**IN THE COURT OF APPEAL OF SEYCHELEES**

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**Reportable**
[2024] SCA 23/2023 (3 May 2024)
(Arising in SCSC 456 CA 4/2022 out of ET 16/2021)

**COCKTAIL (Proprietary) LIMITED**
**Trading as EXCEL MOTORS** **Appellant**
*(rep. by Ms. Alexandra Benoiton)*

versus

**JADE SIMEON** **Respondent**
*(rep. by Mr. Joshua Revera)*

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**Neutral Citation:** *Cocktail (Proprietary) Limited t/a Excel Motors vs. Simeon* (SCA 23/2023) (Arising in SCSC 456 CA 4/2022 out of ET 16/2021).

**Before:** Fernando President, Twomey-Woods, Tibatemwa-Ekirikubinza, JJA.

**Summary:** **Employment Law –** unlawful dismissal

i) A disconnect between a ground of appeal and the arguments presented to support it is tantamount to the Appellant relying on a ground not set forth in the Notice of Appeal. This contravenes Rule 18 of the Rules of this Court. For this reason alone, the ground can be dismissed.

ii) **Computation of benefits due from former employer**: where there is evidence that the employee secured gainful employment in the period between the unlawful dismissal and the lawful termination of employment - the salary earned in post-dismissal employment must be taken into consideration in computing dues from the former employer.

iii) **Interest on decretal sum**: A court may order interest to be paid on the adjudged sum from the date of the decree. However, the principle that parties are bound by their pleadings applies to the prayers and remedies

sought by a claimant. If no claim for interest is pleaded, there will be no interest awarded.

**Heard:** 15 April 2024.
**Delivered:** 3 May 2024.

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**ORDERS**

1. The appeal fails on grounds 1and 2 but succeeds on ground 3.
2. Consequently, the declaration of the Supreme Court Judge that the Appellant unlawfully terminated the Respondent from employment is upheld.
3. The compensatory award computed by the Tribunal in the sum of SR 186,307.60 subject to statutory deductions and confirmed by the Judge is upheld.
4. The award of interest made by the Supreme Court is quashed.
5. The award of costs granted to the Respondent in the Supreme Court is upheld.
6. Two thirds of the costs in the appeal in this Court are awarded to the Respondent.

**JUDGMENT**

**DR. L. TIBATEMWA-EKIRIKUBINZA JA**

(Fernando President, Dr. M. Twomey-Woods JA, concurring)

**The Facts**

1. This matter originated in the Employment Tribunal. The events leading up to the suit being filed in the Tribunal were that the Respondent was an employee in the Appellant company as a Vehicle Sales and Administrative Supervisor. However, the Appellant terminated her employment over allegations of disciplinary offences.

2. At the Tribunal hearing, the Respondent testified that she had been employed with the Appellant company from 1st August 2018 until 9th March 2021 when her employment was terminated.

3. The Respondent explained that while working with the Appellant, she had never received a warning letter prior to her termination and her relationship with her employer was generally good. That she was at all material times a diligent and motivated worker.

4. Furthermore, the Respondent explained that she was terminated for having sent a harsh voice note to the Appellant company's WhatsApp group chat on the 23rd of January. The WhatsApp group had been set up by the Human Resource Manager of the said company. Furthermore, that the Respondent had been seen in town when she was supposed to be in isolation following a close encounter with a person or persons who had tested positive for Covid-19. The Respondent also explained that she was terminated for refusal to provide the password to the company computer of the Managing Director as requested.

5. In response to the allegations levied against her, the Respondent explained that the voice note was sent to the above-mentioned group after a member of staff had tested positive for covid-19. While the Respondent could not remember the entirety of the message, she did recall that it was raising concern of the Appellant's working conditions in the wake of the Covid 19 pandemic. She explained that she is asthmatic and since this was one of the first cases of community transmissions of the virus, she panicked as the staff at the Appellant's premises shared toilets and the kitchen area.

6. The Respondent further explained that due to the busy work space at the Appellant's premises - being that of car dealership - she did not consider it wise in the wake of the pandemic to operate in the usual working hours.

7. Upon being questioned by the Tribunal as to whether or not there had been a disciplinary hearing before she received her termination letter when she returned to work from isolation, she clarified that the Managing Director had asked for a statement from her whereupon she clarified to him that she had not reported the Appellant to the Public Health Officer – Dr. Gedeon. However, shortly thereafter, the Respondent was suspended on the premise of having committed a serious disciplinary offence pursuant to Schedule 2 Part 2 (k) and (i) of the Employment Act.

8. With regard to the allegation that she had been seen out in public when she had been instructed by her employer to stay home following potential contact with a person or persons who had tested positive for Covid-19, the Respondent explained that she had gone to the pharmacy to purchase some items and did not see this as a valid ground for her dismissal. To further drive her point on this particular matter, the Respondent testified that during her suspension period, two employees of the Appellant company - Noelle Calenda and Eric - who should have been in isolation/quarantine came to her house to collect the company car she had been previously using during the suspension period.

9. The Respondent further explained that she never objected to providing the Managing Director the Password to the company computer in her possession; instead she explained that she had simply asked for 15 minutes to remove her personal information on the machine in front of the Managing Director but she never got the opportunity to do this as the CPU was unplugged by the Managing Director who then took the computer to his office.

**Appellant's evidence**

10. The Appellant entity testified through its Human Resource Manager - Miss Cheryl Low Meng – who stated that she had created the WhatsApp Group after one of their staff members had tested positive for Covid-19. This was meant to keep her in contact with the staff. Ms. Low Meng explained that she had told everyone to express themselves respectfully on the group as the Managing Director was a member on the platform and that there was a more informal social WhatsApp group that the Managing Director was not a part of that the employees could express themselves more freely. Ms. Low Meng also explained that the Managing Director had expressed to her that he was unhappy with the manner in which he was addressed by the Respondent in the voice note and believed that she had been insubordinate.

11. Ms. Low Meng explained that the decision to terminate the Respondent was taken after they received an explanation letter from her in which she had not shown any remorse for sending the harsh voice note.

12. After listening to the evidence, the Tribunal held that the Respondent's voice note stating that she would report the situation/ working conditions of the Appellant company to the health officer in charge of Public health was not in itself a serious disciplinary breach. However, the Tribunal found that the main concern was the tone of the voice note which was deemed to have been disrespectful.

13. The Tribunal explained that it was notable that even the Human Resource Manager explained that she understood the reaction of the Respondent on a personal level, even though she disagreed that the message was put across in an unprofessional manner. She further explained that other employees had similar concerns although they had not expressed the same in the WhatsApp group.

14. It was also the finding of the Tribunal that the Respondent's refusal to tender the password and going to the pharmacy whilst in home isolation/quarantine were not established as being serious disciplinary breaches which prejudiced the employer's undertaking.

15. Regarding whether the Termination of the Respondent was effected in line with Section 53 of the Employment Act, the Tribunal held that it was not. The Tribunal found that although the Respondent was given the opportunity to submit an explanation, she was not a party to the rest of the disciplinary inquiries and was simply informed of the outcome. The Tribunal found that the Respondent was unfairly terminated and awarded her SR 153,461.44 as gross salaries, one month's salary in lieu of notice in the sum of SR 14,000; compensation in the sum of SR 18,1846.15 for length of service from 1st August 2018 until 4th February 2022 when the employment was lawfully terminated. The total sum being SR 186,307.60. The Tribunal also ordered that the total sum was subject to statutory deductions and personal income tax.

16. Dissatisfied with the Tribunal findings, the Appellant company appealed to the Supreme Court before Govinden CJ. In dismissing the appeal and upholding the Tribunal's findings and orders, the Judge maintained that the Respondent was unlawfully terminated from employment.

17. Still dissatisfied with the Supreme Court decision, the Appellant lodged an appeal in this Court on the following grounds:

**1.The learned Trial Judge erred in law and on the facts in his determination that the termination of the Respondent's employment was unjustified in law despite agreeing that the Respondent's behaviour was not to be expected of her.**

**2.The learned Trial Judge erred in law in failing to follow the decision of the Seychelles Court of Appeal in line with Section 7 of the Civil Code of Seychelles in respect of calculation of salaries by the Employment Tribunal, irrespective of simultaneous salaries as the Respondent was gainfully employed shortly after her termination.**

**3.The learned Trial Judge erred in law in granting interest as it was *ultra petita* and not prayed for.**

**Reliefs sought:**

1.The appeal be allowed

2.The whole of the Trial Judge's decision be dismissed

3.The Appellant be granted costs in the Supreme Court and in this Court.

**Parties' submissions**

18. The parties' submissions will be reproduced at the time of the Court's consideration of the grounds of appeal.

**Court's consideration**

**Ground 1**

19. Under this ground, the Appellant submitted that the learned Trial Judge erred in law and on the facts by failing to exercise his supervisory powers over the decision of the Employment Tribunal provided for in Section 10 of the Courts Act. Counsel for the Appellant argued that the failure of the trial Court to do their duty was clearly demonstrated in paragraph 13 of the judgment. For the sake of clarity, I reproduce verbatim what the trial judge sated in the impugned paragraph of his judgment:

> *It is with this (sic) principles in mind that I approach this ground of appeal. I will not come to another conclusion on the facts in issue simply because I have a different opinion. I will only do so if I am satisfied that any advantage enjoyed by the trier of facts by reason of having seen and heard the witness could not be sufficient to explain or justify the tribunal's conclusion.*

20. That although it is trite that the Supreme Court should not interference with findings of fact on appeal, this rule is not absolute as a judge on appeal can interfere with findings of fact in appropriate circumstances such as - where the conclusion of the trial court could not have been logically reached or where the trial court drew inferences from the facts that, due to the weight of the evidence strongly against the findings, must be erroneous. In support of this submission, counsel relied on the authorities of **Lefevre vs. Chung Faye & Ors**[1] and **Government of Seychelles vs. Shell Company of the Islands**[2].

21. Counsel contended that the learned Trial Judge ought to have considered the Record of Appeal from the Employment Tribunal in its entirety but failed to do so. Thus, the Appellant contended that this Court must revisit the decision of the Employment Tribunal and its findings in adjudicating this appeal.

22. The Appellant submitted that it showed through evidence that the Respondent threatened to report her employer to the relevant authorities over the measures adopted for their operations. She criticized the measures adopted by management in front of her colleagues and the general tone used by the Respondent was devoid of the respect expected of an

[1] (SCA 36 of 2011) [2014] SCCA 14
[2] (SCA 11 of 1988).

employee towards their employer. Furthermore, that the Respondent continued her insubordination during her suspension period as she deliberately blocked all communication from the Human Resource Manager of the Appellant company.

23. Counsel contended that should the judgment of the lower court be upheld by this Court; it would amount to endorsement of a precedence allowing employees to be insubordinate to their employers without caution of the consequences of their actions. The Appellant submitted that, in line with the decision of **Lefevre vs Chung-Faye (supra)**, it was evident from the facts of the case that the findings of the Employment Tribunal were erroneous.

**Respondent's reply**

24. On the other hand, the Respondent submitted that the claim by the Appellant that the termination of the Respondent was justified is unfounded. And that the finding of the Employment Tribunal and of the Supreme Court that there was no substantial evidence of misconduct that warranted the Respondent's termination should be upheld. That based on the evidence presented before the employment Tribunal, specifically the sending of a voice note did not constitute a serious disciplinary offence.

25. Based on the evidence presented before the Employment Tribunal, the Appellant failed to demonstrate how the actions of the Respondent, specifically sending a 'voice note' in a WhatsApp group, constituted a serious disciplinary offence. The 'voice note' in question pertained to public health issues related to Covid-19, and it was widely recognized that any breaches of standard operating protocols established by Public Health Authorities to prevent the spread of the pandemic should be promptly reported to the relevant authorities. So had the Respondent reported any breach of public health protocols, it would not constitute an offense under the Employment Act. Counsel submitted further that the Appellant did not prove that the Respondent actually reported the non-observance of health protocols to the concerned Authority. The Respondent was consistent in her evidence that she was merely expressing her concerns during the early stages of the pandemic.

26. Counsel also pointed out the fact that the mobile phone used to send the message was personal property and yet the Appellant was seeking a ruling that the use of a personal phone, at the discretion of the owner can constitute a disciplinary offence. That were it that the phone was the property of the company, perhaps one would look at whether the employer had specific policies or expectations regarding the use of devices provided by the company and whether violation of such policies could lead to disciplinary action. Counsel for the Respondent also argued that in any event one of the elements necessary to be proved under the Employment Act was that the offence (serious disciplinary offence) had caused serious prejudice to the employer. And that in the matter before court, this element had not been proved.

27. Furthermore, the Respondent submitted that the dismissal decision was plagued with various procedural flaws which highlighted the Appellant's failure to adhere to the mandatory disciplinary procedures stipulated in Section 53 of the Employment Act.

28. Counsel argued that contrary to the Appellant's submission that a dangerous precedent would be set by upholding the lower court's findings, overturning the findings of the Judge would stifle employees' rights in expressing concerns about their well-being within the company.

**Consideration**

Ground 1

29. I must first and foremost point out that there is hardly any link between the arguments submitted by the Appellant and ground 1 of the appeal as formulated. The ground is formulated as if what the Supreme Court is being faulted for is that on the one hand, the court made a finding that the behavior of the Respondent was not to be expected of her and yet on the other, the court went on to hold that the Respondent's dismissal was unjustified in law. The essence of the ground is that the Trial judge's decision contradicted his finding of fact. In the view of Counsel for the Appellant, having made a finding that the behavior of the Respondent was not to be expected of her, the conclusion of the court that her dismissal was not justified could not have been logically reached.

30. However, in her written submissions, Counsel engaged with the duty of an appellate court and faults the Supreme Court for having failed to re-evaluate the evidence adduced before the tribunal. In the view of Counsel had the judge considered the Record of Appeal from the Employment Tribunal in its entirety, the court would not have upheld the decision of the tribunal which was that the Respondent did not commit a serious disciplinary offence.

31. A disconnect between a ground of appeal and the arguments presented to support is in essence tantamount to the Appellant relying on a ground not set forth in the Notice of Appeal. This contravenes Rule 18 of the Seychelles Court of Appeal Rules which I reproduce below:

**"Notice of appeal**

> The appellant shall not without leave of the Court be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal."

33. On that basis alone, the ground would be dismissed.

34. I have however taken liberty to interrogate the *merits of the submissions* presented by Counsel for the Appellant.

35. But Before I delve into the various arguments, I start with what was stated by the Appellant on the ground of appeal and the specific reply to it by the Respondent. As I have already pointed out above, the ground as formulated faulted Chief Justice for finding that the behavior of the Respondent was not to be expected of her on the one hand, and yet on the other, holding that the Respondent's dismissal was unjustified in law. That having made a finding that the behavior of the Respondent was not to be expected of her, the conclusion of the court that her dismissal was not justified could not have been logically reached.

36. A careful reading of the impugned judgment of the Supreme Court reveals that the basis of the Appellant's ground 1 is paragraph 15 of the judgment which I reproduce below:

> "With respect to the facts relating to the WhatsApp messages, the employer argues that …The general tone and words used by the Respondent showed a lack of respect to … management and was not one which a respectful person would use. *To the contrary, the Tribunal found that in the specific circumstances in which the messages were sent, it was reasonable for the Respondent to do so, though, this might not have been the behavior expected of her."* (my emphasis)

37. In the paragraph which follows - paragraph 16 - the Chief Justice then opens with the sentence: "I have assessed the evidence that the Tribunal relied upon and its decision." This is followed by evaluation of the relevant evidence, including the circumstances in which the 'voice note' was sent. At the end of paragraph 16, the Judge makes his own finding – Her reaction was clearly one that in ordinary circumstances would have been seemingly an overreaction but in the context of the time was reasonable."

38. It is clear that Counsel for the Appellant grossly misunderstood and misread the paragraph the basis on which she formulated her ground of appeal. Indeed, as did Counsel for the Respondent, I disagree with the Appellant that the judge found the behavior of the Respondent to be disrespectful.

39. I now move on to deal with the arguments of the Appellant's Counsel that the Chief Justice failed in his duty as an appellate court.

40. Counsel vehemently argued that the failure of the court to do their duty was clearly demonstrated at paragraph 13 of the judgment. For the sake of clarity, I will reproduce verbatim what the Chief Justice stated at the impugned paragraph of his judgment. But it is important to first draw attention to what preceded the paragraph in issue. Govinden CJ first pointed out that the ground of appeal in contention was factual to wit: "the Employment Tribunal was wrong to come to the conclusion, based on the facts adduced before it, that the Respondent had not committed a serious disciplinary offence that would have called for her dismissal." The judge followed this by a detailed discussion, supported

by case law, of the limitations of a court of appeal when determining factual issues and the principles which guide the court in determining whether to interfere with the findings of a lower court or to interfere with inferences drawn by a lower court from evaluation of facts. Following the above, the Judge then said:

> It is with this (sic) principles in mind that I approach this ground of appeal. I will not come to another conclusion on the facts in issue simply because I have a different opinion. I will only do so if I am satisfied that any advantage enjoyed by the trier of facts by reason of having seen and heard the witness could not be sufficient to explain or justify the tribunal's conclusion.

41. From the above, it is no doubt clear that the Trial Judge was aware of the duty of an appellate court. But what followed is even more important – it shows that the judge applied his knowledge of the duty of an appellate court, to the matter that was before him. Aware that the dismissal was based on three different allegations, the Judge went on to enumerate the facts of each particular allegation and the evidence adduced before the tribunal as will be shown below.

42. Regarding the impugned voice note and the Whatsapp message, the judge stated:

> "The Tribunal found that in the specific circumstances in which the messages were sent, it was reasonable for the Respondent to do so, though this might not have been the behavior expected of her." The judge follows this by his own evaluation of the evidence and states: "I have assessed the evidence that the Tribunal relied upon and its decision. The uncontested evidence regarding the message arose in a specific context …The evidence shows … messages were in relation to public health matters concerning COVID -19 … It is clear that one of her colleagues had come down with illness … Her reaction was clearly one that in ordinary circumstances would have been seemingly an overreaction but in the context of the time was reasonable'

43. It is clear that the Judge re-evaluated the evidence and then came up with is own finding, albeit in agreement with the finding of the tribunal.

44. Regarding the second allegation to wit that the Respondent breached quarantine orders by the employer, the Judge referred to the evidence adduced by the Appellant before the tribunal and to the explanation by the Respondent. The Judge then held that the Appellant failed to adduce any evidence in rebuttal showing exactly how the Respondent had committed a serious disciplinary offence … when in fact it was shown that the Appellant had asked staff to collect the car from the Respondent during the same quarantine period. The Judge observed that the tribunal had not made a specific finding of fact on this issue. The Judge then made a finding, stating that "this court having had the benefit of going over the facts of the case … finds that the Respondent's version was more plausible than that of the Appellant I find that this fact, whether alone or together with others, was not sufficient to support the dismissal.

45. Again, the judgment clearly indicates that the Trial had not only re-evaluated the evidence but also came up with is own finding, after observing that the tribunal had as a matter of fact not made a specific finding on the issue.

46. Regarding the third alleged disciplinary offence – refusal to submit the computer password, the trial judge again observed that the tribunal had not made a specific finding on the issue. That however, the Supreme Court (as an appellate court) is enjoined with the same powers of the tribunal allowing the court to make a determination on the issue. The court stated thus" *having gone over the facts of the case*, … evidence shows that the Respondent did not refuse to give the password …"

47. Again, I find no merit in the submission of the Appellant that the Supreme Court did not carry out its duty as an appellate court.

48. I find that the submission by Counsel for the Appellant that the Learned Chief Justice did not carry out his duty as an appellate to court re-evaluate the evidence adduced before the

tribunal lacks merit. The Learned Chief justice considered the Record of Appeal from the Employment Tribunal in its entirety and the court arrived at its own findings.

49. I therefore have no reason to fault the decision of the learned Judge that the Respondent's dismissal was unlawful.

**Ground 1 is dismissed.**

**Ground 2**

50. Counsel for the Appellant submitted that the learned Trial Judge erred in law in failing to follow precedents that guide courts in calculating compensatory salaries due to unlawfully dismissed employees who by the time of lawful termination have found alternative employment. Counsel specifically submitted that by failing to follow the decision of **Savoy Development Limited vs. Sharifa Salum,[3] the Supreme Court contravened Article 7 of the Civil Code.** The relevant part of the provision states that:
    **(1) A judicial decision is binding on all courts lower in the judicial hierarchy than the court which delivered the precedent decision.**

51. Regarding what I consider as the second limb of the ground, Counsel argued that during the examination in chief before the tribunal, it had been established that after the termination of her employment by the Appellant, the Respondent was gainfully employed by two separate entities. And yet the Learned Chief Justice had held that "*it makes no difference in law that the worker has managed to secure employment between the unjustified dismissal and the decision of the tribunal*".

52. That what the Respondent earned during the period of unfair dismissal, ought to be taken into account in the computation of the compensation due to her for the unlawful dismissal.

**Respondent's reply**

[3] (2021) SCCA 79.

53. On the other hand, Counsel for the Respondent submitted that the Tribunal and Supreme Court correctly exercised their jurisdiction in determining the compensation due to the Respondent. That the formula for calculating compensation legal basis for calculating such compensation in cases of wrongful termination is provided for in **Section 46** of the **Employment Act** as follows:

(l) Workers under a contract of continuous employment are entitled to all employment benefits under this Act from the date of employment until lawful termination of the contract.

(3) Where the lawful termination of the contract as referred to in subsection (1) or (2) is immediately preceded by a period of suspension without pay, the termination is deemed to take effect as from the date the period of suspension began.

54. Counsel also referred to **Clause 7 of the 6th Schedule** to the **Employment Act** which gives the Tribunal the discretion to "award compensation or costs or make any other order as it thinks fit".

55. On the premise of the above provisions of the law, counsel submitted that from the evidence on the Record, the Respondent was suspended from 8th February 2021 to 9th March 2021. Thereafter, she was terminated unlawfully as ruled by the Tribunal and compensation was calculated until the date of lawful termination as declared by the Tribunal. Counsel submitted that this calculation was in line with this Court's decision of **Four Seasons Resort Seychelles vs. Chang-Time**[4] which supports the principle that compensation should be paid up to the date of lawful termination pronounced by the Tribunal, rather than up to the time that the employer terminated the employment.

56. The Respondent argued that the Appellant's contention that the Tribunal erred in law and fact by not considering the consecutive employment of the Respondent after her dismissal was not submitted to the Tribunal and neither was it raised in cross-examination. That furthermore, there is lack of evidence/ no evidence adduced such as pay slips or other proof to support the claim of post dismissal employment. That the Appellant's failure to

[4] (SCA 60L2019 (2022)),

raise this issue before the Tribunal precludes them from introducing new evidence (on a second appeal) to alter the Tribunal's award.

**Consideration**

57. Resolving this ground calls for two things. One is to establish what the current law is in regard to the entitlements of an individual who is unlawfully dismissed, but who by the time of the lawful termination of employment, has secured alternative employment.

58. I will then deal with the evidence available regarding what the employment status of the Respondent was, at the time when her employment was "lawfully terminated".

59. *So, what is the law regarding the payment of salaries due when a worker is unfairly dismissed?*

60. In both ***Savoy Development Limited v*** **Salum**[5] and **Four Seasons Resort Seychelles v Chang-Time**[6] - most recent decisions of this Court - this question was dealt with. The Court in both cases based its determination of the issue on the principle behind Section 46 of the Employment Act which provides in relevant part as follows:

> "*46. (1) Workers under contract of continuous employment <u>are entitled to all employment benefits under this Act from the date of employment until lawful termination of the contracts.</u>"*

61. In both cases, the Court has held that 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. In computing the employment benefits of an employee who has been unlawfully dismissed, the tribunal and or court must include salary and other benefits payable up to the date the Employment Tribunal takes its decision. Section 46

[5] [2021] SCCA 79
[6] [2022] SCCA 12

ensures that if a worker is unjustly dismissed, he is entitled to his salary from the date of the unjustified dismissal until the date of lawful termination.

62. This Court has been consistent in its view that although Section 46 operates to secure the salary an employee would have been entitled to had they not been unjustifiably dismissed, it is not for the purpose of allowing a worker to profit from the unfair dismissal and claim two salaries.

63. In seeking alternative employment to mitigate losses, a dismissed employee has to be commended but the individual 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 the employee cannot be construed to be "employment benefits" under section 46 of the Act.

64. It follows that a pronouncement that – "salaries paid under new employment should not be taken into account when computing salaries due from the date of the unjustified dismissal until the date of lawful termination with the old employer" - is an error in law. As long as there is evidence that the employee secured alternative paid employment after the dismissal, while waiting for the pronouncement by the tribunal, the court making the order for compensation cannot ignore that fact and must take the said fact into consideration.

65. I therefore find that as submitted by Counsel for the Appellant, the Learned Chief Justice contravened **Article 7 of the Civil Code.**

66. I now deal with the evidence available regarding what the employment status of the Respondent was, at the time when her employment was "lawfully terminated". I must emphasize that this is a factual issue.

67. On appeal to the Supreme Court, the Appellant faulted the Tribunal for making an award to the Respondent, without taking into account the fact that the Respondent had been

employed consecutively by two separate entities since her termination of employment with the Appellant.

68. Even before this Court, Counsel for the Appellant submitted that what the Respondent earned during the period of unfair dismissal, ought to have be taken into account in the computation of the compensation due to her for the unlawful dismissal. Counsel contended that that during the examination in chief before the tribunal, it had been established that after the termination of her employment by the Appellant, the Respondent was gainfully employed by two separate entities.

69. On the other hand, the Respondent argued that the Appellant's contention that the Tribunal erred in law and fact by not considering the consecutive employment of the Respondent after her dismissal was not submitted to the Tribunal and neither was it raised in cross-examination. That furthermore, there is lack of evidence/ no evidence adduced such as pay slips or other proof to support the claim of post dismissal employment. That the Appellant's failure to raise this issue before the Tribunal precludes them from introducing new evidence (on a second appeal) to alter the Tribunal's award.

70. The issue to be resolved is a factual issue and it necessitates a re-evaluation of the evidence which was adduced before the tribunal.

71. The relevant part of the tribunal proceedings touching the facts are reproduced verbatim below:

(Examination in Chief)

Question (to the Respondent): Full name Employment and Address

Answer: Jade Simeon, Bougainville, Minister of health as a nurse

Question: Previous employment?

Answer: Dr. Jivan

Question: Previous?

Answer: Excel Motors

Question: How long?

Answer: 1st August 2018 – for almost 3 years

(Cross-examination).

Question: Have you been a Nurse for long

Answer: Yes

Question: So before excel you were a nurse

Answer: Yes

No re-examination)

72. It was in reference to the above extract that the Appellant submitted that the Respondent testified the she had been gainfully employed by two separate entities, notably Dr. Haresh Jivan and the Ministry of Health. The Appellant went to argue that the Respondent did not withdraw or affirm that the statements to that effect were a mistake. That as such, they are judicial admission in line with Article 1356 of the Civil Code. That furthermore, the tribunal did not require the Respondent to produce documents to that effect. Counsel submitted that consequently, the admission is a part of the evidence and contrary to the Respondent's submission, the Appellant was not seeking to adduce fresh evidence.

73. A scrutiny of the judgment of the tribunal shows that in arriving at the amount of salaries due from the date of the unjustified dismissal until the date of lawful termination, the Tribunal made no mention of whether or not the Respondent had secured gainful employment after her dismissal. There was no finding as to any figure to be taken as salaries paid under new employment. It follows that no amount was deducted from the salary that the Respondent would have earned, payable by the Appellant, had she not been dismissed.

74. Unfortunately, in dealing with it, the Learned Chief Justice did not make any finding as to whether or not the Respondent had secured gainful employment after her dismissal. The Judge did not re-evaluate the evidence adduced before the tribunal in regard to the

matter. Instead, he went on to interrogate legal provisions to wit Section 46 of the Employment Act.

75. Because the first appellate court failed in its duty to re-valuate the evidence pertaining to the issue at hand, I have found necessary to step into the shoes of the first appellate court.

76. I must base my decision on the matter, by analyzing what is on record in the form of testimonies in-chief and in cross-examination. I must then be guided by the legal principle that he who avers must prove.

77. The Appellant avers that the Respondent secured gainful employment. The Respondent argues that there was no evidence adduced such as pay slips or other proof to support the claim of post dismissal employment. That the Appellant's failure to raise this issue before the Tribunal precludes them from introducing new evidence (on a second appeal) to alter the Tribunal's award.

78. The Appellant bears the burden of proving the fact in dispute i.e. that the Respondent was gainfully employed.

79. In cross-examination, Counsel for the Appellant seemed to be more interested in proving that everyone in the WhatsApp group knew that that the Respondent was a qualified nurse and the Respondent's aim in sending the impugned messages was to highlight how the company was improperly handling the pandemic – more keen on proving that the Respondent was insinuating that the company was not taking proper precautions. At no time did Counsel for the Appellant at the Tribunal ask any follow up questions/cross-examine the Respondent regarding her post dismissal employment. For example, was her employment with Dr. Jivan previous to her Excel employment? The record shows that the Respondent was not cross-examined on the issue. Where a fact is in dispute, and the court is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. The appellants are duty bound to show by evidence that the Respondent secured gainful employment after her dismissal by the Appellant. This, they did not do.

80. I therefore find that the Tribunal cannot be faulted for not taking any salaries earned post dismissal into account when computing salaries due from the date of the unjustified dismissal until the date of lawful termination with the old employer. There was no evidence adduced to prove such salaries.

81. Ground 2 fails.

**Ground 3**

82. Counsel submitted that it is trite law that a Judge cannot formulate a case for a litigant by granting a relief not sought in the pleadings. Counsel emphasized that parties are bound by their pleadings.

83. Counsel also submitted that the issue of interest was never raised in the lower courts. Therefore, the remedy could not be raised on a second appeal and thus the learned Supreme Court Judge erred in granting interest.

**Respondent's reply**

84. The Respondent refuted the Appellant's argument that interest is not a remedy available under the Employment Act. The Respondent submitted that **Section 63A** of the Employment Act provides for interest payable in the following words:

> **Where compensation is payable to a worker in respect of termination of employment under the provisions of this Part, interest on the amount of such compensation shall be payable at such rate as may be prescribed by the Minister, for the period between the date on which such compensation becomes payable and the date of actual payment. For the purpose of this section compensation becomes payable upon the determination of the competent officer, the ruling of the Minister or the Tribunal, as the case may be.**

85. Counsel also cited **Section 3 of the Interest Act** which provides that, "*Whenever the rate of interest shall not be fixed by contract, the legal rate of interest shall be four per centum per annum in civil or commercial matters."*

86. In light of the above provision, the Respondent submitted that the Supreme Court is vested with the powers to award interest and this need not be claimed by the Applicant in an Employment case.

87. In conclusion, the Respondent prayed that the appeal be dismissed with costs and the Supreme Court's decision be upheld.

**Consideration**

88. The essence of the Appellant's argument under this ground is that the Supreme Court Judge erred in granting interest yet the Respondent did not pray for the said remedy.

89. A court may order interest at such rate as it deems reasonable to be paid on the adjudged sum from the date of the decree. The purpose for granting interest is that the defendant has kept the plaintiff out of use of their money and has retained the money to their benefit.

90. However, the claim of interest has to be pleaded. If no claim for interest is stated, there will be no interest awarded. The principle that parties are bound by their pleadings applies to the prayers and remedies sought by a claimant.

91. In **Vel vs. Knowles**[7] it was held that a Court may not formulate a case for a party after listening to the evidence or grant a relief not sought in the pleadings. Thus, a Judge who grants a relief not sought in pleadings acts *ultra petita*.[8]

92. It is notable that the Respondent did not pray for interest as part of the remedies sought from the employer. However, after hearing the matter, on an appeal from the Tribunal, the Supreme Court Judge stated as follows:

[7] SCA 41/1998.
[8] Monthy vs. Esparon (2012) SLR 104.

*"... all the grounds of appeal are dismissed and the decision of the Employment Tribunal is upheld with costs and interest in favour of the Respondent."*

93. **I therefore hold that ground 3 of the appeal succeeds.**

**Conclusion and Orders**

94. The appeal fails on grounds 1 and 2 but succeeds on ground 3.

95. Consequently, I uphold the order of the Supreme Court Judge that the Appellant unlawfully terminated the Respondent from employment.

96. I also uphold the compensatory award confirmed by the Judge and computed by the Tribunal in the sum of SR 186,307.60 subject to statutory deductions.

97. The award of interest made by the Supreme Court is quashed.

98. I uphold the award of costs granted to the Respondent in the Supreme Court.

99. I award two thirds of the costs in the appeal in this Court to the Respondent.

Signed, dated and delivered at Ile du Port on 3 May 2024.

**Dr. Lillian Tibatemwa-Ekirikubinza, JA.**

I concur

Fernando, President

I concur

Dr. M. Twomey-Woods, JA.