

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 339/03**

In the matter between:

**JACOB P. MKHWANAZI      APPLICANT**

and

**MANZINI CITY COUNCIL      RESPONDENT**

**CORAM:**

**NDERI NDUMA: PRESIDENT**

**JOSIAH YENDE: MEMBER**

**NICHOLAS MANANA: MEMBER**

**M. SIM ELAN E : FOR APPLICANT**

**S. M. KUBHEKA: FOR RESPONDENT**

## **J U D G E M E N T -31/03/05**

The Applicant is Jacob Mkhwanazi an adult male of Madonsa in Manzini. The Respondent is the Manzini City Council, a statutory body established by the Municipal Laws of Swaziland.

In his particulars of claim, the Applicant pleads that he was employed by the Respondent in 1989 as a grass cutter and was in continuous service of the Respondent until December 2002. He earned One Thousand Six Hundred and Seventy Three Emalangen Ten Cents per month ( E1,673.10).

The reason for the termination of the services of the Applicant was that the Applicant had reached the retirement age of 60 years.

The Applicant claims that the retirement was unlawful because at the time of the termination he had not attained the age of 60 years.

That he was not allowed and/or given an opportunity to state his exact age before the retirement and no hearing was conducted. He claims therefore he was unfairly dismissed on the basis that he had not reached the retirement age.

Upon termination, he was paid Ten Thousand Eight Hundred and One Cents (E10,800.01) as gratuity and Three Thousand Three Hundred and Fourty Six Emalangen Ten Cents (E3,346.20) leave pay.

He has pleaded that the aforesaid figures were not correct because he did not get additional notice, balance on gratuity on the service, severance allowance and loss of wages for the premature retirement.

The dispute was reported to the Labour Commissioner who forwarded the same to the Conciliation Mediation and Arbitration Commission (CMAC). The Commission was unable to resolve the same and a certificate of unresolved dispute was issued in terms of Section 85 (1) of the Industrial Relations Act No. 1 of 2000.

In its reply to the particulars of claim the Respondent admits the following:

1. That the Applicant was employed in 1989 and his services were terminated in December 2002.
2. That he earned a gross salary of E1, 673.10 at the time of the termination.
3. That he was retired on the basis that he had attained the retirement age of 60 years.
4. That upon such retirement he was paid a gratuity of E10,878.01 and leave pay in the sum of E3,346.20.

The Respondent denies that the Applicant had not reached the retirement age. It further denies that he was entitled to any of the terminal benefits claimed in the particulars of claim. The Respondent avers that in terms of information given to it by the Applicant when he was first employed on the 7<sup>th</sup> November 1989, the Applicant was born in 1938 and therefore at the time his services were terminated he was already past the retirement age of 60 years.

The engagement form was produced by the Applicant and marked exhibit A1.

## **Issues in Dispute**

The bone of contention is that sometimes on the 8<sup>th</sup> May 1996 the Applicant obtained a birth certificate from the government of Swaziland indicating that he was born on the 25<sup>th</sup> April, 1943.

In terms of the Births Marriages and Death Registration Act of 1983, and in particular Section 28 (3) a death certificate duly issued upon registration of birth of a person "*shall be prima facie evidence of the particulars set forth therein in all courts of law and public offices*".

On the basis of the certificate of birth of the Applicant produced as exhibit 'A3' it is the Applicant's contention that the Respondent ought not to have relied on any other information as to his actual date of birth other than the certificate of birth.

That had it relied on the certificate aforesaid, it would have realized that he was born in 1943, but not 1938. That therefore, it had retired him prematurely in December 2002 and such termination of employment was unlawful and contrary to law.

The arguments by the Applicant were stiffly met by the Respondent. The Respondent stated that it had relied solely on the information given by the Applicant to it as to his date of birth to determine his retirement age.

That according to the company records, 1938 was the correct date in which the Applicant was born and therefore he was well above 60 years old at the date of termination on the 31<sup>st</sup> December 2002.

The Applicant in his particulars of claim and in the written submissions before the court does not state if he had at all furnished the birth certificate dated the 8<sup>th</sup> May 1996 to the Respondent. There is no information on whether the Applicant had made an application to the Respondent prior to the retirement, requesting that it amend the date of his birth he had supplied to it when he was first employed in 1989 to accord to the date in the birth certificate.

No allegations appear at all in the particulars of claim as to why the Applicant had first informed the Respondent that he was born in 1938 if indeed this was not his correct date of birth.

All the other documentation provided by the Applicant such as the Swaziland Travel Document, Swaziland National Identity Card and Swaziland National Provident Fund Membership card reflect his year of birth to be 25<sup>th</sup> April, 1943.

The documentation however must have been acquired subsequent to the acquisition of the birth certificate on the 8<sup>th</sup> May 1996 and therefore the date of birth appearing on them was extracted from the birth certificate.

By agreement of the parties, no oral evidence was adduced in this matter it being common cause that the only issue in dispute was whether or not the employer could disregard the birth certificate aforesaid and insist that the correct date of birth of the Applicant was 1938.

I have looked at the papers before court over and over again and it does not appear to me that there is any averment from the particulars of claim that the birth certificate had been presented to the employer at all prior to the retirement of the Applicant.

All that the Applicant states in paragraph 7 is that he was not allowed and/or given an opportunity to state his exact age.

It is clear that the Applicant provided the employer with his date of birth the first day he was employed.

The Respondent was entitled to rely on the said information to retire the Applicant.

The application fails in its entirety. No order as to costs.

The members agree.

**NDERI NDUMA**

**JUDGE PRESIDENT- INDUSTRIAL COURT**