



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 4143/09

In the matter between

**SIMON FUZA SHONGWE**

**Applicant**

and

**NKOSINATHI NKONYANE N.O.  
CHIEF FIRE OFFICER OF THE FIRE  
AND EMERGENCY SERVICES  
THE PRINCIPAL SECRETARY, THE  
MINISTRY OF PUBLIC SERVICE AND  
INFORMATION  
THE ATTORNEY GENERAL**

**1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent**

**3<sup>rd</sup> Respondent**

**4<sup>th</sup> Respondent**

**Neutral citation:** *Simon Fuza Shongwe v Nkosinathi Nkonyane N.O. & 3 Others* (4143/09) [2014] SZHC 99- (30 April 2014)

**Coram:** **MAMBA J**

**Heard:** **06 December 2013**

**Delivered:** **30 April, 2014**

- [1] This is an application for the review of the judgment of the Industrial Court granted on 15 April 2009 whereby the applicant's application for an interdict against the respondents herein was dismissed.
- [2] In the application before the Court *a quo* the applicant sought an order interdicting and restraining his employer from effecting his compulsory retirement on 01 April, 2009 as per the relevant Government General Orders and other related law.
- [3] The applicant filed at least three documents bearing three different names and dates of his birth. In one document his name appears as Simon Mafuza Shongwe, in another his name appears as Simon F. Shongwe and again in another document his name is reflected as Simon Fuza Shongwe. He says these are all variations of the same name or person. The Court *a quo* had doubts about his veracity on this point and also pointed out the different tax identity numbers reflected on two of these documents. I do not think that it is necessary for this court to make a finding on this issue as this court has not been asked to do so.

- [4] The finding of the Court *a quo* that has been challenged in these review proceedings by the applicant is that the applicant failed to satisfy the court that he should not be compelled to go on retirement based on the date of his birth supplied by him to his employer when he was employed as a civil servant in 1977. In that application form he stated that he was born in April 1949. It is common ground that in terms of the relevant Government regulation, the applicant was bound to go on retirement once he had reached the age of 60 years; which in this case was April 2009.
- [5] The crux of the applicant's case in the Court below was that he was born 1952 and not 1949. He submitted that he based this on his birth certificate (exhibit SFS2) which reflected his date of birth as 05 December 1952. This birth certificate was procured by him from the relevant office in 2004. This information he supplied to officers was based on his Certificate of Registration of First payment (of Graded Tax), known in Siswati as *Sibhikivane*. That document was issued to Mfuza Shongwe in 1969 and he was "judged" therein to be 17 years old. He alleged further that his mother informed him that he was born during the month of December. The actual date is uncertain and was probably chosen by him randomly.

[6] In dismissing the application, the court below held that because of the conflicts regarding the name of the applicant and his date of birth, he had failed to establish that he was entitled to the interdict he had applied for and his application had to fail. More importantly, the court held that in terms of the applicable Government General Orders, the date of birth that is considered in determining when an officer or civil servant shall go on retirement is the date given by that employee upon his or her first appointment into the Civil Service. That is the general rule and that date may on application and upon good cause shown be amended by the responsible Government officer. The applicant, it is common cause, did not make this application.

[7] In this review, the applicant submits that the Court *a quo* erred in relying on the General Orders which constitute subsidiary or subordinate or delegated legislation. He submits that the Court ought to have relied on section 28 (3) of the Birth, Marriages and Deaths Registration Act 5 of 1983 which decrees that the information contained on a birth certificate is *prima facie* proof of the correctness or veracity thereof. In essence, the court, it is argued by the applicant, committed an error of law by applying the wrong law and ignoring the applicable law; that is, was the Court correct in relying on the

General Orders over an Act of Parliament in determining the issue at hand? To my mind, this is question of law and not fact. But of course this is a review and not an appeal as was the case in *Velaphi Dlamini infra*. This submission is totally misconceived as a ground for review. Such a ground is one for appeal rather than review, which is generally restricted to the mode of the procedure that was adopted or employed in those proceedings. (See the judgment of this Court in *Nkosinathi Magagula v The Commissioner of Police and Another Case No. 96/2011* judgment delivered on 9 September 2013).

[8] Again, it is important to note that the Court below did not rule that the applicant was born in April 1949. It merely held that on the evidence or information before it, the applicant had failed to establish that he was entitled to the interdict sought by him.

[9] The facts and issues in this case are substantially similar to those in *Elias Velaphi Dlamini v Ministry of Justice and Constitutional Affairs and 4 others, Industrial Court of Appeal Case 6/2011* (judgment delivered on 22 March 2013). The Court held that ‘...a determination of a person’s date of birth is a question of fact to be decided on the evidence.’ In the present case

the issue is substantially different as stated in paragraph seven above. In *Velaphi's* case the Court considered the applicable General Order, (Order A635) and held that;

‘We accept that the rationale behind this General Order is to curb or prevent the manipulation of dates of birth for the purpose of postponing the retirement dates. This is undoubtedly such a case.

[14] At first blush the General Order might appear to be rather too harsh, having regard to the fact that some people may genuinely not know their correct dates of birth due to illiteracy or other factors. General Order 9 (2) was introduced precisely to ameliorate such harshness. It reads as follows:-

“The power to waive or vary particular General Order shall be vested in the Principal Secretary, Ministry of Public Service and Information, subject when necessary to obtaining the prior approval of the Principal Secretary, Ministry of Finance, or of the Cabinet, as appropriate. If an officer considers that there are exceptional reasons why a particular General Order should be waived or varied, he shall place the relevant facts in writing, through the appropriate channels before the Principal Secretary,

Ministry of Public Service and Information for consideration and decision.” (Emphasis added).

[15] It is decidedly a telling point against him that the appellant did not avail himself of the General Order 9 (2) despite having had ample opportunity to do so after learning of his so-called correct date of birth. We consider that he has got only himself to blame for the outcome in this matter as proposed below.’

The Court below expressed a similar view in this case.

[10] There is another point which has been overlooked by the applicant herein and it is this:

The information supplied by the employee to the employer together with the applicable General Orders, upon employment, forms part of the terms and conditions of employment between the parties. The date of birth of the employee becomes an integral part of these terms and conditions. This date is obviously material for purposes, amongst others, of determining when the employee shall retire from employment. That date supplied to the employer, whether correct or wrong becomes, for purposes of the employment contract, that which shall be regarded as the date on which the employee was born. As a consequence, his real or actual date of birth becomes largely

irrelevant. Therefore, in the instant case, when the employer told the applicant that he was due for compulsory retirement based on his date of birth in 1949, the employer merely said, “upon employment we agreed or contracted that your time of retirement shall be reckoned from that date.” It did not say that he was actually born on that date.

[11] For the foregoing reasons, this application is dismissed with costs.

**MAMBA J**

**For the Applicant : Mr T.R. Maseko**

**For the Respondents : Mr. B. Tsabedze**