the parties have done what they could to show us the direction the law takes on this issue. In our judgment, through its comparison of the Australian legal provision on appeals on a question of law with our Section 65 of the Labour Relations Act, and through the various quotations it has presented us with from the case of **Haritos** and the case of **Jones vs First Tier Tribunal** (supra), it clearly emerges that instances will arise where the determination of a question of fact gives rise to a question of law. Where such happens to be the case, as further suggested by the dictum in the English case the appellant cited, despite the appellate court's jurisdiction being limited to 'errors of law', it should be permitted to venture more freely into the 'grey area' that separates fact from law.

As it is, and we have so said above, it appears to us that the respondent's research on this issue has co-incidentally also confirmed the above to be the correct position of the law on this

point. As depicted in the authorities the respondent has cited, the position they project is not different from the position the appellant has depicted in his authorities on this same issue. In his reliance on the definition of 'question of law' from **Black's Law Dictionary**, the respondent has described such to be a question that concerns the legal effect to be given *to a set of undisputed facts*. Also in his reference to the Zimbabwean case of **Muzuva vs United Bottlers(Pvt) Ltd** (supra), the quotation the respondent has taken speaks of a question of law as being one in which the question for argument and determination is *what the true rule of law is on a certain matter*. Indeed, even a definition this Court has lately come up with in respect of the phrase 'question of law' also confirms this position. It goes: *"On matters of law, an appellate court can reverse trial courts findings if the law was misapplied to the found facts. Questions of law are questions that deal with the scope, effect and application of a legal rule or test to be applied in determining the rights of the parties."*[17]

If we may say so, a matter, even if it be principally on the law, must somehow relate to a given factual situation. It does appear to us, on a comparison of what the different authorities are saying here, that

[17] Professor Arthur Peter Mutharika and Another vs Dr Saulos Klaus Chilima and Another (Supra)

what the Supreme Court of Zimbabwe alluded to in its observation on the true rule of law on a matter is not different from the *set of undisputed facts* as reflected in the **Black's Law Dictionary's** definition, just as we believe it is not different from the link between determinations on facts and questions of law that the appellant has depicted through the Australian cases it has cited, and the need it has also depicted in the English case it has cited for courts in appeals on questions of law to have the freedom to venture into the grey area between facts and law. As it is, our own local case authority confirms this in its observation that a misapplication of the law to found facts does amount to an error of law, and on appeal it can lead to a reversal of a lower court's findings.

What is crucial, however, is for the courts not to blindly or aimlessly delve into factual matters for the sake of doing so. As and when a consideration of facts becomes necessary in dealing with an appeal on a question of law, the concerned Court ought to bear at the fore of its mind a legitimate purpose for getting into such factual considerations. Again here, our view is that the parties in their independent searches for the correct position of the law on this issue have come up with a uniform answer.

As we have already seen from one of the **Haritos** quotations above, the Federal Court of Australia took the view that in dealing with an appeal on a question of law, the court may have to consider how the Tribunal (in our case the Court) below went about its fact finding and the choices it made so that in deciding the question of law the appellate court be in a better position to assess whether the below Tribunal (or in our case the below Court) had stayed within the zone of discretion. In that regard, it made it clear that the appellate court does this, not for purposes of considering whether a particular finding of fact should have been made by the Tribunal (or in our case the Court) in question, but rather for purposes of considering whether it could have lawfully made such a finding of fact.

By coincidence, from the searches and discoveries he had made, the respondent also came up with observations that are to the same effect. Although in acknowledging that in appeals on questions of law matters reach the appellate court with *undisputed facts* in the form of *final and binding* IRC determinations on factual matters, empowered by the authorities he had consulted and quoted from, the respondent, despite contending that matters of fact should be excluded in appeals on questions of law, within the same breath ended up supporting, for specific purposes, the courting of matters of fact by appellate courts. As we saw when he was addressing the

issue of an appeal based on a complaint to the effect that a judgment is against the weight of the evidence, his stand was that the duty of the appellate Court would be confined to merely examining the trial court's fact-finding process in order to check if the Court took relevant evidence into account before making its said findings of fact. Now, this does not differ from what the appellant has shown through the **Haritos case.**

We must say we find the authorities the parties have used to discover the correct position of the law on appeals on questions of law, and on the role factual matters have in a consideration of such appeals, although they are largely from external jurisdictions, to be quite persuasive and sound. We accept the guidance they offer and we will utilize that guidance in this appeal. We need to add, however, that whenever disputes come to court, labour disputes in the IRC included, they can rarely be about an academic application of the law. Of necessity they arise from live factual situations, whose resolution at first instance depends on a matching of the facts obtaining against the applicable law. Of necessity, therefore, even if an appeal following on such adjudication arises purely from questions of law, it would be idealistic to expect that there will be a one hundred *per cent* divorce of the legal questions from the facts.

What the authorities the parties have furnished us with advocate, however, is that appellate courts should not resort to such facts for purposes of deciding whether the Tribunal or Court below should have made particular findings of fact, but whether it could have lawfully made such findings. The corollary of this is that on their part too, appellants on questions of law should not try to hoodwink appellate courts into delving into factual situations for purposes of drawing factual conclusions that are different from those that were made by the final and binding decisions of the trial court. Appellants will only be right in their approach if they invite appeal courts to go into a consideration of the facts solely for the noble principle of checking whether such findings could have been lawfully made. In this case, therefore, these are the guiding principles we will apply in order to come up with our final determination. Depending on the view we take on the purpose with which the appellant inundated the High Court with factual arguments in the presentation of its appeal, the result we will give will have to be in line with our above understanding of the position of the law on the subject.

Determination

We have captured it above in our summary of the appellant's arguments that the appellant has lamented to the effect that the High Court did not even look into the merits of the appeal it had before dismissing it. Hearing this has made us wonder how that court could have been expected to go into an examination of the merits of an appeal it found to be against the dictates of Section 65 of the Labour Relations Act, and to be therefore impermissible. Be this as it may, our rehearing of the appeal has enabled us to appreciate that the High Court in its manner of handling that appeal did not in any way short-change the parties *vis-à-vis* the rights they had as parties to the appeal. It welcomed the processes they filed in aid of the appeal, it heard them argue the appeal in full, it read and considered all the submissions they made in the appeal, and it only came up with its judgment after holistically looking at and evaluating all the material they had placed before it.

At the end of all that, its resultant impression being that the appellant had fallen short of the demands of Section 65 of the Labour Relations Act, the Court below had no option but to dismiss the appeal, as it did. There was no room at all for entering into an evaluation of the merits. In turn, therefore, as we have already indicated above, our job through the rehearing process we have had to conduct, has been to put ourselves in the shoes the High court wore, and to approach

this evaluation in exactly the same manner. We must, therefore, avoid being drawn into a consideration of the merits of what the appellant tabled before the Court below, as we go about the exercise of determining whether or not we too would have concluded that the appellant did not raise any questions of law in his grounds of appeal.

To successfully do this, we have had to meticulously study all that transpired in the Court below. This has entailed us looking, not only at the grounds of appeal that Court was meant to deal with, but also at the oral and written arguments that were articulated in support of and in opposition of the appeal, as well as at the submissions that were made to buttress and to oppose the said appeal. Laborious as this exercise has been, we undertook it as a necessity assignment if we were to fulfil the procedure a rehearing of an appeal entails. Thus, just as the Court below did not go into giving elaborate details of how for each of the grounds of appeal that were before it, it found the arguments to be raising questions on matters the IRC had made final and binding decisions on rather than questions on matters of law, we too will not elaborate the details of everything this exercise has unearthed before us, lest we end up inadvertently or otherwise entering into a discussion of the merits that could only properly have been discussed by the court below if it had found itself seized of a legitimate and acceptable appeal.

As it is, it will be that court's business to discuss those merits should we allow this appeal and send back the matter for it to determine the same on the merits. Suffice to say that after going through all the material the High Court dealt with, and after assessing the manner in which the appellant went about supporting its grounds of appeal in the High Court, we are convinced that he was not asking that Court to decide whether the IRC *could have legally made* the factual findings it made on both the substantive and the procedural aspects of the dismissal/termination herein. Its aim, the rehearing has shown us, was that the High Court should make factual findings that were opposed to or in disagreement with the conclusions the IRC had come up with on the facts.

This, as the authorities we have accepted guidance from above clearly show, contravenes the spirit of a court resorting to matters of fact when considering questions of law. The distinct impression we are left with, therefore, is that had we been the ones sitting in the High Court when that appeal was called for hearing, we would not have come to a different conclusion from the one the learned High Court Judge pronounced in it. Consequently, it is our judgment that the appellant herein indeed failed in its said appeal to the High Court to raise questions of law. Having instead only managed to raise therein questions of fact, which was contrary to what Section 65

demands of appellants in appeals from IRC decisions, we see no substance in the two grounds of appeal the appellant was left with in this appeal, and we thus dismiss them both. Those having been the appellant's only surviving grounds of appeal, our dismissal of the same means that we have dismissed the entire appeal.

Costs

The appellant's appeal having been dismissed *in toto,* immediately arising is the question of costs. The parties presented their arguments, supported by the legal provision on costs under the LRA and some case authorities. As is always the case, opposing parties rarely see eye to eye on this subject. In like manner the parties to this appeal had a tug of war on the matter, with each side pulling towards itself a determination that would best suit its interests. We have no intension of debating the opposing arguments they paraded before us in any further detail.

At this point we only find it important to mention that apart from the general principle that costs lie in the discretion of the Court, we do not lose sight of the noble reasons behind the Labour Relations Act legal provision on the subject of costs.[18] It starts as follows: *S72(1) Subject to subsection (2), the Industrial Relations Court* ***shall not*** *make any order as to costs."* It is only after putting forward this strong statement that it next softens a little by providing as follows: *"S72(2) The Industrial Relations Court may make an order as to costs where a party fails to attend, without cause, any conciliation meeting convened under this Act, or where the matter is* ***vexatious or frivolous.***"

[18] Section 72 of LRA

Our view, if we may put it up-front, is that the reasons behind the promulgation of this special legal provision on costs in relation to industrial relations matters is not to make such litigation expensive and out of reach for the masses of suffering employees. Courts like ours need, therefore, to be slow in turning appeals that come before them into avenues for subverting the helpful intentions of the law for litigants in this area of law. This court should therefore not casually jump onto invitations to stifle the parties' rights to litigate up to appeal levels in these matters. Given the circumstances of this matter, we cannot say that the appeals the appellant took up were vexatious or frivolous. As can be seen, the appeal before us has afforded us an opportunity to pronounce on how appeals on points of law should generally be handled, especially in regard to how delicately matters of fact should be looked at in such appeals. We thus through this judgment take the opportunity to emphasize the point that the right to appeal in labour and industrial matters should not be wantonly or needlessly converted into a mere *privilege* to appeal by parties who cannot see beyond their personal interests on questions of costs. Our order in this case, therefore, is that each party should bear its own costs, just as in the High Court a like order was made.

Consequential order

Our determination of this appeal being a confirmation of the decision of the High Court, which upheld the decision of the IRC on liability, the meaning of all this is that the IRC judgment has always been the right decision in this case. Now, since by the time the appellant took out the first appeal in the matter an assessment of the awarded damages and of

the other dues had not yet taken place, and as the appeal from the High Court to this Court equally did not permit room for that assessment to take place, our order is that this matter must henceforth revert to the IRC for the said assessment of damages and of the other awards it had granted to take place, unless the parties should agree earlier on what the appellant will pay to the respondent under each head of the awards. We order accordingly.

Pronounced in Open Court the 13th day of April, 2021 at Blantyre.

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Honourable Justice R.R. Mzikamanda SC, JA

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Honourable Justice A.C. Chipeta SC, JA

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Honourable Justice L.P. Chikopa SC, JA