



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 205/2018

In the matter between:

MANDLA S. DLAMINI

Applicant

and

CIVIL SERVICE COMMISSION & 4 OTHERS

Respondent

Neutral citation: Mandla S. Dlamini vs Civil Service Commission & 4 Others
[205/2018] [2018] SZIC 87 (17 August 2018)

Coram: X. Hlatshwayo – Acting Judge
(Sitting with D. Mmango and N. Dlamini
Nominated Members of the Court)

Date Heard: 07 August 2018

Date Delivered: 17 August 2018

JUDGEMENT

Before Court is an urgent application which prays for the orders as follows;

- (i) That the Honourable Court dispenses with the time limits, forms and provisions of service as are required in terms of the Rules of this Court and that this matter be heard as one of urgency in terms of rule 15 of the rules of this Honourable Court.
- (ii) Directing the Respondents cited herein to reinstate the Applicant forthwith into his position as Indvuna.
- (iii) Interdicting and restraining the Respondents from proceeding with the wrong retirement of the Applicant pending the final determination of this application.
- (iv) Directing the Respondents to correct the Applicant's date of birth from the wrong 01st June 1958 to the correct date of 15th April 1969 as the first letter of appointment of the Applicant in Folio 1.
- (v) Directing the Respondents to use the first letter of appointment when retiring the Applicant as per General Order A635 and further give the Applicant a copy of the letter of appointment.

- (vi) Directing the Respondents to pay the Applicant his June salary which has been withheld by the Respondents.
- (vii) Costs of the application at punitive scales.
- (viii) That prayers 1,2,3,4,5,6 and 7 to operate as a rule nisi with immediate interim relief returnable on the 18th of July 2018 calling upon the Respondents to show cause why same should not be made an final.
- (x) Granting further and/ or alternative relief.

[1] The application was vigorously opposed and all pleadings were exchanged, and closed. The matter was referred for oral evidence on the dispute arising from date of birth of the Applicant. The cause for the dispute arises from the differing versions pertaining to the date of birth.

[2] The Applicant's assertion, in his pleadings and oral evidence, is that throughout his tenure in Respondent's employ, he has seen his personal employment file being lost several times. This has resulted in three reconstructions of the personal employment file, the last reconstruction having been made in 2017.

[3] The Applicant is adamant that his date of birth is the 15th April 1969 as proven by "MM1" which he alleges he submitted to the Respondent

twice. The last submission was in 2017 when the Respondent was reconstructing his personal employment file for the third time.

[4] The Applicant's birth certificate; "SG3" was allegedly taken for him by his "sister", who is a cousin, properly so-called as she is the offspring of an uncle. He further alleges that the second one; being "MM1" was one he took himself using his mother's national identity card. He alleges that he took it because there was a requirement for birth certificates with personal identification numbers. He was convinced that they contained the same information save for the national identity number on "MM1".

[5] His assertion is that he was being retired prematurely as he has not reached the age of 60, when considering his version of his date of birth, accompanied by the certificates he alleges he submitted over the years.

[6] The Respondent however pleads that it is merely following the provisions of General Order A635 which provides;

"An officer's date of birth that will be acceptable by Government as the true date of birth is the date the officer wrote on first appointment. If an office decides to furnish a sworn affidavit, baptismal or birth certificate with the purpose of amending the original date of birth, the Civil Service Board, or Principal Secretary, Ministry of Public Service and Information shall not accept such a certificate when determining his/her retirement".

- [7] The Respondent has annexed the first birth certificate of the Applicant i.e. “SG3” to its pleadings, and avers that it cannot have been filed into the file at date of Applicant’s employment in 1989 because that certificate was produced by the registry of Births, Marriages and Deaths in 2002. They aver that “SG3” was retrieved from Respondent’s records, in Applicant’s personal employment file.
- [8] The Respondents also avers that if both “MM1 and SG3” are to be considered as the real date the Applicant was born, the same would fly in the face of the “SG4” which is allegedly a copy of the Applicant’s sister’s birth certificate. The argument is that consideration of both siblings’ certificates result in them having been born four (4) months apart, which is physically impossible for human beings.
- [9] The Court will not consider “SG4” at all or any evidence adduced in reference to it for the following reasons; firstly there is no evidence that it was properly produced by the BMDs office, in that it is neither signed nor stamped by the said legitimate producer, secondly and importantly, the Respondent states on oath, that the legitimate office refused to sign it and consequently bind itself to it.
- [10] The Respondent also asserted that the computer print-out annexed as “SG1” is the correct information as it reflects the information provided by the Applicant when he was first employed. This record clearly shows a

birth date of the 1st June 1958 accompanied by a national identity number for the same date.

[12] It is clear, from both pleadings and from oral evidence, that personal employment file has two copies of his birth certificate, one annexed as “MM1” and the other as “SG3” to the pleadings. They have the same date of birth.

[13] It is also clear that the Applicant has submitted proof of birth several times to enable the reconstruction of his personal employment file by Respondent. It is also clear that the copies of the birth certificates have some discrepancies, like the particulars of the parents and their birth dates.

It is also clear that both the certificates were produced from the Applicant’s personal file kept by the Respondent.

[14] What is not clear is how the Respondent’s data-base could have a date of birth inconsistent with the certificates which Applicant has time and again been required to submit. Even more confusing is how the Respondent has failed to produce the source document from which the birth date in the data-base was extracted.

[15] The oral evidence of the Applicant’s mother had many gaps due to her lack of sophistication and education, however it was consistent in as far

as the year of independence was concerned. She did concede an “eventuality” that the Applicant may have been influenced by his “peers” to provide the date as reflected in the data-base but that weighs very little, if anything. The concession was made by the witness, in the supposition that such influence (on Applicant) by his peers did, indeed happen, and even worse, the witness was not in a position to answer to the Applicant’s state of mind. The court did note that the Applicant’s legal representative was not an attorney, hence he may not have known about that objectionable line of question about the witness’s supposition of Applicant’s state of mind.

[16] The evidence shows that the Applicant had taken up the matter of his retirement date, with the Respondents to no avail. Instead of the issue being addressed, the Respondent discovered and expressed several shortfalls in its own records ultimately decided not to change the date of birth. The Respondent states per “MM2”, that its records had Folio 1 which discredits the numbering in the records folios because it was certified in 2010, whereas that certificate was taken in 1992. Further, there is a concession that the file submitted to the Ministry of Public Service cannot possibly be the true record as created at the Applicant’s employment. Furthermore, the Respondent states (at paragraph 4 of MM2) that the Employee Personal Details has the date of birth of 15

April 1969 even though it is not signed. Furthermore, that the Swaziland Income Tax Department has the same date of birth for the Applicant, which was however signed 14 years after the date of engagement. Finally, that the letter of appointment lacks date of issuance, meaning that it gives no assistance in the determination of the matter then. MM5 and MM6 are concession of error by 4th Respondent to 3rd Respondent, which yielded no resolution to the matter.

[17] The documents annexed to the pleadings would ideally enable the court to reach a fair and just decision in application proceedings. However, where there are still issues which cannot be resolved on the papers, the oral evidence normally assist in the same. In **LAWSA Vol 9 paragraph 635** it is stated that *“the balance or onus of proof determines the result if at the end of the trial, the evidence is so evenly balanced that the court is unable to come to a definite conclusion. The party bearing the burden on any particular issue then fails to establish its claim or defence, as the case may be. This burden, which is a matter of substantive law is determined by the pleadings, must be distinguished by purely evidential burden of combating the opponent’s evidence”*.

[18] The oral evidence by the Applicant’s mother was to be approached cautiously for the reasons afore-stated i.e. her lack of sophistication and delving into conjecture. However, the court finds that she was mostly

consistent and reliable, at least as far as period of the country's independence. She may have not known if it was 1958 or 1968 but she knows that it was that time, whatever the exact year. Her evidence is accepted by the Court.

[19] The Respondent's reliance on the purported birth certificate by the registry of Births, Marriages and Deaths, which reflects Siphiwe's birth as December 1968, cannot stand. Firstly for the reason stated above i.e. the registry's refusal to own it, and importantly that the witness insisted that it was the beginning of the year of independence, not the very end.

[20] The principle of best evidence cannot avail the Respondent in as far as SG4 is concerned. The reasons have been stated above. The oral evidence of her biological mother is however more probable, in the absence of evidence that the witness actually provided the information written on the document or submission of an admissible document in that regard.

[21] The best evidence rule will however be accepted by the court in relation to MM1, SG2, SG3 and SG3.1 because those documents are properly signed in terms of the laws of Swaziland.

[22] The best evidence rule does not delve into the contents of the document sought to be used but the fact that it is the actual document which it purports to be. These documents purport to be copies of the different birth

certificates of the Applicant. They are the ones in the Applicant's employment file.

[23] In relation to the dispute of date of birth, the documents accepted by the court as the ones each party allege to be found in the Respondent's records, the court finds that they have the same date of birth.

[24] The computer printout being SG1 is the odd document with a different date of birth and particulars. It would have assisted the court more if only the Respondent had produced the documents from which the data was extracted when being captured into the system. Since it is uncontroverted evidence that the Applicant's file has been reconstructed several times, which points to the loss of the said documents, then it would have assisted the court to, at least, bring in a witness to talk to the information on the spreadsheet or a copy of the identity document whose number appears thereon. On its own, the computer printout sticks out as odd and unsupported by any other evidence.

[25] The Applicant, on the other hand, did not have the documents it first produced and/or signed at first engagement, but managed to produce a birth certificate which has the same date, even though produced at different times during his employment.

[26] The evidence extracted from the correspondences by various Respondent's departments, lend credence to Applicant's version of his

file being constantly reconstructed. The correspondence by Respondent's departments, per MM2 shows that during the reconstruction, the Respondents were actually erring in their entries, thus resulting in inconsistencies in the record. Strangely though, the Respondent decided that they would not change the date of birth despite noting the errors and date of birth as stated therein.

[27] When considering the date of birth reflected in the birth documents produced by both parties, it is difficult to reach any other conclusion except that he was born on the 15th April 1969, thus confirming the date of birth conceded by the Respondent in MM5 and MM6. The Respondent having failed to substantiate the claim of the birth at any other date, but actually producing documentation with the birth date it disputes and letters seeking to rectify its error, has failed to meet requirements for its assertion of the 1958 birth date.

[28] The Respondent has proceeded with the retirement process of the Applicant despite the existence of MM5 and MM6, which were written in March and April 2018, before the conclusion of the said process. Even when served with the urgent application, the Respondent has proceeded to vigorously oppose the application to the full extent of the trial, when it had previously conceded in MM5 and MM6. This is a clear case of abuse of court process.

[29] In light of all the foregoing, the Court grants an order as follows;

1. Directing the Respondents cited herein to reinstate the Applicant forthwith into his position as Indvuna.
2. Directing the Respondents to correct the Applicant's date of birth from the wrong 01st June 1958 to the correct date of 15th April 1969 as the first letter of appointment of the Applicant in Folio 1.
3. Directing the Respondents to use the first letter of appointment when retiring the Applicant as per General Order A635 and further give the Applicant a copy of the letter of appointment.
4. Directing the Respondents to pay the Applicant his June salary which has been withheld by the Respondents.
5. Directing the Respondent to pay the Applicant a further relief in the form of July and August 2018 salary.
7. Costs of the application at a punitive scale.

The Members agree.

X. HLATSHWAYO
ACTING JUDGE – INDUSTRIAL COURT

For Applicant: Mr. S.S. Mtshali (NAPSAWU)

For Respondent: Mr. N. Dlamini (AG's Chambers)