IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 1572/2017

In the matter between

SITHEMBISO GIRLIE NKAMBULE	**APPLICANT**
AND	
THE HONOURABLE JUDGE OF THE INDUSTRIAL COURT	**1ST RESPONDENT**
THE TEACHING SERVICE COMMISSION	**2ND RESPONDENT**
THE MINISTRY OF EDUCATION	**3RD RESPONDENT**
THE MINISTRY OF PUBLIC SERVICE	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral citation:	*Sithembiso Girlie Nkambule v The Honourable Judge of the Industrial Court & 4 Others* (1572/2017) [2017] SZHC 237 (10 November 2017)
Coram:	**MAMBA J**
Heard:	**06 November 2017**
Delivered:	**10 November 2017**

[1] Law of Evidence – admissibility of computer printout evidence – person storing information in the computer is necessary witness to testify thereon, plus, computer must be shown to have been serviced and functioning efficiently or properly.

[2] Civil Law – Law of Evidence – one's evidence on date of birth generally hearsay. Birth Certificate prima facie evidence of facts therein contained.

[3] Civil Law – Application proceedings – dispute of fact. Where evidence constituting dispute of fact is inadmissible – dispute of fact can only be constituted by admissible evidence.

[1] This is an unopposed application for review. I must note or record that when the matter first appeared before me on 03 November, 2017, both Counsel indicated to me that the application was not being opposed. This being a review, I indicated to Counsel that I could not simply grant the application on the mere ground that it was not opposed. I had to have cogent reasons or grounds to set aside the decision of the *court a quo*. The matter was then adjourned to the 6th day of November to enable Counsel to motivate the application in open court.

[2] The brief background to this application are as follows:

2.1 The Applicant is a teacher by profession. She attained or obtained her teaching qualifications from William Pitcher Teachers' College and the University of Swaziland. She was first employed by the Government, as a teacher, on 13 June 1983. On being employed,

she states, she submitted certain personal documents or particulars to the said government; one of which was a 'Letter of Engagement'. That letter, she says, stated her date of birth as 26 July 1961. Neither the original nor a copy of this document could, however, be found.

2.2 It is common cause that in terms of the government general orders and applicable legislation, the applicant was obliged to retire on attaining or reaching the age of 60 years.

2.3 In December 2014, the Applicant was employed as a school principal or headteacher in one of the High Schools around Manzini. In January 2015 the applicant did not receive her salary for that month. On enquiry, she was informed by the government that she had retired on the 01st day of December 2014. In support of this assertion, the government produced a computer printout which indicated or reflected her date of birth as the 01st day of December 1954. Applicant disputed this as her date of birth and insisted that she was born on 26 July 1961 and that this is the date she had submitted to her employer on being employed in 1983. When the Applicant engaged the government in an attempt to correct what she regarded as an error in the government computer records, these overtures were rejected by the government. The

government insisted that the Applicant should produce the documents she filed or submitted to government 'at engagement'.

2.4 In support of her case to have her date of birth amended or corrected, the applicant submitted the following documents:

(a) Birth certificate;

(b) Letter from William Pitcher College;

(c) Application for admission form from the said University and her

(d) Income tax form.

The government also noted that the letter from William Pitcher College stated that the applicant was recorded as having been born on 26 July 1962 instead of 1961 as alleged by her.

[3] Following the stand taken by the government as stated above, and following the matter being unresolved before the relevant forum, the Applicant applied before the *court a quo* for, *inter alia*, the following relief:

‘1. The purported compulsory retirement of the applicant on 1st December 2014 by the respondents be declared null and void and be set aside;

2. The Respondent be ordered to correct the Applicant’s date of birth in their computer system to 26 July 1961;

3. Pending finalisation of this matter, the respondents be interdicted and or restrained from terminating the employment of the applicant on the 31st December 2014’.

She also prayed for costs of suit and for further and or alternative relief. The application was successfully opposed by the government or the respondents. The judgment of the court a quo was delivered by the First Respondent herein on 10 March 2017. That judgment has led or culminated in or prompted this application wherein the applicant prays for an order in the following terms:

‘1. Reviewing and or correcting and setting aside the judgment of the First Respondent dated 10th March 2017.

2. Directing that the purported retirement or the applicant on the 01st December 2014 by the respondents is declared null and void and is set aside.

3. The respondents be or hereby ordered to correct the Applicant’s date of birth in their computer system to be 26th July 1961.

4. Further, and or alternative relief.'

[4] In her application, the applicant states that:

> '---the First Respondent arrived at his judgment arbitrarily or capriciously or mala fide or as a result of adherence to a fixed principle, or in order to achieve an ulterior motive, or that the court misconceived his function or took into account irrelevant consideration or ignored relevant ones or that the decision was so grossly unreasonable as to warrant the inference that the court failed to apply its mind to the matter at hand and committed an error of law.'

These are virtually all the grounds that one may raise to found or justify a review under the common law. Stated together in one sentence as above, these mean pretty little in my view. They constitute a mere skeleton with no flesh at all.

[5] In her founding affidavit, the Applicant states the following pertinent issues; namely:

5.1 The *court a quo* was in error in suggesting that there were disputes of fact in the matter inasmuch as the presiding officer had *mero motu* called for *viva voce* evidence from two witnesses.

5.2 Again, the court erred in ruling that there was a dispute of fact regarding the date of birth of the applicant inasmuch as the court had ruled that the only credible and reliable evidence regarding the said date was that of the applicant's mother which had been submitted by the respondents. The mother of the applicant stated on oath that the applicant was born on 26 July 1962 and not 1961.

5.3 'From a reading of the entire judgment --- it is clear that he placed a lot of emphasis on the suitability of my relative who supplied information to the office of the Registrar of Births, Marriages and Deaths. The court seems to insinuate that my cousin John Slate (Mlambo) did not have personal knowledge of my birth yet it is permissible for a relative in the absence of a parent to apply for a birth certificate.'

[6] In dealing with the alleged disputes of fact, the Learned Judge in the *court a quo* held that the computer printout in the government computer systems from which the government based its case to order the applicant to retire in 2014 was inadmissible because there was no evidence to

establish who had supplied and stored that information in the computer. The accuracy or veracity of that printout was thus not reliable and therefore inadmissible. I would also add that in order for that information to be held admissible, it had to be shown or established that the computer in question had been adequately serviced and was functioning properly at the relevant time. I therefore hold that the *court a quo* was correct in rejecting this evidence as being inadmissible.

[7] Having rejected the evidence of the computer printout, the court could not therefore say that the retirement of the Applicant was in order. To its credit, it did not say it was. The court was nonetheless not asked to make such a determination. What then remained to be considered and analysed were, the applicant's own assertion as to when she was born, her birth certificate, based on the information by Mr. Mlambo and the affidavit by her mother regarding the applicant's date of birth.

[8] Again, I am in agreement with the court below that the Applicant's evidence regarding the date of her birth is hearsay. Essentially, when a person says he or she was born on a specific date, that person says nothing more than that he or she honestly believes from information

available to him or her, that he or she was born on the relevant date. In dealing or deciding on the issue the court stated:

> ’27--- No person can have an independent knowledge of his/her own date of birth. When a person gives information about his/her date of birth, that person is relying on information which he/she has received from another source. In the absence of that source, that information is hearsay and is inadmissible to prove that fact. This principle is aptly stated by authority as follows:
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> > “A witness cannot testify to his own age without infringing the hearsay rule---.” *(The reference is from Hoffmann LH & Zeffertt DH, The South African Law of Evidence, 3rd ed. (1981) (Butterworths).*

[9] The Learned Judge again dismissed the evidence in the form of the applicant’s birth certificate based on the information supplied by Mr. Mlambo. The court held that Mr. Mlambo was a mere relative of the Applicant and there was no evidence establishing how he had obtained the information he had supplied to the relevant government official to procure the said birth certificate. The court held further that whilst the certificate was *prima facie* proof of the facts therein stated, that information remained of no probative value in the absence of the

underlying factual background. The court alluded further to the evidence of the applicant's mother and held that the allegation by the Applicant that her mother was in error due to old age, in stating that Applicant was born in 1962 was 'unsubstantiated, presumptuous and unfair.' The court thus dismissed the evidence by the Applicant regarding her date of birth. It also dismissed the evidence by the Applicant regarding her date of birth. It also dismissed the evidence in the form of her birth certificate. What remained as a factual issue regarding her date of birth was the evidence of her mother Lomgcibelo Roster Nkambule (born Shongwe) who stated in her affidavit, which was coincidentally filed by the respondents, that the applicant was born on 26 July 1962. Regarding the veracity or admissibility of the evidence of Mrs Nkambule, the court emphatically said: 'The affidavit of the applicant's mother remains uncontroverted.' (Per Para 32 of the Judgment).

[10] From the above analysis of the issues – both factual and legal – it is plain to me that there was no real dispute of fact before the court. The issue for determination by the court was the date of birth of the Applicant. Her say-so evidence having been rejected together with her birth certificate and the evidence of the computer printout, the only admissible and

credible evidence on the issue was the evidence of her mother. That evidence should have been accepted by the court.

[11] I accept that the Applicant sought to have her date of birth amended to reflect that she was born on 26 July 1961 instead of 1st December 1954. She was wrong regarding the year of her birth. She was born in 1962 and not 1961. To hold that she should be unsuited because of this rather minor and insignificant error, in the circumstances of this case, would, in my judgment be too harsh, wrong and too technical an approach on the matter. None of the parties herein would be prejudiced by a correction or amendment of the prayer to reflect the correct date of her birth. The correction is accordingly made.

[12] As stated above, this application has not been opposed by the Respondents and Counsel were in agreement that the court a quo erred in its judgment. Both Counsel were again in agreement that there should be no order as to costs. It is so ordered.

[13] For the avoidance of doubt, it is ordered as follows:

1. The judgment of the court a quo issued on 10 March 2017 is hereby reviewed and set aside.

2. The purported retirement of the Applicant on 1st December 2014 by the Respondents is hereby declared Null and Void and is hereby set aside. Prayer 2 of the Notice of Motion is hereby granted as amended, to indicate or record that the Applicant was born on 26 July 1962.

3. There is no order as to costs.

MAMBA J

FOR THE APPLICANT: **MR. S. G. SIMELANE**

FOR THE RESPONDENTS: **MR. M. NSIBANDZE**