THE COURT OF CRIMINAL APPEAL

Hon. Mr. Justice Dr. Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Today the 16th February 2023

Appeal number: 42/2014

The Police
vs.
Omissis
Andrew Beane
Gordon Cordina
Omissis 1
Omissis 2
Andrew Muscat
Saviour sive Sonny Portelli
Maryanne sive Sue Vella
John Bonello
Omissis 3
Philip Farrugia Randon
Juanito Camilleri
George Brancaleone
Caroline Buhagiar Klass

The Court:

1. Having seen that this is an appeal lodged by the Attorney General from a judgment delivered by the Court of Magistrates (Malta) on the 25th January 2021 against **Omissis**, **Andrew Beane** (British Passport number 761248676), **Gordon Cordina** (Maltese Identity Card number 93272M), **Omissis 1**, **Omissis 2**, **Andrew Muscat**

(Maltese Identity Card number 132457M), **Saviour sive Sonny Portelli** (Maltese Identity Card number 605344M), **Maryanne sive Sue Vella** (Maltese Identity Card number 244067M), **John Bonello** (Maltese Identity Card number 599148M), **Omissis 3**, **Juanito Camilleri** (Maltese Identity Card number 476266M), **George Brancaleone** (Maltese Identity Card number 136061M), **Caroline Buhagiar Klass** (Maltese Identity Card number 63876M) who were charged with the following:

> Where several acts committed by them, even if at different times, constitute violations of the same provision/s of the law, and are committed in pursuance of the same design:
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> In their capacity as director/s and/or juidicial representative/s and/or company secretaries and/or manager/s or other similar officer/s of the company HSBC Bank Malta plc (C-3177) having its registered address at 116, Archibishop Street Valletta, Malta, and/or being the persons responsible and appointed by said company to pay wages as well as Omissis itself as a body corporate according to law:
>
> They have failed to pay the basic wage due for the period commencing on the 1st January 2017 up to the 21st June 2018 amounting to Euro 84,251.03; they have also failed to pay the weekly allowance due for the period commencing on the 1st January 2017 up to the 21st June 2018 amounting to Euro 360.25, they have also failed to pay the statutory bonus due for the period commencing on the 1st January 2017 and ending on the 21st June 2018 amounting to Euro 397.48 which globally amounts to the sum of Euro 85,008.76 including tax and national insurance owed to their employee Mark Anthony Muscat (Identity card number 409077M).

2. By means of the said judgment, the Court of Magistrates (Malta), whilst abstaining from taking further cognizance of proceedings agaisnt Omissis, Omissis 1, Omissis 2 and Omissis 3, acquits the persons charged from the charges brought against them.

3. That on the 27th January 2021, the Commissioner of Police filed a note in the acts of this case whereby he informed the Court of his intention to appeal from the judgment given by the Court of Magistrates (Malta) in the above-mentioned names and thereafter the Attorney General received the acts of the case. The Attorney General felt aggrieved by the mentioned judgment and lodged an appeal from the same requesting the Court to reverse and annul the judgment given by the Court of Magistrates (Malta) and to find all the persons charged guity of the charges brought against them and to award the punishment according to law and this after arguing as follows (in brief):

i. The Court of Magistrates was not correct when it decided that the Prosecution could not request the prosecution of individuals for an offence it deemed was committed by the bank which in the words of the Court 'from day one was exonerated from criminal responsability'.
ii. The Court of Magistrates was not correct in deciding that the evidence submitted by the parte civile, Dr. Mark Muscat, was not authenticated and therefore had no probative value and was inadmissible – the Attorney General made reference to fol. 176 of the acts of the proceedings in this regard;
iii. The Court of Magistrates was not correct when it stated that Dr. Mark Muscat did not contest the reason for the termination of his employment;
iv. The Court of Magistrates made a wrong interpretation of Article 19 of Chapter 452 of the Laws of Malta.
v. The Court of Magistrates was not correct in deciding that it was not competent to decide whether there was a 'just cause' or otherwise;
vi. The Court of Magistrates was not correct to decide that with regards to the evidence relating to wages, allowances and bonuses lost the Prosecution failed to bring forward the best evidence.

Considers:

4. That on the 24th September 2012, a trade dispute was registered between the employees of HSBC Bank plc as members of the Malta Union of Bank Employees and HSBC Bank plc as their employer due to the fact that negotiations were underway to change the conditions of employment of the employees without prior consultations with the mentioned Union. The Malta Union of Bank Employees ordered a strike of its members and followed it up with the filing of a warrant of prohibitory injunction on the 9th October 2012 in order to protect its workers which warrant issued on the 8th November 2012 (1507/2012 JZM) thereafter restricting the bank from terminating the employment of its employees or from altering the conditions of employment thereof through unilateral decision-making and this with reference to the employees in grades A21 till A26 which relations of employment at the date of the issue of the mentioned warrant of prohibitory injunction were regulated in accordance with the Salesforce and Sales Management Agreement.

5. That, Dr. Mark Muscat, who was HSBC Group Committee Chairman, on that day, had reported to work but following orders of a strike by the Malta Union of Bank Employees, left the premises and he also carried a briefcase with him which briefcase contained company-sensitive documentation relating mostly to clients' portfolios. Over the following weeks, the trade dispute intensified and the Bank had

ordered the partial lock-out of those employees who were following the Union's directives for which period the employees were not being paid for their wages. In the meantime, Dr. Mark Muscat reported to the bank his accidental loss of the briefcase for which incident, the bank decided to take disciplinary action in the form of a suspension against Muscat. During such period however, the bank continued to pay Muscat his full salary.

6. That on the 28th January 2013 (fol. 61), Dr. Mark Muscat also obtained a warrant of prohibitory injunction (filed on the 11th January 2013 – fol. 58) in his favour (42/2013 JA) in terms of which the bank was ordered to refrain from terminating Muscat's employment or to pursue the disciplinary proceedings against the same because of the incident of the briefcase dated 24th September 2012. The warrant also had the effect of prohibiting the bank from unilaterally changing the conditions of employment of Muscat or to treat him different to the other employees in the grades of A21 to A26 in the Wealth Management Section of the Company/Bank. This notwithstanding, HSBC Bank stood firm about its decision to suspend Muscat and Muscat sent letters through his lawyer (fol. 68) asking to be re-instated at the work place under in his old role as A24C private clients manager. In the meantime, Dr. Mark Muscat also followed up the issue of the warrant of prohibitory injunction with the filing of an application on the 15th February 2013 for the opening of a lawsuit – 153/2013 SM (fol. 64) which suit was decided on the 5th December 2017 by the First Hall Civil Court (fol. 486).

7. That in March 2013, the bank signed a private agreement (fol. 77) with the employees in the Wealth Management Department wherein the parties were agreeing to waive all and any claims and pretentions that they had individually and collectively against the bank in relation to the trade dispute including any strike, lock-out, suspensions and directives and collective grievances and disputes relative to the Sales Force and Sales Management agreements in exchange for the signing of new terms and conditions of employment including a buy-out compensation. Mr. Mark Muscat was not a signatory to this agreement. Also, following this agreement, on the 12th April 2013, a new agreement regulating the conditions of employment of those employees who were in grades A21- A24 was reached between the Malta Union of Bank Employees and the Bank, thereby calling off the long-standing trade dispute and everything ancillary to it including the warrant of prohibitory injunction numbered (1507/2012 JZM), the latter being the subject matter of a second

agreement between the bank and the Union dated 15th April 2013. The latter agreement was to be construed and read in tandem with the official agreement on the new conditions of employment reached on the 12th April 2013 and in this respect also contained a without prejudice clause in relation to the case that Dr. Mark Muscat had against the bank (fol. 74) in relation to the warrant of prohibitory injunction 42/2013 and the subsequent law-suit numbered 153/2013.

8. That in April 2016, a meeting was held between the then CEO of HSBC Bank Andrew Beane and Dr. Mark Muscat and his lawyer where the latter was informed of the bank's decision to withdraw disciplinary proceedings in his regard and he was also requested to report to work as of Monday 25th April 2016 in the same position which he was occupying with the Wealth Management Department at the date of his suspension. Dr. Mark Muscat did not report to work on the 25th April 2016 as had been requested by the bank and his basis of contention was the fact that the bank was ordering him to go back to work in the role of Executive Premium Manager, a role which to his knowledge was inferior in grade and salary to the one that he occupied on the date of his suspension from office.

9. That the bank continued disbursing full salary to Dr. Mark Muscat and sent various letters requesting him to report to work as had been requested in the meeting held on the 15th April 2016 which communication is dated 5th July 2016 and 30th November 2016 (fol. 96). On the 24th January 2017, Dr. Mark Muscat received a formal letter from the head of the human resources department at HSBC Bank informing him of the company's decision to treat his long absence from the workplace as unauthorised absence with the consequence that as from the 25th January 2017 all salary payments were being suspended. Dr. Mark Muscat contested any such decision by a letter sent through his advocates on the 9th February 2017 wherein he also cited the decision of the First Hall Civil Court given on the 7th December 2016 whereby it was decided that the warrant numbered 42/2013 should still remain in force, thereby rejecting the bank's application to revoke any such warrant. Dr. Mark Muscat quoted the Court's decision in requiring the warrant to remain in force as it was still necessary to protect his interests against the bank which could still retaliate against him pending proceedings (153/2013).

10. That subsequently, on the 21st June 2018, the injured party Dr. Mark Muscat received an email (fol. 98) from Caroline Buhagiar Klass as the bank's head of human resources, wherein it was communicated to him that his employment with the bank was being terminated in view of his insistent refusal to return to work notwithstanding the repeated requests made by the bank itself for him to return to his employment.

11. That Dr. Mark Muscat had also on the 31st January 2017 lodged a formal complaint with the Department of Industrial and Employment Relations in relation to the bank's decision to suspend his salary as from the 25th January 2017. The Department of Industrial and Employment Relations from there, pursued a claim for wages for the period covering January 2017 till the 21st June 2018 on behalf of Dr. Mark Muscat for the amount of salary, bonuses and allowances that was calculated to be owed to the latter for the mentioned period on the basis of information provided to the Department by the same. It was this same claim for wages and the bank's refusal to respond to such claim that led to the institution of the current proceedings for breach of the provisions of Chaper 452 of the Laws of Malta against HSBC Bank plc (later withdrawn) and the persons who at the moment of the alleged commission of the offence by the bank, were directors thereof or occupied managerial roles.

Considers further:

The First Grievance of the Attorney General

12. The legal notion of corporate criminal liability is regulated by Article 121D of the Criminal Code, which reads as follows:

> Where an offence under this title has been committed by a person who at the time of the said offence is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the said offence was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this title be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (multa) of not less than twenty thousand euro (€20,000) and not more than two million euro

(€2,000,000), which fine may be recovered as a civil debt and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure:

13. This brought about a mechanism whereby a body corporate, hence a non-physical entity, can be found guilty for the commission of an offence where it is shown that the criminal wrongdoing was perpetrated by a person who at the time of the commission of the offence was vested with decision-making powers for that body-corporate or with the legal representation thereof and it is proven that the offence was committed to the benefit of the body-corporate, whether in whole or in part. The sanction contemplated at law for the offence is also enforceable against the body-corporate and not against its representatives. The body-corporate - being a non-physical entity – may be liable to the punishment of a fine (multa) in the range contemplated by the provisions of Article 121D of the Criminal Code.

14. On the other hand, that the notion of vicarious responsibility is much older, having first been introduced in the Maltese Law in 1975 through article 13 of the Interpretation Act, Chapter 249 of the Laws of Malta.

15. Vicarious responsibility is also found in Article 46 of Chapter 452 of the Laws of Malta. The wording used in the latter article mirrors the text of Article 13 of the Interpretation Act. To this effect, the text of Article 13 of Chapter 249 of the Laws of Malta and Article 46 of Chapter 452 of the Laws of Malta are being reproduced in a side-by-side comparison:

13. Where any offence under or against any provision contained in any Act, whether passed before or after this Act, is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he	46. Where an offence against the provisions of this Act or of any regulations or orders made thereunder is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be

proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.	deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.

16. In the judgment **Il-Pulizija vs. Omissis, Daniel Farrugia et** decided by this Court, differently presided, on the 8th January 2020 the similarity in wording between the text found in Article 46 of Chapter 452 and that employed by Article 13 of Chapter 249 of the Laws of Malta was highlighted and was subject of the following comments:

> **Illi d-diċitura tal-Liġi tixbaħ ħafna dik imfassla fl-artikolu 13 tal-Att dwar l-Interpretazzjoni li titkellem dwar ir-responsabilita' vikarja**[1] għalkemm fis-sena 2002 ġie introdott fis-sistema penali tagħna il-kunċett tal-hekk imsejjaħ corporate responsibility fejn allura korp magħqud li jiġi kkundannat għal vjolazzjoni tal-liġi minnha komess u mhux il-persuna jew persuni li jirrapreżentawha.
>
> ..../....
>
> **Issa mid-diċitura tal-artikolu 46 hawn fuq iċċitat huwa indubitat illi l-kundanna fit-termini tal-liġi dwar l-impjiegi u r-relazzjonijiet industrijali ssir fil-konfront tal-persuna fiżika**[2] u mhux fil-konfront tal-soċjeta' kummerċjali jew korp magħqud li dik il-persuna tkun qed tirrapreżenta.

17. These provisions show that there is a very fine line which distinguishes the concept of vicarious liability from the concept of corporate responsibility. In both cases, it is a body corporate that **commits** an offence; but a decision on the finding of **guilt** or otherwise for the commission of an offence by the company/body corporate, will necessarily require an evaluation of the acts (of commission or of omission) made by that physical person who at the time of the commission of the offence was vested with the legal representation of the company or otherwise had decision-making powers within that body-corporate binding the same. The raison d'etre is that an offence can only be committed through the acts of a living physical natural human being.

18. However, the two concepts differ in that the finding of guilt under Article 121D requires the infliction of a punishment on the **body-corporate itself;** whereas in the case of vicarious

[1] Emphasis of this Court.
[2] Emphasis of this Court.

responsibility (Articles 13 of Chap. 249 and 46 of Chap. 452) the punishment is borne by the **physical person** in his capacity as director, manager and the like of the body-corporate at the time of the commission of the offence by the body-corporate.

19. In **Il-Pulizija vs. Daniela Debattista** decided on the 16th November 2016 by this Court differently presided, the distinction between these two forms of responsibility was expounded as follows:

> Mela d-distinzjoni bejn dina l-forma ta' responsabilita' penali u dik vikarja hija waħda sottili ħafna, għaliex għalkemm fiż-żewġ istanzi il-kundanna issir kontra l-persuna fiżika, uffiċjal tal-korp magħqud, madanakollu l-piena inflitta taħt l-artikolu 13 tal-Att dwar l-Interpretazzjoni taqa' f'ħoġor dik il-persuna, u fil-każ tar-responsabilita ta' korp magħqud l-piena tingħata fil-konfront tal-persuna legali u mhux dik fiżika, fejn l-uffiċjal allura ma jweġibx personalment għall-aġir inkriminatorju. Ukoll għalkemm fejn il-persuna fiżika hi akkużata bir-responsabilita' vikarja tagħha hija tista' teżimi ruħha minn tali responsabilita' billi turi, u dan fuq bażi ta' probabilita, illi hija tkun eżerċitat id-diliġenza meħtieġa għal-kariga minnha okkupata u tkun għamlet dik is-sorveljanza meħtieġa fil-qadi ta' dmirijietha sabiex tara illi ma isir l-ebda att jew omissjoni doluża, ma jidhirx illi bl-istess mod korp magħqud kif rappreżentat jista' isib il-konfort ta' dik l-iskużanti taħt l-Artikolu 121D hawn fuq iċċitat u ikun biżżejjed illi l-prosekuzzjoni tipprova illi r-reat ikun seħħ a benefiċċju tal-kumpanija sabiex tiġi stabbilita' r-reita' f'dak il-korp magħqud.

20. It follows that in the case of corporate criminal responsibility, the declaration of guilt by the Court for the criminal wrong doings of the body-corporate does not impinge upon the physical person's personal liability. While the body-corporate itself is charged with the criminal wrong-doing, the presence of the physical person (director, manager and the like thereof) is required in the criminal proceedings by virtue of the fact that a body-corporate is a non-physical entity necessitating physical representation even in Court.

21. The same cannot be said of vicarious responsibility. In recent years there has been a movement in local and foreign jurisprudence to treat vicarious responsibility as one and the same with the personal responsibility of the persons so charged and found guilty for the acts of the body-corporate. In **Il-Pulizija vs. Carmelo Falzon et** decided by this Court, differently presided on the 7th May 2007 it was held:

Illi kif jghid L.C.B. GOWER ("Modern Company Law" 2nd. Edit.(1957) p.138) :- "**Recent years have seen a further development whereby the rule that the acts of directors are treated as those of the company is, in effect, applied in reverse, so that the acts of the company are treated as those of all its directors.**[3] Many modern statutes and regulations provide that if an offence is committed by a company, every director or officer shall be guilty of that offence unless he proves that it was committed without his consent and that he exercised due diligence to prevent its commission."

22. Similarly, in the case **Il-Pulizija vs. Carmel Camilleri** decided by this Court differently presided on the 5th November 2004, it was held:

L-appellant jikkontendi li galadarba l-akkuza harget kontrih personalment u ma ingabitx prova ta' xi konnessjoni li huwa kellu ma' jew fil-kumpanija in kwistjoni, allura hu qatt ma seta' jinstab hati skond l-imputazzjoni kif dedotta. Dan l-aggravju hu fic-cirkostanzi mhux biss wiehed infondat izda altament fieragh. **L-appellant jaf ezattament x'kien irrwol tieghu fil-kumpanija in kwistjoni** – kif xehed huwa stess fl-udjenza tal-10 ta' Settembru, 2004 (ghalkemm mhux minghajr hafna titubanzi ataparsi ma setax jiftakar); **huwa kien direttur fl-imsemmija kumpanija** u wiehed millufficjali principali taghha peress li kien hu normalment responsabbli mill-pagi u mix-xoghol. Ghalhekk f'dan il-kaz tapplika r-responsabbilta` vikarja li tohrog mill-Artikolu 42 tal-Kap. 135. **Ma kien hemm ebda htiega, kif din il-Qorti kellha diversi drabi l-okkazjoni li tfisser, li fic-citazzjoni jinghad espressament li huwa kien qed jigi imharrek fil-vesti tieghu ta' direttur, jew manager ecc. tal-kumpanija – ir-responsabbilta` vikarja f'dan il-kaz iggib maghha r-responsabbilta` personali ta' dak li jkun proprju ghan-nuqqasijiet tas-socjeta` jew kumpanija, u ghalhekk ic-citazzjoni tohrog korretement u validament meta ssejjah lid-direttur, manager ecc. minghajr referenza ghall- kumpanija, u meta l-imputazzjoni tghid li huwa l-imharrek li ghamel jew naqas milli jaghmel xi haga. Ghalhekk dana l-aggravju qed jigi respint.**[4]

23. The distinction between the two forms of responsibility also requires that in the drafting of the charges that initiate criminal proceedings for a body-corporate's alleged criminal misconduct, the Prosecution decides whether to prosecute in terms of Article 121D of the Criminal Code, in which case it is the body corporate itself which must be charged, or else whether the alleged criminal wrong doings should be borne by the officers of the body-corporate in line with the doctrine of vicarious responsibility in which case the charges must be drafted against the physical person/s mentioned vested with the legal representation of the body-corporate and/or those vested

[3] Emphasis of the Court.
[4] Emphasis of the Court.

with decision-making powers in their personal capacity and/or in their capacity as directors, managers (etc) of that body-corporate. This necessarily requires an analytical exercise by the Prosecution to better understand whether the evidence at hand is such as to warrant the prosecution of the body-corporate for its wrong doings and/or also its officials.

24. Article 121D of the Criminal Code however also presents a further obstacle to the prosecution of a body-corporate in that its parameters extend only to offences committed under the Title III of Part II of Book I entitled 'Of Crimes against the Administration of Justice and other Public Administrations', as pointed out by the Attorney General in her appeal application.

25. Now, it is the Court's understanding that in her first grievance, the Attorney General is attacking the Court of Magistrates' interpretation of the concept of corporate criminal liability as opposed to the concept of vicarious criminal responsibility and this with reference to the Court of Magistrates' comment on page 18 of its judgment regarding the Prosecution's decision to withdraw the charges against the Bank and to insist with the prosecution of its representatives.

26. The Attorney General further opines that given that the offences with which HSBC Bank plc was originally charged were not the type of offences to which Article 121D of the Criminal Code applies, the Court should then have proceeded to delve into whether the bank had committed an offence and if so, the accused, as representatives of the bank at the time of the commission of the alleged offences by the same, should have been found guilty in terms of Article 46 of Chapter 452 of the Laws of Malta which provision embodies the notion of vicarious responsibility.

27. This Court agrees only in part with the Attorney General's argument. The Attorney General is correct in her interpretation of the two distinct concepts of corporate criminal liability and vicarious criminal responsibility and is also correct in arguing that given that the provisions of Article 121D were not applicable in relation to the offences allegedly committed by the body-corporate, the analysis should shift onto whether the persons legally and juridically answerable to the body-corporate at the time of the commission of the alleged offence, were aware of the criminal wrongdoings of the body-corporate. The Attorney General is also correct in her

argument that in this scenario, if found guilty, it is the representatives of the body-corporate that will be found guilty and sanctioned accordingly and not the body-corporate itself (as would be the case through the application of Article 121D of the Criminal Code).

28. The Court of Magistrates (Malta) was correct in its interpretation and application of the concept of vicarious responsibility as embodied in the provisions of Article 46 of Chapter 452 of the Laws of Malta. In considering how the Prosecution had first issued charges against HSBC Bank plc to later withdraw them and insist on the prosecution of its officers, the Court of Magistrates was not in any way excluding the liability of the bank's directors and managers in lieu of that of the bank itself; but it was only commenting or rather criticising the manner in which the Prosecution dealt with the case from its onset whereby it framed charges against the bank itself in a context where the charges pressed against it did not fall under the concept of corporate criminal liability in terms of Article 121D of the Criminal Code.

29. A closer look at the Court of Magistrates' line of reasoning on page 18 shows how, contrary to what the Attorney General maintains, the Court of Magistrates understood that the way to tackle the case was first to assess whether the body corporate – HSBC Bank Limited – had committed an offence in not paying wages to Dr. Mark Muscat and then apply the concept of vicarious responsibility in respect of the defendants as the persons representing the bank:

> It is imperative for the vicarious responsibility of the defendants to subsist under this article, that it is shown that an offence has been committed by the body of persons, in this case the bank, the defendants are representing.
>
> Thus, it must be established whether in not paying wages to a person who, instead of turning up for work (despite repeated calls to do so) opted to follow a full-time course at University, constituted the commission of an offence by HSNC Bank plc.[5]
>
> ..../.....
>
> The prosecution could most certainly have exercised greater caution before instituting proceedings against the bank and a number of individuals it deemed represented the bank and/or were responsible for the non-payment of Muscat's salary.

[5] Emphasis by this Court.

> Yet, stangely enough, before witnesses started being heard and before the proceedings against the bank's representatives had kicked off, the same prosecution withdrew charges against the very same bank it alleged committed the offence. Thus, the Court is faced with the prosecution requesting the prosecution of individuals for an offence it deemed was committed by the bank which from day one it exonerated from any criminal responsibility!

30. The fact that the Court of Magistrates (Malta) eventually decided to acquit the defendants was not a result of the (incorrect) application of the concept of vicarious responsibility as maintained by the Attorney General but was a decision based on the Court of Magistrates' appreciation of the evidence brought before it by the respective parties to the case.

31. Whether the Court of Magistrates could have legally and reasonably decided to acquit the defendants for a breach of the provisions of Chapter 452 of the Laws of Malta is now a matter to be considered further by this Court in its exercise to tackle the other grievances which the Attorney General has put forward in her appeal application.

32. **For these reasons, this Court is rejecting the Attorney General's first grievance.**

Considers further:

The Third, Fourth and Fifth Grievances of the Attorney General

33. The Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta regulates, among others, the relationship between an employer and an employee including the payment of wages and other conditions of work. This relationship is based on an agreement – whether written or verbal – between the employer and the employee. This agreement is referred to as a 'contract of service' or 'contract of employment' is defined in Article 2 of Chapter 452 of the Laws of Malta as follows:

> An agreement, (other than service as a member of a disciplined force except as may be provided in or under this Act) whether oral or in writing,

in any form, whereby a person binds himself to render service to or to do work for an employer, in return for wages, and, in so far as conditions of employment are concerned, includes an agreement of apprenticeship.

34. This agreement imparts predefined and statutorily recognised obligations on both parties. The employee is obliged to render a service or to do work for an employer while the employer is bound to compensate the service rendered or the work done through money being legal tender in Malta. The employee performs his work or service for the employer in return for wages. Wages are earned by the employee as a consideration for the work done or service rendered for the employer. Wages are a form of compensation for the work or services rendered, earned by the employee through work or service carried out by him in fulfillment of the terms of the contract of employment or service regulating their professional relationship.

35. Part III of Chapter 452 of the Laws of Malta sets out a number of rules aimed at protecting the wage entitlement of the employees while also introducing restrictions on the employer's discretion regarding the payment of wages with a view to protect the employee's wages against illegal deductions: such as through the imposition of penalties which had not been previously agreed upon between the employer and the employee. The general rule is that an employee must always be compensated through wages for the hours of work performed or for the service rendered to his employer throughout the duration of their contractual relationship. However in certain specific circumstances, the Law also provides the possibility for the employer to impose lawful deductions, fines or penalties; and it introduces scenarios where the employee can be deprived of his wages in whole or in part.

36. Article 22 of Chapter 452 of the Laws of Malta binds the employer to pay the employees their wages at regular intervals. Article 23 extends the employer's statutory obligations to include also the payment of statutory bonuses established by the Minister for Finance from time to time or as announced by the Government every year as part of its General Estimates. This is in line with the definition of "wages" as found in Article 2 of Chapter 452 of the Laws of Malta, where **wages** includes both the remuneration payable by an employer to an employee in accordance with the terms of the contract of employment or a collective agreement as well as the payment of statutory bonuses.

37. The payment of wages is only part of the bargain for the employee. The other part is the "earning" side. Wages are not gratuities. They are earned by the employee in consideration for his contractually agreed work or service obligations performed to the employer. Once the work or service agreed upon is rendered by the employee, then the employer is bound to honour his side of the deal through the payment of wages; and the Law expressly limits and restricts the margin of action he may take to directly or indirectly limit or curtail the effective payment of the wages lawfully earned by the employee.

38. Article 19 of Chapter 452 of the Laws of Malta is one such example which enshrines the entitlement of wages to the employee by the employer in correspondence to the work carried out or service rendered by the employee. This article seeks to balance the rights and duties of employer or employee. Wages due to employees are protected, but not at all costs and in all circumstances. Hence, as a general rule, employers cannot unilaterally impose fines on their employees. Fines – that is deductions that the employer makes from the wages of employees - can be imposed, but only if agreed upon by contract or written statement specifying in detail the fines to which the employee may become liable in respect of an act or omission and where such contractual fines would have been previously agreed upon by the Director. A collective agreement may however derogate from such rule.

39. Another fundamental principle emerging from this article, and which reproduces the essence of **quid pro quo** in this context relates to the consequences that may befall an employee should he fail, **without just cause**, to give to his employer the total number of hours of work as bound by the terms of the contract of service applicable. In this case, the Law obliges the employer not to inflict on the employee any fine for this loss of work. But the Law empowers the employer to deduct from the wages due to the employee that part of the wages that corresponds to the work so lost.

40. The subject matter of the fourth grievance of the Attorney General is based on the interpretation of this article given by the Court of Magistrates (Malta) in its appealed judgment, which also forms the basis of the Attorney General's request for the revocation of this judgment given that the Attorney General argues how HSBC Bank Malta plc acted in breach of the law by not paying wages to Dr. Mark Muscat who in turn claimed to have a **just cause** in terms of

Article 19(2) of Chapter 452 of the Laws of Malta not to report to work.

41. Article 19(2) of Chapter 452 of the Laws of Malta is not meant to substitute the provisions under Article 75 of this Law relating to unfair dismissal, and which provision confers exclusive jurisdiction over such matters to the Industrial Tribunal.

42. However it is one statutory provision that creates a civil law obligation on the employer which has to be adhered to by the employer, failing which, the employer could be held responsible for the commission of the offence created by article 45 of Chapter 452 of the Laws of Malta. This article provides that it is a criminal offence for any employer to contravene or fail to comply with any recognised conditions of employment prescribed by a national standard order or by a sectoral regulation order or collective agreement, or with any provisions of this Act or any regulations made thereunder.

43. The Prosecution claims that the bank failed to comply with its statutory obligations when it failed to honour the conditions of employment of Dr. Muscat. Hence when the bank made deductions or failed to pay him his wages it committed this criminal offence. The determination of this position requires an assessment of the evidence produced before the Court of Magistrates in order to see whether or not the bank failed its statutory duties to comply with the provisions of Chapter 452 of the Laws of Malta.

44. First of all this is a Court of Criminal Justice and is bound to focus on this matter through the lens of criminal law and criminal procedure. Article 19 of Chapter 452 of the Laws of Malta has to be read in its context. It aims at curbing abusive or arbitrary fines or deductions from wages by employers. It is not meant to turn on its head the basic rule that wages are paid in correspondence for work done by the employee. Nor is it meant to provide the employee a means to receive wages even where no work is carried out. Hence the phrase “without just cause” must be from a criminal law point of view, that is, within the context of criminal proceedings by reference to the position of the person charged with the alleged omissive conduct that is deemed to be a criminal offence. After all it is this conduct that is to be analysed by the Court and in particular whether his failure to pay the wages due was legally justified or whether it went against the Law.

45. The statutory duty of the bank was to refrain from imposing fines on the employee who fails, without just cause to give his employer the total number of hours of work as bound by the terms of the contract of service applicable. But the employer was entitled to deduct from the total wages due to the employee that part of the wages which corresponds to the work which the employee fails to perform without just cause. When the employee fails, without just cause, to give the work due by him, the employer can deduct the wages corresponding to the lost work but cannot impose fines on the worker for the latters' failure to provide his work without just cause.

46. This context is even rendered clearer by article 19(4) of Chapter 452 of the Laws of Malta which states that unless otherwise prescribed in a collective agreement, when an employer suspends an employee from work and during the period of suspension does not pay him wages or pays him less than the wage to which the employee is entitled, the employer shall be deemed to have made a deduction from the wages of the employee by way of a fine equivalent to the amount underpaid to him in wages. By this article the Law clearly hits against the imposition of direct or indirect fines against the employees by their employer. But it does not provide for a carte blanche to the employee, such as to provide a legal alibi for the employee to claim justification not to report for work.

47. This therefore necessarily required the Court to examine the phrase "without just cause" in article 19(2) of Chapter 452 of the Laws of Malta; but it had to do so within the context of criminal law and criminal procedure, its word and its spirit. Part III of Chapter 452 of the Laws of Malta aims to protect the employee's wages from **arbitrary deductions** by their employers. Article 19(2) comes as a derogation from this general principle against illegal deductions by the employers. Here the onus is set on the employer to make a proper assessment of the case as it is employer who is being bound by Law not to make any such deductions.

48. The spirit of this law therefore is to provide a further safeguard to the employee's protection of wages against arbitrary decision making by the employer. So Article 19(2) of Chapter 452 of the Laws of Malta is not meant to impose an added onus on the employee in such a case, given that in an article 19(2) scenario the employee would have already been prima faciae "prejudiced" by the non payment of the wages or the deduction by the employer. But if an employer is then subject to a criminal prosecution on the basis of

article 19(2) scenario, then the onus is on the employer to prove, on a balance of probabilities, how his decision to deduct wages was lawfully grounded by showing that the employee acted "without just cause" in the circumstances of the case.

49. Despite the procedural complexity that this issue went through thanks to prolonged and extensive legal proceedings, the focus of these criminal proceedings are rather simple : whether HSBC Bank Malta plc – as represented by its directors and managers in terms of Article 46 of Chapter 452 of the Laws of Malta - in its decision not to liquidate wages to its employee Dr. Mark Muscat for the period ranging from the 1st of January 2017 to the 21st June 2018 acted in breach of Article 19(2) of Chapter 452 of the Laws of Malta as sanctioned under Article 45 of the same.

50. Despite the various points of contention in this case, it is undisputed that Dr. Mark Muscat **was an employee of the bank** until the 21st June 2018. As such, Dr. Muscat was obliged to render his services in accordance with the contract of employment regulating his relationship with the bank.

51. Dr. Muscat however insists that he had no legal obligation to return to work after the suspension was lifted because of the effects of the warrant of prohibitory injunction numbered 42/2013 issued on the 28th January 2013 were still in force and basically held that unless and until the proceedings were determined in a final and absolute manner by the Courts of Civil Jurisdiction, he was impeded from returning back to his place of work given that his role, function, position and designation were suppressed by the bank and the latter required him to report back to work in a different role which carried different responsibilities at a lesser pay. Dr. Muscat also makes reference to another decision of the Civil Court First Hall dated 7th December 2016 where it was decided that the warrant of prohibitory injunction issued on the 28th January 2013 had to remain in force as a safeguard in favour of Dr. Muscat pending the proceedings that had been filed following the issue of the mentioned warrant.

52. This shows how the civil law and administrative law and labour law aspects in this case became intertwined. However, despite this, the legal question before this Court remains still the same, as clarified above.

53. The warrant of prohibitory injunction numbered 42/2013 was issued by the Civil Court First Hall in fullfilment of the following requests as advanced by the applicant Dr. Muscat by means of an application dated 11th January 2013 (fol. 58 of the acts of the proceedings):

> Illi l-esponenti, sabiex jikkawtela d-drittijiet tiegħu, jixtieq iżomm l-intimat milli :-
> Ikeċċi, jittermina l-impjieg jew ikompli bil-proċess tad-dixxiplina kontra r-rikorrent, jew b'kull mod ieħor jikkastiga lir-rikorrent b'riżultat jew minħabba l-inċident li seħħ fl-24 ta' Settembru 2012 waqt l-azzjoni industrijali ordnata mill-Malta Union of Bank Employees kontra l-HSBC Bank Malta plc jew b'kull mod ieħor jibdel unilateralment il-kundizzjonijiet tax-xogħol tar-rikorrent jew jitrattah differenti mill-impjegati l-oħra fil-gradi A21 sa A26 fit-Taqsima tal-Wealth Management.

54. This warrant of prohibitory injunction was then followed by a sworn application which Dr. Muscat filed on the 15th February 2013 (fol. 64 of the acts of the proceedings) against the bank and by means thereof Dr. Muscat requested the Civil Court First Hall, **among others**:

> ii)Tiddikjara u tiddeċiedi li, f'kull każ, it-teħid tal-azzjoni dixxiplinarja kontra l-esponent dwar dan l-inċident, il-bank intimat aġixxa in mala fede, bi ksur tal-liġi u/jew tal-fteħim kollettiv viġenti;
> iii)konsegwentement tordna t-twaqqif definittiv tal-azzjoni dixxiplinarja mibdija mill-bank intimat kontra l-esponent dwar l-imsemmi inċident u, r-reintegrazzjoni tal-esponent fil-pożizzjoni li kellu, u bħal sħabu l-impjegati fil-Private Clients Department;

55. This lawsuit was decided by the Civil Court First Hall on the 5th December 2017 (fol. 486 of the acts of the proceedings) where the requests as put forward by the applicant Dr. Muscat as above (see paragraph 16) were all rejected by the Court having decided that:

> Illi in vista tal-premess, din il-Qorti ma tqisx li r-rikorrenti ipprova l-każ tiegħu skont il-liġi u konsegwentement:
> i. Takkolji r-risposti tal-bank intimat;
> ii. Tirrespinġi t-talbiet tar-rikorrenti
> iii. Bl-ispejjez kontra r-rikorrenti.

56. However, this judgment was also preceded by other requests that were filed by Dr. Muscat in the records of the warrant of prohibitory injunction 42/2013. From folios 435 et sequitur of the acts of these proceedings, it appears that subsequent to the filing of the lawsuit numbered 153/2013 above, Dr. Muscat also filed other

three applications dated: i) 28th April 2016, ii) 11th July 2016; iii) and 16th September 2016 relative to the warrant of prohibitory injunction 42/2013.

57. First, in the application dated 28th April 2016, the applicant Muscat requested the Civil Court First Court to:

> i) Tirraforza l-protezzjoni tagħha lil Muscat sabiex ma jbati l-ebda konsegwenzi talli ma jobdiex l-istruzzjonijiet tal-Bank sakemm il-kawża u/jew dawn il-proċeduri jiġu deċiżi;
> ii) Tiddikjara illi l-Bank ma ottemperax ruħu ma' l-ordni ta' din l-Onorabbli Qorti kontenuta fil-mandat billi bidel il-kundizzjonijiet tax-xogħol ta' l-esponent;
> iii) Issib lil HSBC Bank Malta plc ħati ta' disprezz lejn l-awtorita' tal-Qorti u jikkundannah il-pieni komminati fil-liġi għal tali aġir abbużiv u illegali u dan għar-raġunijiet kollha msemmija hawn fuq;
> iv) Tordna l-Bank sabiex jirrettifika l-ksur billi jmur lura mill-bidliet unilaterjali li għamel fir-rigward ta' l-esponent Mark Muscat u jħassarhom stante li huma leżivi ta' l-ordnijiet magħmula permezz tal-mandat ta' inibizzjoni fuq imsemmi;
> v) Tordna lill-Bank biex jirrispetta s-sitwazzjoni status quo ante sakemm il-proċedimenti pendenti quddiem il-Prim' Awla tal-Qorti Civili u cjoe' l-kawża li hemm pendenti jiġu finalizzati.

58. This application was decided by the Civil Court First Hall on the 30th May 2016 where the Court proceeded **to reject all the requests put forward by Muscat**. Among others, the Civil Court First Hall considered that it was not necessary for the warrant of prohibitory injunction numbered 42/2013 to be reinforced in accordance with the plaintiff's first request seeing that the buy out clause consisting in the payment by HSBC Bank Malta plc of a sum of Euro 108,000 was availed of by Muscat and this was a sufficient safeguard against the prejudice which Muscat was claiming to have suffered as a result of the negotiation of a new contract (12th April 2013) between the Malta Union of Bank Employees and HSBC Bank Malta plc. The Civil Court First Hall also commented in page 4 of its decision how the applicant Muscat had failed to bring to the attention of the Court the fact that he had in fact benefitted from the mentioned buy out. The Court then concluded that:

> Illi l-Qorti hija tal-fehma għalhekk li r-risposta tal-intimat HSBC hija ben fondata għaliex id-drittijiet tar-rikorrenti baqgħu kolla impreġudikati kemm bil-ftehim kif ukoll bid-digriet li llum jeħtieġ jiġi assodat b'kawża ad hoc.

59. That on the 11th July 2016, the applicant Muscat filed another application in the acts of the warrant of prohibitory injunction numbered 42/2013 wherein he attempted the recusal of the judge who had decided the application dated 28th April 2016 and also requested the revocation a contrario imperio of its decision dated 30th May 2016 as above. Both requests were yet again turned down (fol. 446 of the acts of the proceedings).

60. This application was followed by another (final) application filed on the 16th September 2016 where among others Muscat again requested the revocation of the Civil Court First Hall's decision dated 30th May 2016 and to uphold all requests made by him in the application dated 28th April 2016.

61. On the **7th December 2016**, the Civil Court First Hall decided a request by HSBC to lift the warrant of prohibitory injunction 42/2013, but that Court held that pending court proceedings (153/2013), **there was still the need of retaining in force the warrant of prohibitory injunction numbered 42/2013**, in order to safeguard Muscat against any form of retailation in his regard by the bank.

62. However, as remarked earlier on, the Civil Court First Hall did not only decide the bank's request for the lifting of the warrant of prohibitory injunction, but was also confronted with the further request that was lodged by Dr. Muscat for that Court to adhere to the remaining requests that he lodged in his application of the 28th April 2016 we mentioned in paragraph 57 above. This led to a situation where, just a few days later, on the **12th December 2016**, the same Civil Court First Hall handed down a decision which invariably had a bearing on the legal implications of the former decision of that same Court made on the 7th December 2016 as the Civil Court First Hall decided as follows:

> Tqis illi l-Qorti kellha aktar minn opportunita' waħda biex teżamina u tarbel ir-rikors ta' Mark Muscat. Tibqa' bil-fehma illi dan huwa attentat ieħor magħmul minnu biex jappella minn digriet ġja mogħti fejn il-Qorti ma laqgħetx it-talbiet tiegħu. Fil-fatt il-Qorti in vista taċ-ċaħda tar-rikuża ma tarax kif tista' tilqa' it-talbiet l-oħra avvanzati ġjaladarba d-deċiżjoni tagħha ġja ngħatat għal darba tnejn- konsegwentement tiċħad it-talbiet kollha lilha għal darba oħra avanzati fir-rikors in eżami.

63. This therefore brought about a situation where although on the 7th December 2016 the Civil Court held that there was still need for retaining in force the warrant of prohibitory injunction 42/2013, on the 12th December 2016 the same Court decided that the remaining outstanding requests – including the revocation contrario imperio of the decision reached on the 30th May 2016 (by reference to the requests made in the application of the 28th April 2016 indicated at paragraph 57 above) – did not merit to be adhered to. This led to an apparently conflicting situation that was created by the separate procedures instituted by Dr. Muscat starting by the application of the 28th April 2016.

64. This application too has to be read in its context. This first application dated 28th April 2016 was filed by Dr. Mark Muscat just three days after he was requested to go back to work by HSBC Bank Malta plc seeing that it appears that he was requested to report to work as from the 25th April 2016. And, notwithstanding that on **the 30th May 2016** the Civil Court First Hall had already turned down Dr. Muscat's request to declare that the bank had acted unilaterally when changing his conditions of employment and to declare that the bank had acted in breach of the mentioned warrant of prohibitory injunction, Muscat still insisted on not reporting to work claiming that he did not want to go back to work, inter alia, because his role was inferior to the one that he had occupied before the re-structuring that led to the signing of the agreement between the MUBE and the bank on the 12th April 2013. In page 211 of his cross-examination Mark Muscat says the following:

> Defence: When however they change the structure which was nothing related to you but when the structure was changed and they asked to go in then suddenly you said, ''that you didn't want to go in'' because of the warrant of prohibitory injunction.
>
> Witness: No, no, I said, I asked them 'where am I goint to go in?'' and they said, ''as a Private Client Manager'' and I said it wasa impossible. Then they said as an Executive, they were also possible that they didn't exist.
>
> ...../.....
> Witness: Because the role which they asked me to go in no longer existing and the people who used to do that role **were doing a much inferior role and it was humiliating to go to do a role**[6] grades more than 2 or grades lower than my actual role.

[6] Emphasis of this Court.

65. When Mariella Caruana as a representative of the Department of Industrial Relations testified on page 116 she too confirms that the reason why Muscat did not want to go back to work as he had reported it to her, was that he felt humiliated in accepting an inferior role:

> Mr. Muscat stressed that he could not return to work because he would not be returning to the job he had at the time of the suspension and he would be relegated to an inferior role with reduced earnings.

66. This Court, as a Court of Criminal Justice cannot delve into the civil law issues touching this case as this is not within its competence. However, it is clear from the Civil Court First Hall's decision dated 12th December 2016 that **it was not acceding** to the requests made by Dr. Muscat so that it reinforces its protection to Dr. Muscat so that he does not suffer any consequences for disobeying the Bank's instructions until the case and/or these procedures are decided; to declare that the Bank did not comply with the order of that same Court contained in the warrant of prohibitory injunction when it changed the applicant's working conditions; to find the Bank guilty of contempt of Court and to condemn it to the penalties prescribed in the law; to order the Bank to rectify the breach by reversing the unilateral changes it made to Dr. Muscat's employment status and to cancel them on the basis that he contended that they were detrimental to the orders made by that same Court through the aforementioned injunction; to order the Bank to respect the status quo ante situation until the proceedings pending before that Court bearing number 153/2013 were finalized.

67. And this decree was issued by the Civil Court, First Hall almost a year earlier than the judgment that was reached by the same Court on the merits of the original court case number 153/2013 which was instituted following the issue of the warrant of prohibitory injunction number 42/2013.

68. It is true that the decree of the Civil Court, First Hall dated 12th December 2016 was not final by reference to this warrant of prohibitory injunction. However, this decree created a situation where Dr. Muscat was denied legal ground to refuse to return to work **already** in December 2016 at a time therefore where HSBC Bank Malta plc had already sent him two formal requests to report to work on the 5th July 2016 and on the 30th November 2016.[7]

[7] Folios 471 et sequitur of the acts of the proceedings.

69. The decision made by the Bank to stop Dr. Muscat's salary and bonuses was communicated to Dr. Muscat by means of a letter sent to him by Gareth Williams dated 24th January 2017 – that is after the decision reached by the Civil Court, First Hall of the 12th December 2016; and after that he was requested to return back to his place of work following the meeting with Andrew Beane of the 15th April 2016 requesting him to return back to work as from the 25th April 2016, as well as the further requests of the 5th July 2016 and 30th November 2016. Since the 15th April 2016, the Bank had informed Dr. Muscat that the disciplinary proceedings against him as well as his suspension from work were being lifted. Yet Dr. Muscat persisted in his position not to return to his place of work this notwithstanding. In the meantime, however, not only was Dr. Muscat paid his wages and also bonus during the period of suspension, but the Bank continued paying him his wages even after that the period of suspension was lifted. Then, once that the Bank saw that despite that Dr. Muscat accepted the buy-out payment, after lifting the suspension, and after repeated requests for Dr. Muscat to return to his place of work, being also in possession of the decree issued by the Civil Court, First Hall of the 12th December 2016, it made its decision not to continue paying Dr. Muscat wages for services that he was not rendering and which he was refusing to render. Indeed, Gareth Williams was very clear in his letter of the 24th January 2017 that Dr. Muscat's salary was to continue being paid from the date of his return to work – as was his bonus entitlement.

70. Furthermore, this Court cannot fail to note that **the decision to consider Dr. Muscat as having relinquished his employment with the Bank** also came about through a letter communicated to Dr. Muscat on the 21st June 2018 that is after the Civil Court, First Hall's judgment of the 5th December 2017: which decision rendered final and definite the safeguards which Muscat had requested to be issued in his favour through the issue of the warrant of prohibitory injunction numbered 42/2013. The issue raised in the third grievance of the Attorney General relating to the fact that the Court of Magistrates (Malta) was not correct to claim that Dr. Muscat did not contest the reason for termination of his employment is indeed inconsequential given that this was not a central issue in the determination of this case. The reasons leading the Court of Magistrates (Malta) to decide the case the way it did went beyond Dr. Muscat's eventual contestation of his dismissal by the Bank and focused more on the subject matter of the second, fourth, fifth and

sixth grievances. Hence for these reasons, the third grievance is to be rejected.

71. But turning back to the fourth and fifth grievances, as mentioned above, this decision of the Civil Court, First Hall reached on the 5th December 2017 also saw the case that Mark Muscat had initiated against the bank whereby it claimed, among others, that the bank had acted unilaterally when changing his conditions of employment by means of a new agreement dated 12th April 2013, being decided as **unfounded in fact and at law. This decision also meant that Muscat could no longer insist on the bank to re-instate him in the same position in which he was at the time of his suspension from office. This time round this decision was not interim in the same way as the decision given on the 12th December 2016; but it was a final decision which signified Muscat's loss of the suit that he had initiated against the bank. This notwithstanding, Muscat still refused to go back to work until such time that on the 21st June 2018, the bank officially terminated Muscat's employment with the bank.**

72. Despite Dr. Muscat's strong resistance to the new contract of employment, it is an undisputed fact that Dr. Muscat never went back to his place of work to see – directly and personally – whether and to what extent his contention that this new role was of an inferior grade, humiliating, etc, was founded in fact and at law. Nor did he have to opportunity to test exactly how the new salary and bonus formula, albeit complicated as he complained, was going to operate in his regards. Despite this, it is also undisputed that notwithstanding his fierce resistance to the new agreement reached between the Malta Union of Bank Employees and the HSBC Bank Malta plc– going as far as claiming that it did not bind him – yet he nonetheless accepted the buy-out compensation in the amount of Euro 108,000 which the bank disbursed to him following the agreement dated 12th April 2013 between the Union and the Bank in spite of the fact that he claimed that this collective agreement did not apply to him.

73. At folio 203, Dr. Muscat claims that the amount of Euro 108,000 was given to him as part-payment on account of the total difference in wages which the bank owed him in relation to the change in role. However, it appears that there was no agreement between Mark Muscat and HSBC Bank Malta plc that this compensation formed part of a bigger sum which was owed to him as part payment. That is perhaps how he could have seen it. But in

reality it was not so. In fact Dr. Muscat received the second highest contract buy-out amount – second only to Christian Debono's. But even if Dr. Muscat claimed that this agreement did not bind him and it was carried out "without prejudice" to his position, the said agreement, as can be seen on fol 75 clearly stated that it was a "Sales Force and Sales Management agreement contract buy out" which was agreed "in order for the employees concerned to fall under the new terms as stipulated in the collective agreement which is being signed together with this agreement". So these payments were being made with a specific purpose and for a very specific aim. If Dr. Muscat did not request this payment, and if he felt not bound by it, then he was free not to accept the said payment so as to ensure that his protest position would not be in any way prejudiced. If as he claims he found this deposit in his account – made by the Bank without his request – he had a very simple option to refuse that amount and deposit it under the authority of the Court who was being seized with the merits of his case. Yet he chose not to do this and to keep the money, despite his fierce resistance to the said agreement.

74. And, of course, it appears also undisputed that Dr. Muscat continued to receive his salary payments during the whole period of suspension from work. In fact when defence counsel asked whether the sum was received as a part-payment, Dr. Mark Muscat says that these sums were simply deposited in his account, also admitting having made use of them 'to live with':

> Defence: And it was not being proposed you as a part payment? Am I correct in saying that it was not?
> Witness: It just depositted like they depositted the new payments as well, the new salary, the new bonuses.[8]

75. This Court cannot go into the merits of whether the acceptance of the buy-out compensation in the amount of Euro 108,000 effectively is tantamount to Muscat's tacit acceptance of the terms and conditions of the new contract signed on the 12th April 2013 between the MUBE and HSBC Bank Malta plc because any such considerations fall outside the jurisdiction of this Court. But notwithstanding Dr. Mark Muscat's acceptance of that benefit, the new contract and the effects thereof were negotiated on a 'without prejudice' basis as transpires through the agreement signed between the MUBE and the bank on the 15th April 2013 (folio 73 of

[8] Fol. 207.

the acts of the proceedings) therefore three days after the coming into effect of the new contract of employment. The 'without prejudice' clause found on page two of the mentioned agreement reads as follows:

> This present agreement is entered into without prejudice to Mark Muscat's rights to pursue any claim against the bank including his rights under the prohibitory injunction numbered 42/2013 and his right to proceed with the law suit numbered 153/2013 which was filed following the said prohibitory injunction.

76. This Court understands that the 'without prejudice' clause meant that during such time that the warrant of prohibitory injunction numbered 42/2013 was in force and pending the conclusion of lawsuit numbered 153/2013, Dr. Mark Muscat could not be considered to have agreed to the terms of the new contract of employment signed on the 12th April 2013. **However this does not mean that Dr. Mark Muscat was not in the meantime still an employee of HSBC Bank Malta plc and it remained an undisputed fact that Dr. Mark Muscat's status of employee of the bank remained in force until such time as his contract with the bank was terminated. It is also undisputed how Dr. Mark Muscat kept on receiving full wages as an employee of HSBC Bank plc Limited even during such time as he was suspended from duties and for a good eight months after he was requested to return to work and repeatedly refused to do so**.

77. At page 346 Caroline Buhagiar Klass, who was the head of the human resources of HSBC Bank Malta plc during the time when the decision to stop the payment of wages was taken, claimed:

> Witness: **But you took the money so you accepted the money that we gave you all the other colleges**[9] and that fact that you took the money it meant that you accepted these new conditions, otherwise it means that you would have returned the money...

78. As an employee of the bank Dr. Mark Muscat could not refuse to return to work when requested to do by his employer and this notwithstanding any contractual and civil contentions which the parties had against the other for matters related to his same contract of employment. Dr. Mark Muscat could not unilaterally decide to refuse to go to work indefinitely on the premise that the terms of a contract were not what he desired as the issue whether HSBC Bank Malta plc acted in breach of a collective agreement, of a warrant of

[9] Emphasis of this Court.

prohibitory injunction or of any other rights pertaining to its employees, was a matter to be decided by the competent civil Court, and not a matter that he could decide himself or retaliate against through his no show at the place of work.

79. No warrant of prohibitory injunction ever gave Dr. Mark Muscat a legal basis for refusing to go to work or actually gave a blessing for his unauthorised absence from work. Also, as has already been explored by this Court further up, on the **30th May 2016**, Dr. Mark Muscat had already an interim ruling given by the Civil Court First Hall refusing to accede to his request to declare that the bank had acted in breach of the warrant of prohibitory injunction numbered 42/2013 and most importantly, in this same decision the Civil Court had also rejected Dr. Mark Muscat's request to order the bank to go back from the unilateral changes that it had made in his regard through the contract dated 12th April 2013 and to re-instate him status quo ante.

80. Furthermore, this same ruling of the Court dated 30th May 2016 was confirmed again on the 12th December 2016, after which Dr. Mark Muscat continued to refuse to go back to work. The parte civile refused to go back to work even after that on the 5th December 2017, the Civil Court, First Hall decided that the lawsuit filed subsequent to the issue of the warrant of prohibitory injunction 42/2013 was not founded at law against the bank.

81. Notwithstanding the fact that Dr. Mark Muscat lost his long-overdue case against the bank, notwithstanding the fact that during all this time, the bank continued paying regular wages to the same, he still refused to go back to work insisting on his position that he refused to go back to a position which was inferior and humiliating.

82. In the meantime, it was also proven that during this time Dr. Mark Muscat was also attending a full-time law course at the University of Malta and from the testimony given by Rowena Leontijevic, it does not appear that Dr. Mark Muscat absented himself from full-time lectures held during office hours.

83. The bank did not stop the payment of wages abruptly and without any notice or during the period of suspension. From the testimony given by all the directors of the bank as well as by the CEO Andrew Beane and the head of human resources Caroline Buhagiar Klass, the company even sought legal advice before

taking the decision to stop the payment of wages for the unauthorised absence of their employee, and therefore acted with due diligence. Also, as appears from the letter dated 24th January 2017 (folio 473 of the acts of these proceedings), issued by HSBC Bank Malta plc head of human resources Gareth Williams, Dr. Mark Muscat was informed that 'any absence going forward' was going to be treated as unauthorised absence meaning that as from the 25th January 2017 all payments were going to be stopped. This also shows that Dr. Mark Muscat **was warned** of the consequences of his continued absence. Despite this warning, and the fact that just a month before the Civil Court had rejected his case, Dr. Mark Muscat continued with his stance, despite of what by then was a lost cause.

84. The Court of Magistrates (Malta) therefore could legally and reasonably arrive at its decision as found in its judgment. In this case it was clearly proven that the change in the conditions of employment were not made capriciously by the Bank or otherwise made as an ad hominem measure. To the contrary, even the Civil Court, First Hall in its judgment of the 5th December 2017 – who had better documentary visibility than this Court on this matter – arrived at this same conclusion. Therefore, while this Court took note of the case law ably quoted by Dr. Muscat in his note of submissions, it cannot discard the fact that his case is markedly different from the ones quoted by him specifically due to the particular, unnecessarily complicated, procedural iter that his case went through. Dr. Muscat could and did resort to lawful civil claims against the bank in what was a lawful way to try to safeguard his legal position. But then again, he had to see that these proceedings move in tune one with the other, to avoid the possibility of there being apparently conflicting decisions. Nor could he tactically use these actions as a stratagem for him not to report to work. All the matters which he raised, had to be eventually decided by the Civil Court, First Hall; but in the meantime it was not legally tenable for him to argue, definitely after the decree of the 12th December 2016, that the civil law action itself gave him the right to refuse his employer's instructions to go back to work – especially once that the same Civil Court, First Hall had unequivocally noted that he continued to regularly receive wages from the company and also pocked a compensation of Euro 108,000 as a buy-out compensation for the change of contract – then to continue refusing to report to work thereafter.

85. In the scenario described above, this Court therefore **cannot conclude that**, on the basis of the evidence supplied and the

procedural scenario that developed in this case, **the decision of the Court of Magistrates (Malta) was wrong**.

86. It therefore goes to follow that the Attorney General's third, fourth and fifth grievances are being rejected.

The Second and Sixth grievances of the Attorney General

87. The note mentioned at fol 176 exempted the Prosecution from producing evidence on the veracity of documents exhibited by Dr. Muscat during his testimony tendered on the 29th October 2019. At fol 111 it was minuted also that the parties agreed that it was not necessary to produce as witness a representative of the Malta Business Registry to testify on the authenticity of the information contained in the documents to be presented by the Prosecution in relation to the involvements of HSBC Bank Malta plc between 2017 and 2019. On the same page it was also minuted that before Prosecution closes its evidence, defence was being given the opportunity to file a note before the 16th December 2019 wherein it was to indicate whether the documents presented by **Dr. Mark Anthony Muscat** needed to be authenticated according to Law.

88. It transpired that on the same date when this minute was filed – the 29th November 2019 - Mariella Caruana gave evidence and exhibited a number of documents, including photocopies of payslips allegedly pertaining to Darren Mangion. Darren Mangion testified on the same date. He was not requested to confirm these payslips on oath and to confirm their authenticity.

89. Furthermore, when Defence filed the note at fol 176, they very craftily phrased it so that they exempted Prosecution from producing evidence regarding the veracity of the documents exhibited by **Mark Anthony Muscat in the course of his testimony of the 29th October 2019**. No mention was made by Defence of showing their intention of exempting Prosecution from bringing evidence to authenticate the documents presented by Mariella Caruana on the 29th November 2019, or any other document filed by Dr. Muscat himself, apart from those he filed on the 29th October 2019.

90. The evidence produced relating to wages, allowances and bonuses lost, cannot in any way be deemed to have respected the

best evidence rule. Apart from the problem created by the lack of authentication of the most relevant and salient documents highlighted above, there is also the added problem that most of the computation relating to the new wage, allowance and bonus structure was made by reference not to the entitlement of Dr. Muscat but to that of his colleague. While the Court appreciates the procedural difficulties involved in this scenario to obtain the best evidence, on the otherhand, it cannot state that the Court of Magistrates (Malta) was legally and reasonably wrong in its conclusions by reference to this. After all there were other avenues available for the Prosecution to officially prove what the wages, allowances and bonus (structure and computation) were going to be in the case of Dr. Muscat.

91. The Second and Sixth Grievances are therefore being rejected.

DECIDE

For these reasons, the Court is rejecting the Attorney General's appeal application and is confirming the judgment of the Court of Magistrates (Malta).

Aaron M. Bugeja,
Judge