IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 296/2004**

In the matter between:

AARON FAKAZI KUNENE **Applicant**

and

THE PRINCIPAL SECRETARY – MINISTRY

OF AGRICULTURE AND CO-OPERATIVES **1ST Respondent**
THE ACCOUNTANT GENERAL **2ND Respondent**
THE ATTORNEY GENERAL **3RD Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**S. HLOPHE**
FOR RESPONDENT	**:**	**V. KUNENE**

J U D G E M E N T - 13/09/2006

1. In 1999, the Applicant worked as an Inspector of Works in the Fire and Emergency Services Department under the Ministry of Housing and Urban Government earning a salary on Grade 10. In July 1999 the Civil Service Board approved his promotion to Grade 12 in the post of Workshop Manager in the Ministry of Agriculture and Cooperatives.

2. The Applicant assumed duty in his new post on 26th July 1999, but on 1st September 2000 the High Court granted an order in Civil Trial Case No. 1796/00 in the following terms:

- *The appointment of the 2nd Respondent* [the present Applicant] *to the position of Workshop Manager in the Ministry of Agriculture and Cooperatives (Land Development Section) is declared irregular.*

- *The appointment of the 2nd Respondent as Workshop Manager is set aside*.

3. Apparently the Applicant's appointment had been successfully challenged by disappointed aspirants for the post on the grounds of irregularities in the recruitment process. The Applicant then received a letter from the Civil Service Board informing him that "*the High Court of Swaziland ruled that your appointment as Workshop Manager Grade 12 is irregular. The Board has accordingly withdrawn your appointment with effect from the 31st October 2000."*

4. The Principal Secretary in the Ministry of Agriculture requested the Civil Service Board to appeal against the High Court decision as he considered the Applicant to be qualified and competent for the post to which he had been appointed. Nevertheless, the Board in its wisdom did not appeal the decision, nor did it take any steps for more than a year to regularise the Applicant's appointment as

Workshop Manager by commencing the recruitment process afresh.

5. The Applicant remained at the Ministry of Agriculture without a post. He could not revert to his old position of Inspector of Works at the Fire and Emergency Services Department because that post had been filled on his promotion. The Government continued to pay the Applicant on Grade 12.

6. In late March 2002 the Applicant received a letter from the Ministry of Agriculture and Cooperatives advising him that the Ministry would discontinue his salary with effect from the 1st April 2002, for the reason that *"the Ministry cannot pay your salary when you are not legally employed in the Ministry."*

7. The Applicant brought an urgent application to the Industrial Court for an order directing the Government to continue paying his monthly salary at Grade 12 as and when it fell due. In a judgement delivered on the 8th May 2002 under Industrial Court Case No. 110/2002, the Court (Nderi Nduma JP presiding) ordered the Civil Service Board and the Accountant General *"to continue paying the Applicant on the position he holds at Grade 10 with the Fire and Emergency Department."*

8. A period of nine months passed. Then the Applicant received a letter from the Ministry of Agriculture and Cooperatives stating as follows:

" *OVERPAYMENT OF SALARY—YOURSELF*

I am directed to inform you that you were overpaid salary between the

period 14th September 2000 and 31st March, 2002 inclusive amounting to E20,591-71. The Ministry of Agriculture and Cooperatives paid you on Grade 12 instead of Grade 10 during that period. This follows the judgement and order of the Industrial Court of Swaziland issued on the 14th September, 2000 which set aside your promotion to workshop Manager Grade 12 and the direction from the Public Accounts Committee."

9. This letter contains various incorrect statements of fact. It was the High Court, not the Industrial Court, which made an order in September 2000. The High Court did not set aside the Applicant's promotion, it set aside his appointment to the post of Workshop Manager. Furthermore, the withdrawal of the Applicant's appointment, as communicated to him by the Civil Service Board, was with effect from 31st October 2000, and if there was any overpayment of salary, this was from 1st November 2000, not the 14th September 2000 as claimed.

10. The Applicant protested to no avail against the intended recovery of the alleged overpayment, and finally instituted the present application, in which he claims an order:

(a) That the Respondents be stopped from deducting the sum of E532-28 from the salary of the Applicant every month.

(b) That the sums already deducted be paid back to the Applicant.

(c) Costs

ARGUMENTS

11. Applicant's counsel argued that the Respondents are not entitled to recover the sum of E20591-71 by monthly deductions from the Applicant's salary for the following reasons:

- The Applicant was not overpaid. All monies paid to him by way of salary were lawfully received by him; and/or

- The Applicant is an innocent party who is being penalised for an irregularity for which he was not responsible; and/or

- The deductions are unfair to the Applicant and render him unable to support his family out of the balance of his income.

12. Respondent's counsel argued to the contrary that the deductions are lawful and fair because:

- After the Applicant's appointment as Workshop Manager was withdrawn he was not entitled to be paid on Grade 12 . The Applicant has been unjustly enriched and the Government is entitled to recover the overpayment;

- The Respondent is acting in accordance with the judgement of the Industrial Court, which states that so long as the Applicant continues to tender his services, the Respondent should and is bound to continue paying him on Grade 10 scale.

ANALYSIS OF THE LAW

13. The Respondent is making deductions from the Applicant's monthly salary, in order to recover monies which it alleges it has overpaid the Applicant by paying his salary at Grade 12 instead of Grade 10 during the period 14th September 2000 to 31st March 2002.

14. In legal terms, the Respondent claims that the Applicant has been unjustly enriched as a result of monies overpaid to him in error, and that it is entitled to recover such overpayment by way of set-off against the Applicant's monthly salary. The legal basis for the Respondent's claim lies in the common law quasi-contractual action known as the *condictio indebiti.* This action, like all enrichment actions, is founded on principles of equity.

15. In order to protect an employee from arbitrary and unauthorised deductions being made from his wages under the guise of set-off, and to ensure that money earned by him should (subject to specific exceptions) pass directly and without deduction into his own hands, the legislature enacted specific provisions under Part VI (Protection of Wages) of the Employment Act 1980 (as amended).

Section 56 of the Act expressly sets out the circumstances under which an employer is authorised to make deductions from the wages of an

employee.

Section 64 provides that "*any employer who makes any deduction from the wages of an employee or receives any payment from an employee contrary to the provisions of this Part…shall be guilty of an offence…*"

16. Section 56(1) states:

"An employer may deduct from the wages due to an employee –

(a) ……..

……..
……..
……..
any amount paid to the employee in error as wages in excess of the amount due to him."

17. 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.*

18. 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.

19. 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 (ie 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."

20. 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:

20.1 may be a mistake of fact or of law; and

20.2 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."

21. 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*).”

22. 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. On the question of the burden of proof, Hefer JA is also of assistance:

"There is also the question of the onus of proof. In Recsey v Reiche 1927 AD 554 at 556 it was said that the onus in an action based on the condictio indebiti 'lies throughout the whole case' on the plaintiff. This remark was obviously intended to refer to every element constituting the plaintiff's cause of action. This includes the excusability of the error. As was pointed out in Mabaso v Felix 1981 (3) SA 865 (A) at 872H considerations of policy, practice and fairness inter partes largely determine the incidence of the onus in civil cases; and I can conceive of nothing unfair in, and of no consideration of policy or practice militating against, expecting of a plaintiff who alleges that he paid an amount of money in mistake of law, to prove sufficient facts to justify a finding that his error is excusable."

24. 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.

25. 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.

APPLICATION OF THE LAW TO THE FACTS

26. It is common cause that the Applicant was paid at Grade 12 for the period in question. The first requirement for the condictio indebiti (see paragraph 19 above) is thus established.

27. The court accepts for purposes of this judgement that the Respondent was under no legal obligation to pay the Applicant at Grade 12 as from the 1st November 2002 (see paragraph 9 above), and the wages paid in excess of Grade 10 were paid *indebite.* The second requirement is also established.

28. It is the third requirement that presents the Respondent with some difficulty, bearing in mind that the onus is on the Respondent to prove that the overpayment was made in error, not deliberately, and that the error is excusable.

29. According to the judgement of the Industrial Court in Case No. 110/2002, the Applicant reverted to his previous position at Grade 10 once his appointment as Workshop Manager had been set aside by order of the High Court. The President of the Court states in his judgement at page 2:

"The Ministry of Agriculture ought to have regularised the Applicant's

promotion after it was served with the court order by conducting the recruitment process afresh but instead it continued to pay the Applicant in disregard of a court order on Grade 12."

27. The Applicant's counsel argued at the hearing of the present application that the continued payment of the Applicant at Grade 12 was deliberate, because the Ministry of Agriculture anticipated that the Civil Service Board would appeal the High Court judgement and the effect of such appeal would be to stay the setting aside of the Applicant's appointment. Respondent's counsel responded with the counterargument that the overpayment was made by the Accountant-General, not the Ministry of Agriculture, and the error was due to the Accountant-General not being made aware at the proper time that the Applicant had reverted to Grade 10.

28. When considering whether the overpayment was made in error or deliberately, the Court considers it necessary to look at the intent of the Civil Service Board and the Applicant's line Ministry, namely the Ministry of Agriculture, not that of the Accountant-General. The latter as Paymaster for the Civil Service may have processed the overpayments, but he would have done so on the basis of the line Ministry's payroll as submitted to him from time to time.

29. The Court does not believe that the Ministry of Agriculture retained the Applicant at Grade 12 on its payroll for a period of seventeen months in ignorance of the fact that the Applicant had no post at Grade 12 and should have reverted to Grade 10. Such ignorance is an administrative improbability that could only be accounted for by gross negligence on the part of the Principal Secretary and the Chief Accountant in the Ministry. The more probable explanation is that the Ministry anticipated that the Applicant's appointment as Workshop Manager was still

possible, either through a successful appeal or through a new recruitment process, and pending a final outcome it refrained to take any steps to remove the Applicant from its payroll, or to procure that he reverted to Grade 10.

30. In the view of the Court, it matters little whether the Ministry made a deliberate decision to continue to pay the Applicant at Grade 12, or allowed the status quo to continue through administrative paralysis, indifference, or out of sympathy for the Applicant. In all these cases, the effect is the same: the overpayment of the Applicant was not due to mistake.

31. Even if the Court is wrong in this regard, it is our view that the error relied on by the Respondent is inexcusable:

31.1 There is no suggestion that any irregularity in the appointment of the Applicant to the post of Workshop Manager is attributable to any fault on his part. Moreover, the Applicant is entirely innocent of any conduct which may be regarded as contributing to his overpayment at Grade 12. He merely accepted payment of his salary at the higher grade. He was under no obligation to refuse or protest such payment, and in all likelihood he regarded such payment as his due in terms of the promotion he had received.

31.2 If the overpayment was made in error, then this arose from slackness or studied passivity on the part of the Respondent, both in its failure to correct the overpayment at the earliest opportunity and in its indifference towards the predicament of the Applicant. The extent of this slackness and indifference over a period of seventeen months, involving the career and remuneration of an employee, is so

inexcusable that it does not warrant the protection of the law.

32 The historic nature of the condictio indebiti remedy as one granted *ex aequo et bono* should be preserved, and care should be taken to avoid it being turned into a tool of injustice to the receiver of money paid *indebite*. As Tindall J warned in **Trahair v Webb and Co 1924 WLD 227 at 235:**

"(W)here the plaintiff bases his claim for relief on an equitable doctrine the Court must be careful that, in a desire to do justice to the plaintiff, an injustice is not done to the defendant."

It is the judgement of this Court that an injustice will be done to the Applicant if the deductions from his salary are allowed to stand.

33. For the reasons set out above, an order is granted in terms of prayers (a), (b) and (c) of the Notice of Application.

The members agree.

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P.R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT