IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE (GENERAL JURISDICTION DIVISION, COURT 12) ACCRA, HELD ON THURSDAY THE 28TH DAY OF MARCH 2024 BEFORE HIS LORDSHIP JUSTICE AYITEY ARMAH-TETTEH

SUIT NO: GJ/0301/2022

CELESTINE RUTH EDEM - PLAINTIFF

VRS

1. **KWARLEYZ GROUP**
2. **BELFAST CITY MANAGEMENT LIMITED - DEFENDANTS**

PARTIES: PLAINTIFF ABSENT

DEFENDANTS ABSENT

COUNSEL: EMMANUEL YAW HUKPATSI FOR SOLOMON FAAKYE FOR PLAINTIFF

ADWOA ENYIMNYAM PAINTSIL FOR BOBBY BANSON FOR DEFENDANTS

JUDGMENT

INTRODUCTION

[1] The 1st Defendant is incorporated as a Group of Companies which includes 2nd Defendant. 2nd Defendant is a Hospitality company located at the Airport City, Accra. The Plaintiff was employed on 19th November, 2020 as a Financial Controller for the 2nd Defendant effective 4th January, 2021. Her appointment was terminated on 6th August, 2021. The case raises several questions including whether the Plaintiff was employed by both 1st and 2nd Defendants, and whether an employee of a subsidiary company is

necessarily an employee of its holding or parent company and as such 1st Defendant is a necessary and proper party to the proceedings. Another question that arises is whether the Plaintiff's appointment was wrongfully terminated.

PLAINTIFF'S PLEADINGS

[2] The case of the Plaintiff as can be gathered from her pleadings is that she received an offer letter authored by the 2nd Defendant and dated 19th September, 2020 for the position of Financial Controller with the 2nd Defendant effective 4th January, 2021. According to Plaintiff, the offer letter had attached to it her contract of employment on the 1st Defendant's letterhead. It is the further case of the Plaintiff that after working for 7 months with the 2nd Defendant she received an email from the Legal Manager of the 1st Defendant, asking her to provide her Curriculum Vitae, Offer Letter and copy of contract and certificates for re-evaluation of her position. After that, she received an email from the Defendants instructing her to cease working as the Financial Controller and refrain from accessing 2nd Defendant's information and hand over to the Chief Accountant to act in the interim until her position is re-evaluated.

[3] According to Plaintiff, she was later invited to a meeting on 6th August, 2021 at which the Human Resource Manager, the Legal Manager and the Chief Executive Officer were present. At the meeting, the Chief Executive Officer stated his unwillingness to work with her anymore because operational expenses had increased since her resumption as Financial Controller. At the meeting, she was asked to hand over all company assets in her custody. The plaintiff contends that no notice was given to her for the termination of her appointment and the reasons given for the termination were not valid.

[4] The Plaintiff therefore claims against the defendants the following reliefs:

1. A declaration that the Plaintiff was neither negligent nor incompetent in her work as financial controller and the termination was wrongful and unfair.

2. General damages for wrongful and unlawful termination on employment.
3. General damages for embarrassment, pain and loss that the Plaintiff suffered as a result of defendant's actions and inactions.
4. An order for accumulated salary from date of termination of appointment including all benefits that would have accrued to her if she was still in employment, leave allowance, clothing allowance and any other allowance that plaintiff would have been entitled to within the period.
5. An order for payment of outstanding unpaid SSNIT contributions due from the time of commencement of work until present to SSNIT.
6. Interest on all monies that will be adjudged to be due plaintiff from the day it became due.
7. Cost including solicitor's fees.
8. Any other orders that the Court deems fit.

DEFENDANTS' PLEADINGS

[5] The Defendants denied the claim of the Plaintiff and contended that Plaintiff's appointment was with the 2nd Defendant and the 2nd Defendant had agreed with the Plaintiff that the Plaintiff's employment would be evaluated for possible continuation after an initial 6-month probation period. According to Defendants during the probation period of Plaintiff's employment with the 2nd Defendant, there were a lot of inefficiencies in the financial affairs of the 2nd Defendant as a result of which Plaintiff was asked on more than one occasion to reduce expenditure and adopt cost-saving policies for efficiency in the 2nd Defendant's financial affairs but the Plaintiff failed to heed. According to Defendants at meetings held with Plaintiff, Plaintiff failed either to provide any reasonable explanation for the exponential increase in operational expenses or a road map to make 2nd Defendant's operations more financially efficient.

[6] It is the further case of the Defendants that the evaluation of Plaintiff's performance after the period of probation included examining documents with which Plaintiff applied for the position and that 2nd Defendant's officers noticed that Plaintiff had not furnished the 2nd Defendant with a copy of the certificate evidencing plaintiff's qualification as a Chartered Accountant.

PROCEDURAL HISTORY

[7] The Plaintiff initially sued out the Writ of Summons against the 1st Defendant alone on 14th December, 2021. Upon service on it, 1st Defendant entered an appearance on 10 January 2021. On 19th January, 2021, the 1st Defendant filed an application to strike out Plaintiff's Statement of Claim for disclosing no cause of action against the 1st Defendant because the offer letter was issued by Belfast City Management Limited (2nd Defendant) and the 1st Defendant had nothing to do with the contract. Upon service of the Application on the Plaintiff, she opposed it by filing an affidavit in opposition.

[8] The ground of the opposition was that the 1st Defendant had some dealings with her during her appointment and that whether or not she had an employment relationship with 1st or 2nd in itself must be a matter of trial to be established by the adduction of evidence at the trial. Upon service of the affidavit in opposition, the 1st Defendant by a Notice of withdrawal filed on 25 February 2022 withdrew the application to strike the Plaintiff's Statement of Claim for disclosing no cause of action. Subsequently on an application by the Plaintiff, on 16th March, 2022, the Belfast City Management Limited was joined to the suit as 2nd Defendant.

Attempt at Mediation

[9] On 5th April, 2022, on an application by the 1st Defendant, which application was not opposed by Plaintiff, proceedings in this matter were stayed and the dispute referred to Mediation under section 64 of the Alternative Dispute Resolution Act, 2010, Act 798. The

reason is that the offer letter of the Plaintiff stated that the parties shall attempt to resolve any dispute arising therefrom in accordance with Act 798. The mediation was however unsuccessful and the matter had to be heard by this court.

ISSUES FOR DETERMINATION

[10] At the close of pleadings, the following issues were set down for the determination of the suit.

1. Whether or not there was a valid contract of employment between the Plaintiff and Defendants.
2. Whether or not the circumstances under which the Plaintiff's employment was terminated by the defendants amount to wrongful termination under Ghana's Labour Laws.
3. Whether or not the circumstances under which the Plaintiff's employment was terminated by defendant's amount to unfair termination under Ghana's Labour Laws.

EXAMINATION OF ISSUES

[11] In proof of her case, the Plaintiff testified and did not call any witnesses. Even though one Frazier Nyantakyi filed a Witness Statement intending to testify for the Defendants, at the close of Plaintiff's case, Defendants exercised their right not to testify and thus opted not to mount the witness box testify in the matter. However, under cross-examination of Plaintiff, Defendant tendered in evidence email correspondence dated 29th June, 2021, from Plaintiff to Vanesa Akuetteh under the subject: *RE: REQUEST FOR INFORMATION* and email correspondence dated 30th July, 2021 from Vanesa Akuetteh to Plaintiff under the subject *REQUEST FOR INFORMATION* through her as Exhibits 1 and 2 respectively. So, the only evidence adduced by the Defendants will be the exhibits tendered through Plaintiff under cross-examination.

ISSUE 1: Whether or not there was a valid contract of employment between the Plaintiff and Defendants.

[12] It is pleaded at paragraphs 4, 5 and 6 of Plaintiff's amended Statement of Claim as follows:

4. Plaintiff avers that she received an offer letter dated 19th November, 2020 for the position of Financial Controller with Belfast City Management Limited effective 4th January, 2021.
5. Plaintiff says that the offer letter given to her by 2nd Defendant had attached to it a contract of employment on the 1st Defendant's letterhead which she signed and submitted.
6. Plaintiff says that at all material times in defendants' dealings with her, they held themselves out as one and the same company.

[13] In response to the above averments of the Plaintiff, the Defendants in their amended Statement for Defence pleaded at paragraphs 2, 3 and 4 as follows:

2. The Defendants admit paragraphs 1 to 4 of the Statement of Claim.

3. The defendants state in further response to paragraph 2 that as a limited liability company, the 2nd Defendant is a separate legal entity from the 1st Defendant and has power to sue and be sued in its own name.

4. Save that the Plaintiff was furnished with an offer letter, the defendants deny the averments contained in paragraph 5 of the statement of claim.

[14] The Defendants by paragraph 2 of their Statement of Defence admit that Plaintiff received an offer letter for the position as Financial Controller with 2nd Defendant. The

law is that when an averment in a pleading is admitted the party who made the averment does not need to call any witness to prove what has been admitted. I therefore find that Plaintiff received an Offer Letter from the 2nd Defendant. The Defendants however by paragraph 4 of the Statement of Claim deny that the offer letter issued to Plaintiff had attached to it a contract of employment on 1st Defendant's letterhead.

[15] Since Plaintiff claims that her contract of employment which she signed was on the letterhead of the 1st Defendant attached to the offer letter, a claim the Defendants deny, it behooves the Plaintiff to prove that allegation failing which a ruling will be made against her on that issue.

Section 17 of the Evidence Act, NRCD 323 provides as follows:

> Except as otherwise provided by law
>
> (a) The burden of producing evidence on a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof;
> (b) The burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.

Section 14 of the Evidence Act, 1975, (NRCD) 323 provides as follows: -

> Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that he is asserting.

And Section 10 (1) of the Act explains 'burden of persuasion" as follows:

> For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

[16] In **Wrangler Ghana Ltd v. Spectrum Industries Pvt. Ltd, Lands Commission** [2023] DLSC 16164 the Court per Asiedu JSC held as follows**:**

> Thus, within the meaning of sections 12,13,14 and 17 of NRCD 323 as quoted above, whenever a party to a civil suit makes positive averment which is crucial to a claim or defence which he had asserted in his pleading and which had been denied by his opponent and the party wishes to succeed on that claim or defence, then the law enjoins that party to adduce that kind of credible evidence, in relation to the assertion made, within the meaning of section 17 as quoted above, which will establish that degree of belief in the mind of the court, in accordance with the provision contained in section 12 of NRCD 323, that the existence of the fact(s) which he had been asserted (but which had been denied by his opponent) is more probable than its non-existence.

[17] The Plaintiff in her testimony on this issue testified as follows:

> I say that I received an offer letter from the 2nd defendant dated 19th November, 2020 for the position of Financial Controller effective 4th January, 2021. I say that I received the offer letter after series of successful interviews with management of the second defendant…… I further say that the offer letter given to me had attached to it a contract of employment which I signed and submitted to the employer.

The Plaintiff tendered in evidence Exhibit B. Exhibit B is the offer letter given to the Plaintiff. It was issued on the letterhead of the 2nd Defendant and signed by Atuobi Kissi Debrah the General Manager for the 2nd Defendant. The Plaintiff also tendered in evidence Exhibit E. Exhibit E is a statement of account for the social security contribution of the Plaintiff. On Exhibit E, the current employer of the Plaintiff is given as Belfast City Management Limited (2nd Defendant).

[18] The Plaintiff testified further that, later after she had joined the company a new contract of employment was given to her to sign but unfortunately, the new contract did not have the exact terms and conditions that were earlier agreed upon. According to Plaintiff, the new contract of employment was on the letterhead of the 1st Defendant. That new contract was not signed. It was tendered as Exhibit C. Plaintiff did not tender the contract of employment, which she claimed she signed which was attached to the Offer letter. Exhibit C was not the contract of employment attached to Exhibit B. Plaintiff was not able to provide the required documentary evidence in support of her allegation that her contract of employment was on the letterhead of the 1st Defendant.

[19] In the case of **Ackah v Pergah Transport Ltd & Others** [2010] SCGLR 728 at 736 the Supreme Court per Adinyira JSC opined as follows:

> It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more probable than its non-existence. This is a requirement of law of evidence under sections 10(1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).

[20] The Plaintiff allege the existence of a documentary evidence and that document was not produced in evidence. That document was alleged to attached to the Offer letter which was countersigned by the Plaintiff. The said offer letter was tendered in evidence

as exhibit B but not the alleged attached contract of employment. The effect is that said contract of employment on the letterhead of the 1st Defendant does not exist.

[21] The Plaintiff herself under cross-examination admitted that her contract was with the 2nd Defendant and not the 1st Defendant.

This is what transpired when Plaintiff was cross-examined by learned Counsel for the Defendants:

> Q. If I may refer the witness to their Exhibit B (Exhibit B shown to witness). It is upon the terms of Exhibit B that you state your employment with the 2nd Defendant is hinged. Not so?
>
> A. Yes
>
> Q. And it is these terms that you alleged the 2nd Defendant has breached. Not So
>
> A. Yes
>
> **Q. I put it to you that the 1st Defendant and you never had any terms of employment.**
>
> **A. Yes .**
>
> **Q. I further put it to you that any claims of breach of subject to Exhibit B would be between you and the 2nd Defendant.**
>
> **A. Yes**

By the above testimony of the Plaintiff, she admits that there was no contract of employment between her and the 1st Defendant. The law is that, where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than relying on such admission. see **Darko v Ofei** [2018-2019] I GLR 165.

[22] In the present case, the Plaintiff admits that her contract of employment was between her and the 2nd defendant and not between her and the 1st Defendant. The Defendants will not need any better evidence than the admission made by the Plaintiff herself. I will hold that the Plaintiff's contract of employment was between her and the 2nd Defendant and not between her and 1st Defendant.

[23] In his written address learned Counsel for the Plaintiff submits that the Defendants in paragraph 2 of their Statement of Defence admit that the Plaintiff was an employee of Kwarlyez group (1st Defendant). Even though Defendants do not deny paragraph 2 of the Plaintiff's amended Statement of Claim which says that 1st Defendant is incorporated as a group of companies which includes the 2nd defendant, they contend that the two companies, 1st and 2nd Defendants are two separate legal entities.

[24] The submission of learned Counsel for the Plaintiff is not supported by the pleadings. In paragraph 2 of the Statement of Claim, it is pleaded as follows:

2. The 1st Defendant is incorporated as a group of companies which includes Belfast City Management Limited.

In response to the above averment, the Defendants pleaded in paragraph 2 of their Statement of Defence as follows:

2. The Defendants admit paragraphs 1 to 4 of the Statement of Claim.

[25] From the above averments, it cannot be said that the Defendants admitted that Plaintiff was an employee of Kwarleyz group (1st Defendant). What the Defendants admitted to was that the 1st Defendant is incorporated as a group of companies which includes 2nd Defendant company. 2nd Defendant company being a subsidiary of the 1st Defendant does not automatically make employees of 2nd Defendant the employees of 1st Defendant.

[26] A corporate group is composed of companies and each company within the group is a separate legal entity. Just because there is a collection of subsidiaries that make up a group does not mean that they have one single legal existence. The general rule is that a company is a separate legal entity from its shareholders and it is a well-established principle of company law that, as a rule, a parent company is not liable for the acts of its subsidiaries. Parent and subsidiaries are separate entities, with separate legal liability for their acts and omissions. Parent companies may either hold all or part of the shares of its subsidiaries and are as such shareholders/members of subsidiary companies. See **Smith, Stone & Knight v. Birmingham Corporation** [1939] 4 All ER 116 where the Court per Atkinson J. at page 120 opined:

> It is well settled that the mere fact that a man holds all the shares in a company does not make the business carried on by that company his business nor does it make the company his agent for the carrying on of the business. **That proposition is just as true if the shareholder is itself a limited company.** (emphasis mine)

[27] The Company law principle that a company is a separate legal entity separate at law from its shareholders and directors was applied in the case of **Morkor v Kuma** (1998-99) SC GLR 620 at page 632 where the Supreme Court per Sophia Akuffo JSC (as she then was) stated as follows:

> A company is, thus a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it. From the time the House of Lords clarified this cardinal principle more than a century ago in the celebrated case of Salomond v Salomond & Co [1897] AC22, it has, subject to certain exceptions, remained the same in all common law countries and is the foundation on which our Companies Code, 1963 is grounded.

[28] The legislature recognises a holding company as a separate legal entity. As such, according to Section 329 of the Companies Act 2019 (Act 992), the mere fact that a body corporate has a subsidiary which is incorporated, resident, or carrying on business in the Republic does not automatically constitute the place of business of that subsidiary or an established place of business of that body corporate.

Section 329(3) and (4) of the Companies Act, 2019, Act 992 provides as follows:

> (3) The expression "established place of business" means a branch, management, share, transfer, or registration office, factory, mine, or any other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which the agent regularly fills orders on behalf of the body corporate.
>
> (4) For the purposes of subsection (3),
>
> > (a) a body corporate does not have an established place of business in the Republic merely because the body corporate carries on business dealings in the Republic through a genuine broker or general commission agent acting in the ordinary course of business as a broker or general commission agent; or
> >
> > (b) the fact that a body corporate has a subsidiary which is incorporated, resident, or carrying on business in the Republic, whether through an established place of business or otherwise, does not of itself constitute the place of business of that subsidiary, an established place of business of that body corporate.

[29] By necessary implication, section 329(3)(b) assumes that the place of business of a subsidiary company is not the place of business of the parent or the holding company. Even though section 329 applies the external companies in my opinion the principle on the legal relationship between holding companies and their subsidiaries is same and relevant.

[30] Even though as a general rule a, a parent company is not liable for the acts of its subsidiaries there are instances where the veil of incorporation is lifted by the court and the parent company held liable for the acts and omissions of its subsidiaries. See the English case of **Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)** [2021] UKSC 3.

[31] The key facts in the case were that a group of Nigerian citizens inhabited an area allegedly affected by oil leaks from pipelines and associated infrastructure operated by the Shell Petroleum Development Company of Nigeria (SPDC). The claimants alleged that these spills had caused widespread environmental damage including serious water and ground contamination. Claims were brought, in negligence, against SPDC and its parent company, Royal Dutch Shell (RDS). The case against the parent, RDS, was brought on the basis that RDS owed the claimants a duty of care either because it exercised significant control over material aspects of SPDC's operations; and/ or that it assumed responsibility for SPDC's operations. The issue before the court was whether the claimants have an arguable case that a UK domiciled parent company owed them a common law duty of care so as properly to found jurisdiction against a foreign subsidiary company as a necessary and proper party to the proceedings. The court held that in principle a parent company could owe a duty of care to the claimants in respect of the acts of its subsidiary. The court found that the parent company exercised significant control over the operations of the subsidiary and have in certain instances assumed responsibility of the subsidiary company.

See also the case of **Vedanta Resources PLC and another v. Lungowe & others** [2019].

[32] In the **Okpabi & others v Royal Dutch Shell Plc& Anor and the Vedanta Resources PLC and another v. Lungowe & others** (supra) the Courts held the parent companies liable for the actions of the subsidiaries because the parent companies were found to exercise significant control over the subsidiaries and the parent companies have in certain circumstances assumed responsibility of the subsidiaries and therefore lifted the veil of incorporation and held the parent companies liable for the actions of the subsidiaries.

[33] In the instance case, to hold 1st Defendant liable for the actions of its subsidiary, the 2nd Defendant, the Plaintiff must establish that the 1st Defendant exercise significant control over the management and operations of the 2nd Defendant and also 1st Defendant has assumed responsibility for the actions of the 2nd Defendant. In my view piercing the corporate veil should be supported with positive evidence establishing the basis to warrant the liability of the holding or parent company for the actions or omissions of its subsidiary and, for that matter, the liability of a sole shareholder. The Plaintiff herein has not provided any such evidence to warrant a finding to the effect that 1st Defendant company has a significant control over the 2nd Defendant company or has assumed responsibility for the actions of the 2nd Defendant as a basis for the acts of the 2nd Defendant to be construed as the acts of the 1st Defendant.

[34] The offer letter issued to the Plaintiff was by the 2nd Defendant, Exhibit E indicates that the current employer of the Plaintiff in the records of the Social Security and National Insurance Trust for the purpose of her social security contribution is 2nd Defendant. Under cross examination of the Plaintiff, she testified that it was the 2nd Defendant that employed her and not the 1st Defendant. The Plaintiff was not able to establish that there

was a contract of employment attached to the Offer letter and the said contract of employment was on the letter head of the 1st Defendant Company. On the evidence I am satisfied that the Plaintiff was employed by the 2nd Defendant alone and hold that Plaintiff employment was with 2nd Defendant and she had no contract of employment with 1st Defendant. Plaintiff has also not been able to establish any basis for the lifting of the corporate veil of the 1st Defendant to make it liable for the actions of the 2nd Defendant.

[35] In her written address learned Counsel for the Defendants submitted that Plaintiff did not execute any contract of employment with the 2nd Defendant. According to her, rather, the Plaintiff was offered a position at the 2nd Defendant's outfit subject to the successful completion of a probational period after which she would now receive a valid contract of employment. I seem not to agree with learned Counsel because the facts and evidence do not support her contention.

[36] In her book *The law of Contract in Ghana*, the author Christine Dowuona -Hammond at page 3 had this to say on determination of the existence of a contract :

> Contracts are bargains and the most usual way to make a bargain is for one party to propose the terms or conditions on which he is prepared to transact with the other party and for the other party to accept, modify or reject them. The determination of the existence of agreement is therefore usually made within the context of "offer and acceptance". Thus, in determining whether or not a contract has been made, the courts usually begin by looking out for a promise by one party, which usually takes the form of an" offer" and a corresponding" acceptance" of the offer by the other party. Thus, exchange of promise for promise or promise for an act is what constitutes the bargain or agreement.

[37] In the present case, I find that Exhibit B constituted a valid term of contract of employment between the Plaintiff and 2nd Defendant for the following reasons. Exhibit B

was an offer of employment by the 2nd Defendant to the Plaintiff. It was signed by the General Manager of the 2nd Defendant Company and addressed to the Plaintiff. Plaintiff received it and accepted the offer and counter signed it. The acceptance of the offer was she countersigning the offer letter, agreeing to work and indeed working for the 2nd Defendant. The first paragraph of the Offer Letter, Exhibit B provides is in the following terms:

> We are pleased to offer you the position of FINANCIAL CONTROLLER with Belfast effective 4:1:2021. Below are the major points and stipulations of your employment contract regarding the position.

Exhibit B goes further to provide for duration, remuneration, benefits, probational period and termination clauses among other terms of the contract.

[38] I cannot see how anyone could interpret Exhibit B as anything other than a valid employment contract. The opening paragraph and subsequent provisions outlined in the offer letter make this clear, provided that the offer is accepted. Additionally, the 2nd Defendant has not denied issuing Exhibit B to the Plaintiff, nor have they denied that the Plaintiff accepted the offer. Based on the available evidence, I am satisfied that the 2nd Defendant did employ the Plaintiff, and that Exhibit B constitutes a valid contract of employment between the Plaintiff and 2nd Defendant.

I will now examine the 2nd and 3rd issues together as they are related.

ISSUE 2 Whether or not the circumstances in which the Plaintiff's employment was terminated by the defendants amount to wrongful termination under Ghana's Labour Laws.

ISSUE 3 Whether or not the circumstances under which the Plaintiff's employment was terminated by defendants amount to unfair termination under Ghana's labour Laws.

[39] There is no doubt that the Plaintiff's employment was terminated. The plaintiff testified that on 6 August 2021, she was invited for a meeting with the Human Resource Manager Gifty Gador, Legal Manager Vanesa Akuetteh, Fraizer Nyantakyi and the Chief Executive Officer Mr. Bediako. At the meeting, the Chief Executive Officer stated his unwillingness to work with her anymore on grounds that, operational expenses had allegedly increased since her assumption of office as the Financial Controller. Mr. Bediako then requested her to hand over all company assets in her custody.

[40] The 2nd Defendant does not in substance deny that the meeting took place. It also does not deny that Plaintiff's appointment was terminated at that meeting even though they put it in a different way that her appointment was not confirmed. 2nd Defendant, however, contends that Plaintiff's appointment was terminated because, during the probation period of the Plaintiff's employment with the 2nd Defendant, there were a lot of inefficiencies in the financial affairs of the 2nd Defendant and the Plaintiff failed either to provide any reasonable explanation for the exponential increase in operational expenses or a road map to make 2nd Defendant's operations more financially efficient. 2nd Defendant further contends that during evaluation of the Plaintiff's performance after her period of probation, it was noticed by officers of the 2nd Defendant that Plaintiff had not furnished the 2nd Defendant with a copy of the certificate evidencing the Plaintiff's qualification as a Chartered Accountant and there was a gap in her qualification for the role.

[41] The Plaintiff in her amended Statement of Claim pleaded as follows:

12. Plaintiff denies the grounds of dismissal stated by the CEO on basis that the said grounds was not supported by any fact at all and [as] such there was basis to arrive at such conclusion.
13. The Plaintiff says that the Defendants did not give her any formal hearing to allow her explain the situation or give answers to the accusations leveled against her.

The hearing given her was done a week after her removal from Office when a new person had already occupied her position.

14. Plaintiff says that no notice was given to her before her employment was terminated.
15. Plaintiff avers that the act of the defendants is wrongful and unlawful because it sins against the terms of the employment contract and breaches the duties imposed on the defendants by law.
16. Plaintiff avers that, the acts of the defendants constitute unfair and wrongful termination

The Plaintiff testified as follows:

> I contend that the act of defendants is wrongful because it sins against the employment contract…. I also contend that the termination of the employment by 2nd defendant on the basis of lack of current level of qualification is unfair.

The Plaintiff seems to be saying that her termination was both wrongful and unfair. Per her reliefs, the Plaintiff sued for both wrongful and unfair termination.

[42] The difference between unfair termination and illegal or wrongful termination of an employment contract was made clear by the apex Court in the case of **Charles Afran** vrs **S.G.SSB Ltd** [2019] DLSC 6157. The Court speaking through Professor Kotey JSC held thus:

> "Unfair termination", as distinct from the common law concept of "wrongful dismissal", is therefore a creature of statute, currently the Labour Act, 2003 (Act 651).; The Plaintiff in this case did not sue for "unfair termination" but "wrongful dismissal". As the Court of Appeal noted, "the plaintiff's suit was grounded on wrongful termination yet the learned trial judge failed to make such a finding, but rather held that his employment was unfairly terminated in that it sinned against

S.62 of the Labour Act, 2003 (Act 651)". We hold that the trial Court erred when it failed to consider whether the Plaintiff's employment had been wrongfully terminated under the terms of his contract of employment. This was required of the trial High Court as an initial first step. This failure was a grievous error. There was no basis for the trial High Court's holding that; "I believe that the Plaintiff's appointment was terminated under section 62". As we have noted, the letter of termination Exhibit D stated quite clearly that the Plaintiff's employment was being terminated under his contract of employment and pursuant to section 12 of the Rules and Conditions of service, Exhibit G. The trial High Court's holding that the termination of the Plaintiff's employment was in violation of the Labour Act, 2003 (Act 651) is therefore untenable as this is not an action for "unfair termination". Furthermore, under section 62 the termination of a worker's employment is fair if the contract of employment is terminated by the employer because the worker is incompetent. We therefore hold that the termination of the Plaintiff's employment was not "unfair" in terms of Act 651 as the Plaintiff was incompetent in the performance of his duty.

[43] Again, in the Supreme Court case of **Tagoe v Accra Brewery Ltd** [2017-2020] SCGLR the Court in holding 1 of the headnotes held that:

In a claim founded on wrongful termination of employment contract, the plaintiff assumed the initial burden of producing evidence to satisfy the court about his terms of employment and also that the termination of his appointment was contrary to the terms of his employment or existing law. The defendant would then be obliged to produce evidence to justify the termination. Thus, in the instant dispute the Respondent's company's plea of assault as justification for the

termination of the appointment, the burden of proof did not shift onto the Respondent company before the Appellant had made a case.

[44] Section 63 provides for circumstances under which a termination of employment can be said to be unfair.

Section 63—Unfair Termination of Employment.

(1) The employment of a worker shall not be unfairly terminated by the worker's employer.

(2) A worker's employment is terminated unfairly if the only reason for the termination is

(a) that the worker has joined, intends to join or has ceased to be a member of a trade union or intends to take part in the activities of a trade union;
(b) that the worker seeks office as, or is acting or has acted in the capacity of, a workers' representative;
(c) that the worker has filed a complaint or participated in proceedings against the employer involving alleged violation of this Act or any other enactment;
(d) the worker's gender, race, colour, ethnicity, origin, religion, creed, social, political or economic status;
(e) in the case of a woman worker, due to the pregnancy of the worker or the absence of the worker from work during maternity leave;
(f) in the case of a worker with a disability, due to the worker's disability;

(g) that the worker is temporarily ill or injured and this is certified by a recognised medical practitioner;

(h) that the worker does not possess the current level of qualification required in relation to the work for which the worker was employed which is different from the level of qualification required at the commencement of his or her employment; or

(i) that the worker refused or indicated an intention to refuse to do any work normally done by a worker who at the time was taking part in lawful strike unless the work is necessary to prevent actual danger to life, personal safety or health or the maintenance of plant and equipment.

(3) Without limiting the provisions of subsection (2), a worker's employment is deemed to be unfairly terminated if with or without notice to the employer, the worker terminates the contract of employment

(a) because of ill-treatment of the worker by the employer, having regard to the circumstances of the case; or

(b) because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the workplace.

(4) A termination may be unfair if the employer fails to prove that,

(a) the reason for the termination is fair; or

(b) the termination was made in accordance with a fair procedure or this Act."

[45] Benin JSC in **The Republic v. High Court, Accra (Industrial And Labour Division Court 2); Ex Parte Peter Sangbah-Dery** (Civil Motion No. JS/53/2017) held thus;

Upon a close look at Section 63 of the Act, it will be noticed that the grounds stated therein as grounds for unfair termination of employment are largely taken from

> the Human Rights provisions of 1992 constitution particularly articles 24, 26 and 29 and it appears the legislature was merely seeking to give effect to those provisions.

[46] Again, in the case of **Morgan & Ors v. Parkinson Howard Ltd** (1961) GLR 68, the Court held as follows:

> In an action for wrongful dismissal, the plaintiff must prove the terms of his employment and then prove that his dismissal is in breach of the said terms or that it contravenes some statutory provisions regulating employment.

[47] My understanding of the law as espoused by the decisional authorities is that any claim for unfair termination must arise from the statute, in this instance the Labour Act 2003, Act 651 and must be based on any or a combination of the circumstances set out in section 63 whilst an illegal or wrongful termination may arise from the conditions of service or terms of contract, or where a party who terminates the employment fails to give the other party the required notice or salary in lieu of notice in breach of section 17 of Act 651.

[48] In the present case, since the Plaintiff's relief is for both unfair termination and wrongful termination, I will ascertain from the facts and evidence whether the termination was in violation of any conditions of service or employment contract between the parties or whether or not the claim arises from a violation of any provisions of Act 651.

[49] Counsel for Defendants in her written address submitted that the Plaintiff was on probation and that her performance was found not to be satisfactory after evaluation and as such her appointment was not confirmed also, she did not provide the requisite certificates for her employment.

[50] It is clear from the evidence that the 2nd Defendant terminated the employment of the Plaintiff under the contract of employment. Per Exhibit B the Plaintiff was employed on 19 November 2020 and the appointment took effect on 4 January 2021. The provision under probation is in the following terms:

> Probation: You will be on probation for three (6) months after which your appointment may be confirmed. Belfast reserves the right to terminate your appointment before the end of the probationary period.

Even though in words the probation was "three" months, in figures it was"6" months, both parties are in agreement that the probation was for 6 months. From the facts the probationary period of 6 months ended on 4th July, 2021. It was on 6th August, 2021 that her appointment was terminated. From the facts, it cannot be said that Plaintiff's appointment was terminated within the probation period. She had worked for 7 months and termination was after the 7th month. The effect is that by the terms of her contract of employment, her probation period was over at the time her appointment was terminated.

[51] Even if Plaintiff's employment was terminated during her probation period, the question is, is an employee on probation entitled to be given notice for the termination of employment during the probationary period? I think so.

[52] Probation is defined by the Cambridge English dictionary as *"a period of time at the start of a new job when you are watched and tested to see if you are suitable for the job. A process of testing or observing the character or abilities of a person who is new to a role or job."*

[53] A probationary employee is newly employed on a conditional employment contract to evaluate the employee's work performance during the probationary period to ascertain if he or she is able to perform the work at the required standard before confirming the appointment. In my view once the person is appointed, he or she is an

employee and can be dismissed or terminated for reasons such as poor performance. She is also entitled to some basic benefits and certain protection like payment of her wages or salary and termination notice.

[54] As I have said, the Plaintiff had worked for over 6 months and her probation period was over. Indeed, she had worked for 7 months and by the terms of her employment, her probation period was over. In my view, the Plaintiff was entitled to be given notice in accordance with the provisions of Exhibit B, her terms of employment. The provision on termination in Exhibit B is in the following terms:

> Termination: Should you wish to terminate your appointment after your probation period, you must give as least one (1) month written notice prior to your departure date or pay one (1) months' salary in lieu of notice. Similarly, Belfast will give you one(1) months' notice in the event of termination of your appointment . However, Belfast reserves the right to terminate your appointment without notice for any gross violation of its policies, rules and regulations.

[55] The legal authorities are to the effect that an employer and employee are free and equal parties to the contract of employment and each can terminate the contract of employment by giving the appropriate notice or salary in lieu of notice.

In **Kobea & Ors v. Tema Oil Refinery** [2003-2004] SCGLR 1033, Dr Twum JSC at 1039 stated;

> At common law, an employer and employee are free and equal parties to the contract of employment. Hence either party has the right to bring the contract to an end in accordance with its terms. Thus, an employer is legally entitled to terminate an employee's contract of employment whenever he wishes and for whatever reasons, provided only that he gives due notice to the employee or pay

him his wages in lieu of the notice. He does not even have to reveal his reasons much less to justify the termination.

[56] Section 17 of Act 651 also deals with notice of termination of employment and it provides as follows:

17. Notice of termination of employment

(1) A contract of employment may be terminated at anytime by either party giving to the other party,

1. In the case of the contract of three years or more, one month's notice or one month's pay in lieu of notice.
2. In the case of a contract of less than three years, two weeks' notice or two weeks' pay in lieu of notice; or
3. In the case of contract from week to week, seven days' notice.

(2) A contract of employment determinable at will by either party may be terminated at the close of any day without notice.

(3) A notice required to be given under this section shall be in writing.

(4) The day on which the notice is given shall be included in the period of notice.

[57] Per Exhibit B, the Plaintiff's employment was for two years and by the terms of her contract, she was entitled to one months' written notice or one months' salary in lieu of notice for the termination of her employment. She was neither given the required notice nor was she paid one months' salary in lieu of the notice. I find that the termination of Plaintiff's employment with the 2nd defendant was in breach of her employment contract and as such wrongful.

[58] Even though I have determined that the Plaintiff's employment was in breach of her contract of employment and as such unlawful, the 2nd Defendant gave two main reasons for the termination of Plaintiff's appointment and I will want to examine them. The first reason is an alleged incompetence on the part of the Plaintiff. This reason is captured in paragraphs 6, 7,8 and 9 of the Defendants' amended Statement of Defence filed on 16 May 2023. The allegations in those paragraphs are to the effect that the Plaintiff's performance was very poor and below expectation and since she joined the 2nd Defendant's company, there were a lot of inefficiencies in the financial affairs of 2nd defendant. That she was given the opportunity to redeem herself but she could not.

[59] Section 15(e) (ii) of Act 651 provides grounds of termination of employment as follows:

> 15 . Grounds for termination of employment.
>
> A contract of employment may be terminated
> (e) by the employer because of the inability of the worker to carry out work due to
> (ii) the incompetence of the worker

[60] An employer is not bound to give reasons for the termination of an employee and to justify same provided the appropriate notice is given or salary in lieu of notice is paid. However, if he decides to give reasons for the termination provided for under section 15(e)(ii) he would have to prove the same failing which the termination would be deemed to be unfair in terms of Section 63(4)(e) of Act 651.

> (4) A termination may be unfair if the employer fails to prove that,
> (a) the reason for the termination is fair; or

(b) the termination was made in accordance with a fair procedure or this Act."

[61] The defendants gave incompetence and poor performance as reason for the termination of Plaintiff's appointment. The Plaintiff denied the allegations of incompetence and poor performance. The Defendants who make the allegation have the burden of proof to establish that allegation. If they fail to discharge that burden the reason for the termination would be said to be unfair in terms of Section 63(4)(e). The law is that it is the party who stands to lose on an issue if no evidence is led on it that bears the burden of proof as far as that issue is concerned. This is provided for in Sections 14 and 17 of The Evidence Act;

"14. Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.

17. The burden of producing evidence

Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence."

[62] In the instant case, if no evidence is led on the allegation that the Plaintiff was incompetent and performed poorly and that warranted the termination of her employment it is the Defendants who will lose on the issue. The Defendants did not testify. The allegations were contained in the pleadings of the Defendants. Pleadings do not constitute evidence.

In **Gihoc Refrigeration & Household** v **Jean Hanna Assi** (2005-2006) SCGLR at 476 Dr Date-Bah JSC had this to say on averments made in pleadings but no evidence led on those averments at the hearing:

> What was pleaded is not necessarily proof of the truth of the matter pleaded. I am content to limit myself to the evidence on record in this case.

See also **Hayword v Pullinger & Partners Ltd**. (1950) 1 ALL ER 581

[63] In the instant case, the 2nd Defendant opted not to testify and did not testify. The only evidence that 2nd Defendant can therefore rely on are Exhibits 1 and 2 which were tendered through Plaintiff under cross-examination. Exhibits 1 and 2 do not establish the incompetence of the Plaintiff in the performance of her job as the Financial Controller of 2nd Defendant. The effect is that the 2nd Defendant was not able to prove the allegation that the Plaintiff was incompetent and performed poorly and her performance led to any financial losses to the 2nd Defendant. The termination of Plaintiff's appointment on the unproven allegation of incompetence will be deemed to be unfair in terms of Section 63(4)(e) of the Labour Act as the 2nd Defendant failed to prove any reason at all for it be said it was fair or not.

[64] The second reason given by the 2nd Defendant for the termination of the Plaintiff's appointment is that during the evaluation of the Plaintiff's performance, the 2nd Defendant's Officers noticed that the Plaintiff had not furnished the 2nd Defendant with a copy of the certificate evidencing her qualification as a Chartered Accountant. I find this reason very intriguing. In the first place, per Exhibit B the Plaintiff was not appointed as a Chartered Accountant. She was appointed as a Financial Controller. The Defendants in paragraph 12 of the amended Statement of Defence, averred that the role that the Plaintiff applied for required qualification as a Chartered Accountant to perform

creditably. The 2nd Defendant failed to produce any evidence to support their claim that the Plaintiff was required to produce her Chartered Accountant certificate during the appointment process for the position of Financial Controller. As has been said earlier the Defendants did not testify and the allegations in the pleading remain only allegations and do not constitute evidence.

[65] In any event, was the Plaintiff interviewed before being offered the appointment? On the evidence there is no doubt that the Plaintiff was interviewed and was found to be suitable for the Job she applied for and subsequently appointed.

The Plaintiff testified as follows:

3. I say that I received the Offer letter after series of successful interviews with management of the 2nd Defendant.
4. I repeat paragraph 3 and say throughout the interviews, copies of my CV and academic certificates were in possession of the interview panel for review.

And under cross-examination of the Plaintiff the following was her testimony:

Q. How did you apply for the job offer.

A. When I was recommended, I spoke with the CEO and the CEO asked the HR to contact me and I was invited for interview.

Q. Was the interview in-person or virtual.

A. It was in-person

Q. Prior to the in-person interview, did you send any copies of your CV and other academic certificates to the 2nd Defendant Management.

A. Yes, I did

Q. By what means did you send these copies of your CV and academic certificates.

A. I quite remember I sent an email but during the interview hard copies were submitted as well.

Further

Q. Who was on the interview panel.

A. There were two ladies, Felicia who was the HR at Number one Oxford Hotel which is owned by 2nd Defendant and the second lady the HR for Kwarleyz which is also owned by the 2nd Defendant, her name is Maame Ama. That was the first interview and at the second interview again Felicia and the CEO of an external recruitment agency. And the third interview was a virtual interview with the CEO and the General Manager for 2nd Defendant. The CEO name is Nana Kwame Bediako and the then General Manager.

[66] The Defendant did not deny that the Plaintiff was interviewed on three occasions. I believe that with the caliber of members on the interview panel they will not call for the CV and academic qualifications of the Plaintiff in respect of the job she was being interviewed for. She was interviewed on three occasions and Defendants want me to believe that the interview panel did not have the CV and academic records of the Plaintiff at the interview? I do not believe that. I am satisfied that the Plaintiff submitted her CV and academic records to the 2nd Defendant and they were available to the 2nd Defendant and the members of the interview panel and the CV and academic certificates were considered before the Plaintiff was offered the job. It was unfair for the 2nd Defendant to

terminate the appointment of the Plaintiff on the ground that she did not possess the requisite qualification for the role she applied and was appointed to.

[67] The Plaintiff is asking for damages for wrongful and unfair termination of her employment with the 2nd Defendant. She is also asking for compensation for earned leave. What is the quantum of damages the Plaintiff entitled to in the instant case? I find some guide in the case of Ashun v **Accra Brewery Ltd** [2009] SCGLR 81 at 84 the Apex Court per Date-Bah JSC held as follows:

> In principle then, in the absence of any contrary statutory or contractual provision, the measure of damages in general damages for wrongful termination of employment under common law of Ghana is compensation, based on the employee's current salary and other conditions of service, for a reasonable period within which the aggrieved party is expected to find alternative employment. Put in other words, the measure of damages is the quantum of what the aggrieved party would have earned from his employment during such reasonable period, determinable by the court, after which he or she should have found alternative employment. This quantum is, of course, subject to the duty of mitigation of damages.

The court further held as follows:

> Nevertheless, the duty of mitigation of damages devolves on an employee. Accordingly, he or she has the duty to take steps to find alternative employment.

[68] Again, in **Bani v. Maersk Ghana Limited** (J4/48/2010 [2011] GHASC 11(30 March 2011) Date Bah JSC once again stated as follows:

> These facts call for a restatement of the Ghanaian common law on the termination of contracts of employment and the extent to which it has been modified by the statutory provisions in the Labour Act 2003 (Act 651). It remains the common law that the remedy available to an employee who has been wrongfully dismissed or terminated is an action for damages. An employee cannot be awarded an order for his reinstatement into a job from which he has been removed unlawfully, unless there is a public law element which requires otherwise…

[69] In, the present case, the Plaintiff is entitled to general damages for wrongful termination of her employment.

Section 20 (1) of Act 651 provides:

> In any undertaking every worker is entitled to not less than fifteen working days leave with full pay in a calendar year of continuous service

And section 30(1) provides:

> Where the employment of a worker is terminated, the worker is entitled to annual leave in proportion to the period of service in the calendar year.

[70] The plaintiff worked continuously for 7 months in the calendar year and she is entitled to a proportion of leave. Plaintiff worked for 7 months with the 2nd Defendant before her appointment was terminated. There is evidence that she secured a new job two months after the termination of her appointment. In the circumstances of this case, I think an award of GH¢30,000.00 as general damages will be adequate. I, therefore, award Plaintiff general damages of GH¢30,000.00.

The 2nd Defendant is to pay any outstanding Social Security contribution of the Plaintiff with the period of her employment between January 2021 and July 2021.

CONCLUSION

[71] The Plaintiff in this case was employed by the 2nd Defendant and her employment was with the 2nd Defendant exclusively. She did not have a contract of employment with the 1st Defendant, which is the Parent Company of the 2nd Defendant. The Plaintiff was not able to establish any basis for holding the 1st Defendant liable for the actions of its subsidiary the, 2nd Defendant. The offer letter issued by the 2nd Defendant to the Plaintiff which Plaintiff accepted was a valid contract of employment between the Plaintiff and the 2nd Defendant. The termination of Plaintiff's employment was wrongful, and she is entitled to general damages. I therefore dismiss Plaintiff's case against the 1st Defendant. and enter judgment for the Plaintiff against 2nd Defendant as follows:

1. Termination of Plaintiff's employment by 2nd Defendant was wrongful.
2. I award Plaintiff GH¢25,000.00 as general damages for wrongful termination of employment against the 2nd Defendant.
3. 2nd Defendant to pay any outstanding Social Security Contribution of Plaintiff between January 2021 and July 2021.
4. I award costs of GH¢25,000.00 in favour of the Plaintiff against the 2nd Defendant.
5. I dismiss Plaintiff's claim against the 1st Defendant and award costs of GH¢20,000.00 in favour of the 1st Defendant and against the Plaintiff.
6. Plaintiff's reliefs 3 and 6 are dismissed as same were not proved.

(SGD.)

AYITEY ARMAH-TETTEH, J

JUSTICE OF THE HIGH COURT