

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2022] SCCA 12 (29 April 2022)

SCA 60/2019

(Appeal from ET 51/2015)

In the matter between

**Four Seasons Resort Seychelles**  
(rep. by Mr. Elvis Chetty)

**Appellant**

and

**Marie Daniella Chang-Time**  
(rep. by Mr. John Renaud)

**Respondent**

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**Neutral Citation:** *Four Seasons Resort Seychelles v Chang-Time* (SCA 60/2019) [2022]

SCCA 12 (Arising in ET 51/2015) (29 April 2022)

**Before:** Twomey, Robinson, Tibatemwa-Ekirikubinza, JJA

**Summary:** Employment Law – In cases of unlawful dismissal, an employee is entitled to compensatory wages until the Tribunal’s decision is delivered.

**Heard:** 13 April 2022

**Delivered:** 29 April 2022

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**ORDER**

The appeal is dismissed with costs to the respondent.

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**JUDGMENT**

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**Dr. L. Tibatemwa-Ekirikubinza (JA)**

- [1] This is an appeal from the decision and orders of the Supreme Court (Govinden, J.) dated 11<sup>th</sup> October 2019 handed down in an appeal from the Employment Tribunal.
- [2] The background facts to this appeal are that the Respondent was employed by the Appellant as a Room Attendant. On 17<sup>th</sup> July 2015, she was suspended from duty on the basis that she had shown a lack of respect and threatened the Appellant’s

representative. Her disciplinary hearing was held on the 19<sup>th</sup> July 2015 upon which the Appellant found that the Respondent had committed a serious disciplinary offence in violation of Rules 1 and 7 of its Policy and schedule 2 part II of the Employment Act. The Appellant therefore terminated the Respondent's employment.

[3] Subsequently, the respondent instituted a grievance procedure under the Employment Act and claimed for reinstatement to her employment without loss of earnings. When the parties failed to reach an amicable settlement, the respondent filed a complaint before the Employment Tribunal.

[4] The Employment Tribunal found that the Appellant had failed to adduce evidence to prove that the Respondent had committed the alleged disciplinary offence. Finding, however, that the Respondent had not adduced evidence of loss of earnings, the Tribunal only made an order for the Appellant to pay her one month's salary in lieu of notice and compensation for length of service.

[5] Dissatisfied with the Tribunal's decision, the Respondent appealed to the Supreme Court on grounds that:

- (i) the Tribunal had erred in not reinstating her employment;
- (ii) in the alternative, the Tribunal erred in not recognizing that as her new job paid less than the job she had been terminated at, she was entitled to compensation for loss of earnings; and
- (iii) that the Tribunal had erred in its computation of the employment benefits when it did not include salary and other benefits payable up to the date the Employment Tribunal takes its decision,

Supreme Court Judge, Govinden, found that the Employment Tribunal erred in failing to state its reasons why reinstatement of the Respondent to her former position of employment would be impractical or inconvenient and that it cited a wrong provision of the Employment Act, viz. Section 61(2) (a)(iii) and not Section 61(2)(a)(ii) in reaching its decision.

[6] The Supreme Court, however, declined to make an award of compensation for loss of earnings based on the difference between the Respondent's new salary at her new job and her salary at her old job with the Appellant, holding that such compensation is alien to the Employment Act. The Court went further to note that at any rate, the Respondent had failed to prove the difference between the two salaries.

[7] In terms of terminal benefits, the Supreme Court held that it was settled law that salaries and other benefits are payable by an employer to their employee until the date of the determination made by the Employment Tribunal. Accordingly, the Court awarded the Respondent salary arrears for 30 months and 10 days from the date of dismissal (15<sup>th</sup> July 2015) to the date of the Employment Tribunal's determination of the matter (21<sup>st</sup> May 2018). The Court also ordered the Appellant to pay the Respondent compensation for her length of service up until the date on which the Employment Tribunal made its determination. In awarding this compensation, the Court noted that, "...it makes no difference in law that the worker had managed to secure an employment between her unjustified termination and that of the decision of the Tribunal."

[8] The Appellant Company was dissatisfied with the Supreme Court's decision and lodged an appeal before this Court on the following grounds:

1. **That the learned trial Judge erred in law and on the evidence in that the decision is unreasonable and cannot be supported by the evidence and law;**
2. **That the learned trial Judge erred when finding the Tribunal was at fault for not giving reasons when it arrived at the determination that reinstatement of the Appellant was "inconvenient" or "impracticable" and that the Employment Tribunal made reference to the wrong provision of the Act;**
3. **That the learned trial Judge erred when arriving at the conclusion that the Appellant was in employment until the determination of the Employment Tribunal;**

4. **That the learned trial Judge erred in law when he made the pronouncement that “it makes no difference in law that the worker had managed to secure an employment” whilst conducting her case before the Tribunal.**

### **Prayers**

- [9] The Appellant’s prayers are for this Court to quash the decision of the Supreme Court and make any other orders that it thinks fit.

### **Ground 1: Submissions of Counsel**

- [10] The essence of the submissions of Counsel for the appellant under this ground was in regard to the procedure adopted in handling the *plea in limine* raised by the appellant. He further faulted the Trial Judge in making no determination or pronouncement on the matter.

- [11] Under the same ground, Counsel for the appellant faults the court for making an order which ignored the fact that there was evidence that the appellant secured alternative employment.

- [12] On the other hand, Counsel for the respondent argued that the Trial Judge was reasonable in his action because of the constant absence of the counsel for the respondent.

- [13] To fully comprehend the procedure that was adopted by the trial judge in handling the *plea in limine litis*, it is necessary to put down the chronology of the relevant proceedings. It was as follows:

**27th March 2019** - Counsel for the respondent raised a *plea in limine*.

Court - you need to support this plea with a response or will fix it for oral submission

Counsel - we would fix it with oral submission because your Lordship will already have all the documents on file

### **30th May 2019**

Both Counsel absent

Appellant present in court

Judge explained to the appellant in open court that 30th May had been fixed to hear submissions of counsel on the *plea in limine* to the effect that the appeal had been filed out of time. Court went on to refer to the date of the decision of the tribunal and the filing of the appeal etc.

Case adjourned to 5th June for hearing of submissions on *plea in limine*.

**5th June 2019**, counsel for the appellant present, counsel for the respondent had another counsel standing in for him.

Court adjourned case to 4th July with the following directions: **we will fix the matter (plea in limine) for hearing - "for Exparte hearing on the plea in limine"**

### **4th July 2019**

Counsel for the appellant was present in court

counsel for the appellant was absent

respondent was absent

Court mentioned that there was on record a Notice of Motion dated 1st July for an Order that the hearing be vacated. Given that the Learned Counsel for the Respondent is absent we will proceed with the hearing as fixed.

Note: the court's directions had been that it would sit to hear the plea in *limin* but what happened was that the case was argued on merits.

Thereafter the counsel for the appellant proceeded to argue the appeal on its merits.

The Trial Judge did not make a finding on the plea.

### **Analysis of the Court**

- [14] The procedure adopted by the Judge may have perhaps led to some confusion. The court had directed that on 4<sup>th</sup> July 2019, what was to be argued was the *plea in limine*. What took place however was hearing the merits of the appeal.
- [15] Also confusing was the fixing of the hearing of a matter “ex parte” when both parties were at the time of fixing the date, represented in court by counsel.
- [16] It is an established rule that a successful plea that the matter was time barred would lead to an out-right dismissal. The *plea in limin litis* raised by the appellant was that the appeal from the decision of the Tribunal to the Supreme Court had been filed out of time. It is trite that were this plea to succeed, the court would not proceed to consider the merits of the appeal.
- [17] In **Gomme and Another v Maurel and Another**<sup>1</sup> this Court pointed to the importance of according due regard to procedure while determining pleas of *limin litis*. Domah, JA first noted that from various cases which have come before this court on the manner in which such preliminary issues have been thrashed out, it seems to us that parties as well as courts are not uniform on their practice. He furthermore stated that:
- ... the procedure for determination of such preliminary issues should be accorded all the serious attention it deserves. A slip at this stage may result either in a denial of justice to a justice-seeking citizen or an abuse of process against an innocent one. ...
- [18] I entirely agree with the above observations.
- [19] The plea in question is a matter both of law and fact.
- [20] Under Rule 5 of Schedule VI (S73 A) of the Employment Act: Any person against whom judgment has been given by the Employment Tribunal may appeal to the

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<sup>1</sup> [2006] SCCA 15

Supreme Court subject to the same conditions as appeals from a decision of the Magistrates' Court.

[21] Section 6 (1) of the Courts Act, provides that every civil appeal from Magistrates Courts to the Supreme Court shall be commenced by a notice of appeal.

[22] And according to Section 6 (2) the notice of appeal shall be delivered to the clerk of the court within fourteen days from the date of the decision appealed against unless some other period is expressly provided by the law which authorises the appeal.

[23] Under the rules for computing time, the Interpretation and General Provisions Act provides that in computing time for the purposes of an Act, a period reckoned by days from the happening of an event or the doing of any act or thing is exclusive of the day on which the event happens or the act or thing is done (**Rule 57 (1) (a)**). In the Computation of time, "days" means court days;

[24] It is on record that the Tribunal delivered its decision on 21<sup>st</sup> May 2018. It is also on record that the Notice of Appeal was filed in the Supreme Court on 8<sup>th</sup> June 2018.

I have computed the relevant period between 21<sup>st</sup> May and 8<sup>th</sup> June 2018. Having excluded 'non' court days and the day on which the decision was delivered (21<sup>st</sup> May 2018) I find that the appeal was filed 12 days from the date the decision was delivered and therefore within the prescribed 14 day period.

Consequently, irrespective of what may have been a "confusing" procedure, **Ground 1 fails.**

## **Ground 2**

[25] It was the argument of the appellant that the trial judge erred in finding the Tribunal at fault for not giving reasons when it arrived at the determination that reinstatement of the appellant was inconvenient or impracticable and that the Tribunal made reference to the wrong provisions of the Act.

[26] I find that the Trial Judge based his finding on the now accepted interpretation of Section 61 (2) (ii) and (iii) of the Employment Act. In **Nagarajan & Anor v Four Seasons Resort**<sup>2</sup> this Court held that in cases of unjustified termination of employment, reinstatement must be considered as the primary remedy unless employer shows reinstatement is impractical and inconvenient. It therefore follows that where the Tribunal makes a finding that the termination of employment was unjustified, but does not proceed to order that the employee be reinstated in line with Section 61 (2) (b), and instead operates under 61 (2) (iii) it must go on to give reasons for its departure from the primary remedy.

[27] Indeed as was argued by the respondent's counsel, the burden lies on the employer to adduce evidence to establish that the circumstances of the case fall under 61 (2) (iii) – the exception to the general rule.

[28] It is no doubt for this reason that the Trial Judge held:

*The tribunal in its decision did not give any reasons why it did not find reinstatement of the appellant in the employment conducive. It failed to make any findings in that regard. It failed to show why it was impractical or inconvenient to reinstate the appellant. I find that this finding is a mandatory requirement in law if the tribunal was to make the order that it purported to do in this case. (my emphasis)*

[29] Arising from the above analysis, **Ground 2 of the appeal fails.**

### **Ground 3**

[30] Counsel for the appellant merely restated what was in the ground of appeal - the learned trial Judge erred when arriving at the conclusion that the Appellant was in employment until the determination of the Employment Tribunal despite evidence to the contrary.

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<sup>2</sup> [2019] SCSC 686



[31] Counsel for the respondent linked this ground to the issue of entitlements and benefits, arguing that an employee would be entitled to the benefits she would have earned had she not been subjected to the unlawful termination of employment. Counsel therefore cited Section 46 of the Employment Act which provides *inter alia* that workers are entitled to all employment benefits under this Act from the date of employment **until lawful termination of the contract. (My emphasis)**

[32] The *Employment Tribunal* is the legally established institution for purposes of hearing and deliver justice in employment related disputes. Where a person files a dispute alleging unlawful dismissal, it must follow that it is only when the Tribunal has made a decision that one can talk of “lawful” termination of employment.

[33] The above position has been confirmed by this Court in **European Hotel Resort vs. Nourrice**<sup>3</sup>. The Court agreed with the trial Judge’s (Karunakaran, ACJ) finding that:

**Compensation should be paid up to the date of lawful termination pronounced by the Tribunal and not up to the time that the employer terminated the employment.**

[34] I therefore hold that **Ground 3 too fails.**

#### **Ground 4**

[35] The appellant faulted the learned trial Judge finding that: “it makes no difference in law that the worker had managed to secure an employment whilst conducting her case before the Tribunal.” It was the submission of Counsel that the Trial Judge failed to appreciate **Savoy Development Limited vs Sharifa Salum** – a very recent decision of this Court.<sup>4</sup>

In note that in the above mentioned case, as is the case before us, the employee who had been unlawfully dismissed secured employment elsewhere whilst conducting her case before the Tribunal. One of the issues determined by the Court was whether in computing what is to be awarded to an employee unjustifiably dismissed, it makes no difference in

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<sup>3</sup> SCA 23/2013 (17 April 2015).

<sup>4</sup> [2021] SCCA 79

law that the worker has managed to secure employment between the unjustified dismissal and the decision of the Tribunal.

[36] In the Judgment of Twomey JA with which the other Justices were in agreement, she cited with approval authorities to the effect that was the date of lawful termination pronounced by the Tribunal or Court is the actual date of lawful termination for the calculation of entitlements to salaries and terminal benefits.

[37] Twomey JA held further that in her view:

**The Employment Act protects the payment of salaries under contracts of employment even when the employed is unjustifiably dismissed. Section 46 ensures that if a worker is unjustly dismissed, they are entitled to a salary from the date of the unjustified dismissal until the date of lawful termination. That however, whereas Section 46 operates to secure the salary she would have been entitled to had she not been dismissed, it is not for the purpose of allowing a worker to profit from her unfair dismissal and claim two salaries. No doubt in seeking alternative employment to mitigate her losses, such an employee is to be commended but she cannot benefit from simultaneous salaries from two different employers - any emoluments in excess of what would have been paid by the employer who unjustifiably dismissed her cannot be construed to be “employment benefits” under section 46 of the Act.**

[38] I have no reason to differ from a most recent unanimous decision of this Court.

**Ground 4 of the appeal succeeds.**

### **Conclusion**

[39] Grounds 1, 2 and 3 fail.

Ground 4 succeeds.

### **Order**

- [40]
1. This matter is remitted to the Employment Tribunal for the purpose of computing benefits due to the respondent.
  2. Salaries and other benefits are payable by the employer to the employee until the date of the determination made by the Employment Tribunal to wit salary and any other benefits for 30 months and 10 days from the date of dismissal (15<sup>th</sup> July 2015) to the date of the Employment Tribunal’s determination of the matter (21<sup>st</sup> May 2018).
  3. The computation shall take into account salaries she has earned at her new employment and deduct these from salaries she would have earned at Four Seasons Resort Seychelles between the date of her unjustified dismissal and the date of lawful termination, that is the date when the Tribunal pronounced its decision. Thereafter the Appellant is ordered to pay the salaries due to the Respondent as computed by the Employment Tribunal.
  4. The Appellant to pay the Respondent compensation for her length of service up until the date on which the Employment Tribunal made its determination.
  5. The Appellant is ordered to pay the Respondent one month’s salary in lieu of notice
  6. The whole with interest and costs.

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Dr. L. Tibatemwa-Ekirikubinza, JA

I concur:

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Dr. M. Twomey, JA

I concur:

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F. Robinson, JA

Signed, dated and delivered at Ile du Port on 29 April 2022.