IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **Case No.** 254/2022

In the matter between:

DANIEL RODRIGUES CACACHAL Applicant

And

THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION 1st Respondent

ESWATINI GOVERNMENT 2nd Respondent

THE ATTORNEY GENERAL 3rd Respondent

Neutral Citation: Daniel Rodrigues Cacachal vs. The Chairman of the Civil Service Commission & 2 Others (254/22) [2023] SZIC 88 (29 August 2023)

CORAM: **V.Z. DLAMINI – JUDGE**
(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango – Nominated Members of the Court)

LAST HEARD: 09th August 2023

DELIVERED: 29th August 2023

Summary: ***Applicant filed an urgent application interdicting the Respondents from deducting from his salary monies that were overpaid to him for over a period of eleven (11) years. The Applicant also claimed underpayment and refund of monies withheld as a result of a downgrade of his salary scale over a decade ago. The Respondents raised point of law that Court lacked jurisdiction because underpayment claims had prescribed.***

Discussed: ***The requisites for a valid claim under the condictio indebiti or set off following overpayment of monies in error discussed.***

Held: ***Court lacks jurisdiction to entertain the claims for underpayment and refund as claims had prescribed. Further, that Respondents were not entitled to recover overpaid allowances as their conduct was grossly negligent and inexcusably slack.***

JUDGMENT

INTRODUCTION

[1] The Applicant, a liSwati male, was first employed on a two-year contract by the 2nd Respondent as a Portuguese Interpreter for the Courts of the law of the Kingdom of Eswatini on the 1st October 2003. At the time of employment, the Applicant was not a citizen of Eswatini and as such was offered four fixed-term contracts of two years at a time, the last of which was between the 1st October 2009 to 30th September 2011. While still on fixed-term employment with the 2nd Respondent, the Applicant applied for Eswatini citizenship in July 2007 and was eventually awarded citizenship on the 29th January 2010, but collected his Certificate of Citizenship on the 8th March 2010. After receiving

the Certificate of Citizenship, the Applicant filed a copy with the Human Resources Office of the Judiciary at the High Court of Eswatini because at that time, he was under the supervision of the Judiciary.

[2] As he was required by the fixed-term contract, the Applicant notified the Judiciary of his interest to continue working for the 2nd Respondent three months before the expiry of the fourth contract, that is in June 2011. He further expressed an interest of being employed permanently because he had now acquired citizenship, which was one of the prerequisites for appointment to a permanent and pensionable post with the Government of Eswatini. After his fixed-term contract expired in September 2011, the Applicant was not immediately offered a new contract, but continued to work without a formal instrument of appointment until he received a new instrument appointing him permanently to the position of Portuguese Interpreter on the 27th April 2012. On the 17th March 2015, the Applicant was then appointed a Public Prosecutor serving under the Director of Public Prosecution until his retirement in July 2023.

BACKGROUND TO APPLICATION

[3] When the Applicant was employed for the first time in October 2003, he was paid an inducement allowance of 10% of his basic salary as part of his remuneration; the 2nd Respondent continued to pay the Applicant the said allowance even after the latter was permanently employed until he was advised by an Accountant, a certain Mrs. Matse based at the Ministry of Justice and Constitutional Affairs on the 7th July 2022 that it was discovered that he had been receiving inducement allowance unlawfully since acquiring citizenship in January 2010. He was further notified that the amount that he had unlawfully received since January 2010 was **E102, 000.00**; the

Accountant then advised him to see the Principal Human Resources Officer of the Ministry of Justice and Constitutional Affairs.

[4] On the 11th July 2022, the Applicant met the Principal Human Resources Officer; the latter confirmed the Accountant's opinion and further said that he should have long approached the Accountant to notify her to stop paying him the inducement allowance as he was now a citizen of Eswatini. The Principal Human Resources Officer also informed the Applicant that the amount that he received unlawfully was recalculated from the date of his permanent appointment to date and the correct amount that he owed the 2nd Respondent was **E88, 000.00**. The Principal Human Resources Officer then said the aforesaid debt would be deducted from the Applicant's salary for eleven (11) months until it was liquidated, provided he cooperated.

[5] It was the prospect of having a large portion of his salary deducted during the last year of his service with the 2nd Respondent, coupled with past alleged unfair labour practices (summarized below) that he had suffered at the hands of his employer that jostled the Applicant to file the application by way of urgency in which he sought the following orders:

1. ***Dispensing with the normal time limits, forms and manner of service and enrolling this matter to be heard as one of urgency.***

2. ***Condoning the Applicant's non-compliance with the rules of the above Honourable Court.***

3. ***Interdicting and restraining 1st and 2nd Respondents from suspending the payment of inducement allowance to applicant deducting [sic] any amounts from Applicant's salary for repayment of any inducement allowance already paid to Applicant, pending this Court's***

consideration and determination of all the issues that gave rise to the application.

4. *Declaring that the "inducement allowance" that 1st Respondent awarded Applicant at the inception of the employment relationship remains a benefit to which Applicant is lawfully entitled.*

5. *Declaring that the term of employment, from 1st Respondent, that required Applicant to serve probation when 1st Respondent employed Applicant permanently, is malicious, unlawful, null and void.*

6. *Compelling 1st and 2nd Respondents to pay applicant with interest at the rate of 9% per annum all the money that applicant would have received from 2nd Respondent had 1st Respondent not downgraded the Applicant's earning scale from 1st October 2011 to 13th March 2015.*

7. *Compelling 2nd Respondent to refund applicant with interest at the rate of 9% per annum, the unlawful, excess PAYE tax on the back pay of salary in arrears from 1/10/11 to 31/05/12.*

8. *Costs of application.*

9. *Further and / or alternative relief.*

SURVEY OF ARGUMENTS

RESPONDENTS' POINTS OF LAW

[6] The Respondents opposed the application by advancing a defence on the merits in addition to raising points of law. In essence, the points of law were in respect of prayers **5, 6** and **7** above. To that extent, the Respondents contended that this Court had no jurisdiction to entertain the application in

respect of the said prayers, on three grounds. Firstly, the issues in respect of which the orders are sought arose more than a decade ago and factual disputes exist, as such the Applicant ought to have reported a dispute in terms of **Part VIII** of the **Industrial Relations Act, 2000 (as amended) (IRA)**.

[7] The Second point of law was that these issues, namely underpayment due to a downgrade of his pay scale, income tax refund, unlawful probation, retention allowance and devalued pension had prescribed in terms of the **IRA** and the **Limitation of Legal Proceedings against the Government Act, No. 21 of 1972**. Thirdly, even if the Applicant was not time-barred on the issue involving income tax, this Court did not have jurisdiction at all over tax disputes.

MERITS

[8] On the merits, the Respondents turned to the issues relating to the Applicant's entitlement to inducement allowance. In that regard, the Respondents argued that the Applicant was aware that upon acquiring citizenship and permanent employment, his entitlement to inducement allowance would cease, but he knowingly benefited for over a decade; this reprehensible conduct should not be countenanced by this Court. Counsel for the Respondents Mr. Mashinini further submitted that even if it could not be shown that he was aware that he ought to have advised the employer that he was still receiving inducement allowance after acquiring citizenship, the provisions of **Establishment Circular No. 27 of 1979**, which prohibit the payment of allowances to expatriates upon acquisition of the said status, is law and as such, the Applicant could not plead ignorance of the law as that is not a competent defence in law. Lastly, the Respondents contended that they paid the

Applicant all benefits that were erroneously withheld after he and his colleagues sued the employer in 2009.

[9] To fortify his arguments, Mr. Mashinini referred and furnished the Court with the following authorities: **Lindiwe Matsebula v Malindza High School & 3 Other [SZIC 09] 19th February 2021; Bongani Shabangu v The Army Commander – Umbutfo Swaziland Defence Force & 2 Others (154/2015) [2017] SZHC 257 (14th December 2017)**; and **Inyatsi Construction Group Holdings Limited v David Roberts and Another (19/2020) [2021] SZICA 04 (July 2021).**

APPLICANT'S CASE

[10] In his papers, the Applicant hinted that his pursuit of prayers **5, 6** and **7** cited above hinged on the subsistence of the employment relationship. During arguments, the Court invited him to clarify his position vis-à-vis the points of law; the Applicant indicated that he was reluctantly conceding to the points since it was apparent that the Respondents would succeed by default as it has taken a year for the application to be finalized and he had already retired. Otherwise, the Applicant half-heartedly contended that, this Court has jurisdiction, firstly because it was a Court of equity. Secondly, he argued that, the points of law raised could not avail the Respondents because it has also taken them a decade to raise the question of his entitlement to inducement allowance; they were not allowed to approbate and reprobate at the same time.

[11] On the merits, the Applicant submitted that the Respondents had failed to prove that he was aware that his entitlement to inducement allowance would cease after he acquired citizenship. He also argued that there was nothing in the four fixed-term contracts indicating that his entitlement to inducement

allowance was based on his being an expatriate. Furthermore, the Applicant argued that **Establishment Circular No. 27 of 1979** was not a law of general application; consequently, Respondents' contention that his lack of knowledge of the instrument was not an excuse was untenable.

[12] Mr. Cacachal also submitted that the circular itself enjoins Heads of Department to publish it to general staff, but the Respondents had failed to show that it was brought to his attention between 1st October 2003 and July 2022. In any event, the Applicant argued that the circular was issued in 1979, more than two decades before he took up employment with the Respondents.

[13] Mr. Cacachal further argued that his conduct could also be justified for other reasons. He was underpaid following the downgrade of his pay scale when he was unlawfully made to serve probation; he went unpaid for a period of seven months; he was subjected to excessive taxation and his pension was devalued due to the downgrade of his pay scale. He added therefore that, even if by some stretch of imagination, it could be shown that he should have reasonably known about the provisions of the circular, he reasonably believed that the Respondents were recompensing him for the financial hardship he suffered in the past. Lastly, the Applicant argued that he also reasonably believed that the inducement allowance was part of his benefits because as a polyglot (multilingual person), he was required to interpret in four languages, namely English, Portuguese, Shangaan and SiSwati yet his colleagues interpreted in English and SiSwati only.

[14] Mr. Cacachal relied on the following authorities: **Constitution of Eswatini; Employment Act, 1980; Prescription of Salaries and Allowances Act 6 of 1969 (as repealed); IRA**; and **Josephine Ndlangamandla and 13 Others v**

The Chairman of the Civil Service Commission and 2 Others (IC Case No. 453/09).

ADJUDICATION

[15] On the 18th August 2022, this Court heard brief arguments and granted an interim order suspending the payment of inducement allowance to the Applicant and interdicting the Respondents from effecting any deductions from the Applicant's salary pending the finalization of the matter. The *rule nisi* was extended several times and revived by consent on the 19th July 2023 before final arguments were made by the parties on the 9th August 2023.

[16] At the outset, the Court will dispose of the points of law raised by the Respondents to oppose prayers **5, 6** and **7** of the Notice of Application; these are captured in paragraph **5** of this judgment. Without further delay, the Court holds that the points are meritorious. It is common that the issues giving rise to the reliefs sought under those prayers arose between 2012 and 2015; consequently, a period of eight (8) years has lapsed without the Applicant approaching Conciliation Mediation and Arbitration Commission (CMAC) to report a dispute in terms of **Part VIII** of the **IRA.**

[17] In our view, the reliefs sought in prayers **5, 6** and **7** do not only lack urgency, they are inundated with disputes of fact and under those circumstances the **IRA** and this Court's **Rules** enjoin the Applicant to comply with the provisions of **Part VIII** before he may approach this Court for redress. **Section 76 (2)** of the **IRA** provides that a dispute may not be reported to the CMAC if more than eighteen (18) months has elapsed since the issue giving rise to dispute arose.

[18] The Industrial Court of Appeal in the cases of **Usuthu Pulp Company v Jacob Seyama and Others (ICA case no: 1/2004)** and **Inyatsi Construction Group Holdings Limited v David Roberts and Another (19/2020) [2021] SZICA 04 (July 2021)** has held that disputes that should be reported to CMAC as a matter of law, are deemed to be prescribed if they were not reported to CMAC within eighteen (18) months, even if the defence of prescription is raised for the first time in Court.

[19] It is also apparent from the Applicant's evidence that he had no serious intention to pursue prayers **5, 6** and **7**; these are not only ancillary to the real dispute involving the inducement allowance; they were included to try and show that the Respondents had a history of treating him unfairly. There is no doubt in our minds that had the question of the Applicant's entitlement to inducement allowance not threatened his salary and pension benefits, the issues relating to underpayment, income tax, probation, retention allowance and pension would never have been raised.

[20] We now turn to deal with the question of the Applicant's entitlement to inducement allowance and / or Respondents' right to recover from Applicant's salary monies allegedly unlawfully overpaid to him over a period of eleven (11) years. In terms of **section 56 (1) (e)** of the **Employment Act, 1980,** an employer has the right to recover from an employee's wages monies overpaid to that employee in error as wages. The employer's right is however not absolute.

[21] In the case of **Aaron Fakazi Kunene v The Principal Secretary-Ministry of Agriculture and Cooperatives and 2 Others (IC Case No. 296/2004) at paras: 17 – 19,** the Court *per* Dunseith J.P. (as he then was) opined as follows:

"The Act thus authorises the employer to set off money which it claims was overpaid in error as wages, by deduction from the wages due to an employee. The employer does not have to first come to court and establish its claim of condictio indebiti. This does not preclude an employee from challenging the right of the employer to make the deduction(s) from his wages by way of set off, and if he does so the employer must prove the requirements of the condictio indebiti action. The requisites for a valid claim under the condictio indebiti were set out by Van Zyl J in Frame v Palmer 1950 (3) SA 340 (C) at 346D-H in these terms: "(a) The plaintiff must prove that the property or amount he is reclaiming was transferred or paid by him or his agent to the defendant. (b) He must prove that such transfer or payment was made indebite in the widest sense (i.e. that there was no legal or natural obligation or any reasonable cause for the payment or transfer). (c) He must prove that it was transferred or paid by mistake."

[22] His Lordship Dunseith J.P. (above quoted case) continued to observe at **paras: 21 – 22** that:

"With regard to the third requirement set out in (c) above, namely proof that the payment was made by mistake, it is now established law that the mistake: .....may be a mistake of fact or of law; and .....must be excusable. In the case of WILLIS FABER ENTHOVEN (PTY) LTD v RECEIVER OF REVENUE AND ANOTHER 1992 (4) SA 202 (A) at 224, the SA Court of Appeal ruled that: "Our law is to be adapted in such a manner as to allow no distinction to be drawn in the application of the condictio indebiti between mistake in law (error juris) and mistake of fact (error facti). It follows that an indebitum paid as a result of a mistake of law may be recovered provided that the mistake is found to be excusable in the

circumstances of the particular case." What is meant by an "excusable" error or mistake? In Rahim v Minister of Justice 1964 (4) SA 630 (A) the Court held that an amount of money paid indebite in mistake of fact could not be recovered by means of the condictio indebiti where the conduct of the payer was found to have been 'inexcusably slack' (at 635E-F). As appears from 634A-C of the report, the Court adopted the view of Glück and Leyser that, to quote Leyser, crassus et inexcusabilis error condictionem indebiti impedit; and Voet's statement that "the ignorance of fact should appear to be neither slack nor studied (nec supina nec affectata)." Hefer JA in the Willis Faber Enthoven judgement at pages 223-224 stated as follows in relation to mistakes of law: "It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no debitum and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment. (Consider, for example, the case of a person who, whilst in doubt as to whether money is legally due, pays it not caring whether it is and without bothering to find out.) These are only a few considerations that come to mind; others will no doubt manifest themselves with the passage of time as claims for the recovery of money paid in error of law come before the Courts."

[23] At paragraphs **24 and 25** Dunseith J.P. (above cited case) concluded on the requisites for a valid claim under the *condictio indebiti* or set off as follows:

> *"One further aspect of law should be mentioned in relation to error or mistake. That is the requirement which is discussed by Wessels: The Law of Contract (2nd ed.) para 3690 in these terms: 'If the payer had the means of knowledge and carelessly refused to avail himself of the means he possessed to determine the facts, his ignorantias subpoena ad effectata might well be construed either into actual knowledge or into such indifference as to whether the money was due or not, that he must be held to have intended the payment whether he owed the money or not.' In other words, where an undue payment is made in circumstances where the payer could without difficulty have ascertained that payment was not due, the court may construe the payment as having been made deliberately, and not mistakenly at all. Obviously a distinction must be drawn between cases where the overpayment of wages arises due to a purely clerical error, such as an error of calculation or an application of the wrong grade, on the one hand, and an error of judgement, where the wrong amount is paid due to an incorrect decision or the failure to make a decision."*

[24] The import of the facts of the **Aaron Fakazi Kunene case (above)** to the present case warrant repetition. In 1999, Mr. Kunene worked as Inspector of Works in the Fire and Emergency Services Department and was earning a salary on Grade 10. Then in July 1999, the Civil Service Commission (then CSB) approved his appointment on promotion to Grade 12 in the post of Workshop Manager tenable in the Ministry of Agriculture and Cooperatives. After being challenged by his colleagues, the High Court declared his appointment irregular; the CSB subsequently wrote to him and informed him that his appointment on promotion was withdrawn with effect from 1st

October 2000. Nevertheless, Mr. Kunene remained at the Ministry of Agriculture with a post and continued to earn a salary on Grade 12. On the 8th May 2002, the Court *per* Nderi Nduma J.P. (as he then was) ordered the CSB to pay him on the position he held at Grade 10. After nine months the Ministry of Agriculture wrote to Kunene notifying him of the overpayment and expressed an intention to recover the monies from his salary.

[25] His Lordship Dunseith J.P. (as he then was) applied the principles cited in that judgment, which we quote with approval in paragraphs **21** to **23** of this judgment; he found on the facts that Ministry of Agriculture had deliberately overpaid Mr. Kunene for seventeen months and even if it did so in error, it was so slack and passive in failing to correct the overpayment within a reasonable time. The employer was also found to be indifferent toward the Applicant's predicament; consequently, the Court held that employer did not deserve the protection of the law.

[26] In the present case, the Respondents contend that the Applicant was aware that his entitlement to inducement allowance would only subsist so long as he was employed by the 2nd Respondent and remained an expatriate or non-citizen of Eswatini, but should he become a citizen, the entitlement would cease. For that reason, the Respondents argued that it logically followed that when the Applicant discovered that he was still receiving an inducement allowance after acquiring citizenship, he should have notified the accountants in the Judiciary and / or Ministry of Justice about the anomaly so it could be rectified at the earliest opportunity. The Respondents' contention is predominately premised on **Establishment Circular No. 27 of 1979**, in particular that its provisions are law and Applicant's ignorance thereof is not an excuse.

[27] The significance of the provisions of **Establishment Circular No. 27 of 1979** warrant quoting *verbatim* at this juncture, it reads:

"

13th September, 1979

ESTABLISHMENT CIRCULAR NO. 27 OF 1979

ACQUISITION OF CITIZENSHIP OF SWAZILAND BY EXPATRIATE OFFICERS

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1. *Government has decided that in cases where an expatriate officer applies for, and is successful in acquiring citizenship of Swaziland in terms of the Citizenship Order, 1974, such an officer shall, with effect from the date of obtaining such citizenship, relinquish all claims to the benefits applicable to expatriate officers.*
2. *It is incumbent upon an expatriate officer when registered as a citizen of Swaziland to advise his Head of Department, and the Director of Personnel Management, immediately the new status is obtained. To do otherwise, will result in the officer receiving benefits to which he is not entitled; the value of which will have to be refunded to Government.*
3. *If the expatriate officer is registered as a citizen of Swaziland during a current tour of duty, the contract on which he is serving will be regarded as being terminated from the date of registration; the conditions of the contract will only be fulfilled up to that date. Thereafter any future employment with the Government will be based on local conditions of service applicable to Swazi citizens.*

4. *It is requested that Permanent Secretaries and Heads of Departments should bring the contents of this Establishment Circular to the attention of all expatriate officers employed in their Ministries/Departments.*
5. *Amendments to General Orders will be made in due course to accommodate the policy outlined in this Establishment Circular.*

S. J. S. SIBANYONI

DIRECTOR OF PERSONNEL MANAGEMENT/ HEAD OF THE CIVIL SERVICE

DISTRIBUTION: SECRETARY TO CABINET

ALL PERMANENT SECRETARIES

ALL HEADS OF DEPARTMENTS"

[Emphasis added].

[28] The validity of Government circulars and / or directives has been a subject of debate in this jurisdiction for years; but we have not found any precedent on the question of the legal status of Government directives in general; we have had to borrow from legal precedents in the Republic of South Africa, which were find persuasive and applicable in this jurisdiction.

[29] On the question of the legal status of Government directives, the Supreme Court of Appeal in the case of **Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA) at para: 7** stated as follows:

> *"The word 'policy' is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and*

what is not with reference to specificity is, in my view, not always very helpful or necessarily correct..... Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear...."

[30] Then in a recent decision, the Constitutional Court of the Republic of South Africa in the case of **Ahmed and Others v Minister of Home Affairs and Another 2019 (1) SA 1 (CC) paras: 41-42; 54** explained the legal position of Government directives as follows:

"The nature and status of a directive is unclear. A directive is an official policy document, which guides government departments on how to apply legislation. According to Baxter, directives belong to a 'body of rules which are of great practical importance' and which constitute 'instructions issued without clear statutory authority to guide the conduct of officials in the exercise of their powers'. Baxter refers to departmental circulars and directives as 'administrative quasi-legislation', which are neither legislation nor subordinate legislation. This does not necessarily mean that a directive is unenforceable or that it has no legal status. Where it appears that an Act has anticipated the creation of a directive, a court will be more willing to find that it has legal authority and is enforceable. The fact that directives are not promulgated and there is uncertainty as to their legal status, may lead

to a situation where an official or body relies on a directive that is not aligned to applicable law. The nature of policy directives differs. They may be statutorily required, in which case their lawfulness is assessed against the empowering legislation seen through a constitutional lens. In other cases, the application of the statutory policy in individual instances may be challenged on the grounds of the infringement of certain fundamental rights, like the right to equality. In Barnard, this court held that there was no discrimination against the applicant because the policy was flexible and the functionary's exercise of discretion in accordance with that flexibility could not be faulted. Lastly, the policy may not be expressly required by legislation, but be an internal document that regulates the implementation and application of statutory powers granted to functionaries..... A directive which has not been officially published, for example in the Government Gazette, or made accessible to the public and merely issued by the Director-General of the Department to all immigration officials as an operational guide, can hardly be suggested to be a law or carry sufficient weight so as to override the Regulations."

[Underlining added].

[31] Applying the above principles to the facts of the present case, this Court makes the following observations. The Respondents did not allege and prove that **Establishment Circular No. 27 of 1979** was published in a Government gazette. The circular provides that in due course its provisions would be incorporated into the Government General Orders in the form of an amendment, but the Respondents did not produce any such amendment. The fact that the circular itself was produced in Court as proof of the existence of

the policy forty-three (43) years after it was issued suggests that the General Orders were never amended to incorporate its provisions.

[32] The Court agrees with the Applicant that **Establishment Circular No. 27 of 1979** is not a law of general application; it was intended for internal regulation of the terms and conditions of public officers in the employ of the Government of Eswatini. This means that the principles of employment law apply. In the Court's view, the principles applicable in the disciplinary control of employees by the employer apply with equal force to the present case. To that extent, the learned GROGAN J. in his text *DISMISSAL 4th Edition at page 175-176,* remarks as follows:

> *"Employees may be disciplined for contravening rules only if they knew, or ought to have known, of the existence of the rules. This follows logically from the requirement that employees cannot be seen to have committed misconduct if they did not know, or could not reasonably have known beforehand, that the employee regarded his or her actions as misconduct. Within limits, employment law does not recognise the principle 'ignorance of the law is no excuse'. Nor does the law permit an employee to shelter behind the instruction or consent of a superior if the employee knew that the instruction was unlawful, or the superior was aware that the employee's action was wrong. A distinction must be drawn between an employee's plea that he or she did not know of the existence of the rule and a plea that the employee was not aware that he or she was actually breaking a rule of which the employee was aware. For example, employees may claim that, although they were aware of a rule against theft, the item had been unwittingly left in their pockets. The requirement that employees must have been aware of the rules they are accused of contravening flows from the general principle*

that it is incumbent on employers to ensure that the standards of conduct that they set are known to employees. Publication of rules is a general principle of fairness and good labour relations. A prudent employer will ensure that the rules of the workplace are set out in a comprehensive code of conduct, which brings the rules and the sanctions that can be expected for non-compliance to the attention of employees. The requirement that rules must be published does not mean that they are cast in stone. Conditions in particular workplaces may change, and conduct that is acceptable today may be frowned upon tomorrow. Employers are permitted to introduce rules to cope with changing demands and circumstances. But, when they do this, they must ensure that the new rules are brought to their employees' attention." [Emphasis added].

[33] The Respondents have not proved that the circular in question was brought to the attention of the Applicant in October 2003 when he was first employed or in January 2010 when he acquired citizenship or in April 2012 when he was permanently employed. Out of his own desire to be permanently employed, the Applicant filed his Certificate of Citizenship within a reasonable time and by doing so, he unwittingly complied with paragraph **2** of the circular. This brings us to another point. Paragraph **2** of the circular only enjoined the Applicant to advise the Head of Department and Director of Personnel Management immediately upon acquiring citizenship, which he did by filing the certificate with the Human Resource Officer in the Judiciary.

[34] The provisions of the circular suggest that once the expatriate has discharged his or her obligation, the duty to make the necessary adjustment in the terms of service of the expatriate who has since become a citizen, lies elsewhere; there is no obligation placed on the new citizen to advise the employer that he

or she is still receiving a benefit reserved for expatriates. After all, the circular does not even list the types of allowances reserved for expatriates, not to mention inducement allowance. In the Court's view, this obligation would be implied where the fixed-term contracts offered to the Applicant expressly provided that his entitlement to inducement allowance was tied to his expatriate status.

[35] There is no express nor implied provision in all the Applicant's instruments of appointment and document titled '*Government Contract of Service*' that he signed that suggests that the 10% inducement allowance was paid to the him because he was an expatriate. What we note, if that is to count in the Respondents' favour, the Applicant's instruments of appointment reflect that he was entitled to *"Allowance (Contract Addition)"* of 10% basic salary. When the Applicant was offered permanent employment, the entitlement to *"Allowance (Contract Addition)"* of 10% basic salary was omitted in the instrument of appointment, nevertheless he continued to enjoy the benefit.

[36] A compelling argument may be made that; the above facts should have made the Applicant realize that he was not entitled to inducement allowance. That may be so, but the Respondents' basis for challenging the Applicant's entitlement to the benefit was not permanent employment *per se,* it was his acquisition of citizenship. In any event, the aforesaid provisions of the fixed-term contracts and the permanent contract are subject to more than one inference. It is for that reason that we find the Applicant's version that he reasonably believed that he was paid the allowance in recognition of his multilingual skill not farfetched. The Court therefore finds that the Applicant was not responsible for the anomaly, but the same cannot be said about the Respondents.

[37] The Applicant advised the Respondents within a reasonable time upon his acquisition of citizenship. As alluded above, he unknowingly complied with the provisions of **Establishment Circular No. 27 of 1979**. The 1st and 2nd Respondents did not act on the Applicant's advice for more than a decade. In the Court's view, it is probable that the anomaly was discovered when the Respondents were reviewing the Applicant's employment file in preparation for his imminent retirement. As is common cause, it is the 2nd Respondent's policy not to offer permanent employment to expatriates; the Respondents' earliest opportunity to make the adjustment was when the Applicant filed his certificate of citizenship in 2011 and the second opportunity came when the Applicant was permanently employed in April 2012. The third opportunity was when the Applicant was appointed Public Prosecutor.

[38] It is apparent on the face of the instruments of appointment that each time the Applicant was offered a contract by the 1st Respondent, the Accountant General was also served with copies; the rationale for that was for the Accountant General to effect the necessary adjustments on the remuneration package due to the Applicant. The Court finds that the Respondents' error of paying the Applicant inducement allowance for eleven (11) years was grossly negligent and inexcusably slack. In the premise, the Respondents' error does not warrant the protection of the law. The Applicant should not be made to suffer financial hardship due to the gross negligence and inexcusable slackness of the Respondents.

[39] While the Court holds the view that the Respondents have no right to recover the inducement allowance already paid to the Applicant from his salary or other benefits, we also find that the Applicant had no right to compel the Respondents to continue paying him the said allowance after it was discovered in July 2022 that he had been receiving it. Although the Applicant believed

that he was entitled to inducement allowance because of his exceptional skills, the basis of his belief shows that he acted in good faith; however, it did not logically follow that the foundation for his belief was existing terms and conditions of employment. The Applicant did not produce any legal instrument that stipulated that the basis of his entitlement to inducement allowance was his multilingual skill.

CONCLUSION

[40] The Court has found that the point of law on jurisdiction and / or prescription raised by the Respondents to oppose the granting of prayers **5, 6** and 7 in the Notice of Application were meritorious because the underpayment and / or refund claimed had prescribed. Furthermore, while the Court has found that the Applicant was not entitled as of right to claim payment of inducement allowance after July 2022, we have also found that the Respondents have no legal right to recover the inducement allowance already paid to the Applicant for over a period of eleven (11) years. On the question of costs, the Court's view is that it is fair and just that each party pays for his or her own costs because they were both partially successful.

[41] In the result, the Court orders as follows:

[a] Prayers **4**, **5**, **6** and **7** of the Notice of Application be and are hereby dismissed.

[b] The 1st and 2nd Respondents are interdicted and restrained from deducting the amount of **E88, 000.00** from the Applicant's remuneration and / or deferred benefits such as pension.

[c] There is no order for costs.

Members agree.

V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

For Applicant : In Person

For Respondents : Mr. M. Mashinini
(Attorney General's Chambers)