



## **IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 495/10**

In the matter between:

**JANE SIBONGILE DLAMINI**

**APPLICANT**

And

**THE GOVERNMENT OF SWAZILAND.**

**1<sup>ST</sup> RESPONDENT**

**SWAZILAND NATIONAL PROVIDENT FUND**

**2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE**

**: JUDGE**

**DAN MANGO**

**: MEMBER**

**GILBERT NDZINISA**

**: MEMBER**

**FOR APPLICANT**

**: MR. D. MANICA**

**FOR 1 & 3 RESPONDENTS**

**: MR. S. HLOPHE**

**FOR 2<sup>ND</sup> RESPONDENT**

**NO APPEARANCE**

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**JUDGEMENT 24.03.11**

[1] This is an application that was brought to Court under a certificate of urgency by the Applicant on 11.10.10. On 13.10.10 an interim consent order was granted by the Court. Thereafter the matter endured numerous postponements for five months as arguments were finally heard in Court on 10.03.11.

[2] The Applicant is seeking an order in the following terms:

*“1. Condoning the non-compliance with the time limits forms and provisions of services as are required in terms of the rules of this Honourable Court and non-compliance with the Industrial Relations Act 2000 and that this matter be heard as one of urgency.*

*2. Interdicting and/or restraining 1<sup>st</sup> and 2<sup>nd</sup> Respondents from effecting the purported compulsory retirement from Public Service intended for the 4<sup>th</sup> December, 2010 forthwith.*

*3. Declaring the aforesaid purported retirement null and void ab initio and of no force or effect same having being invoked prematurely; Applicant having not attained retirement age.*

*4. A rule nisi in terms of prayers 1 and 2 above-mentioned do hereby issue to operate with immediate effect forthwith pending finalization of this matter.*

*5. Costs of suit.*

6. *Further and/or alternative relief.*”

- [3] The 1<sup>st</sup> Respondent duly filed its Answering Affidavit in opposition, and thereafter the Applicant filed her Replying Affidavit. In its Answering Affidavit the 1<sup>st</sup> Respondent raised a point of law for *non-joinder* of the Public Service Pension Fund. This point of law was however abandoned by the 1<sup>st</sup> Respondent.
- [4] The evidence before the Court revealed that the Applicant is an adult female Civil Servant. She was employed by the 1<sup>st</sup> Respondent on 17<sup>th</sup> February 1977 as a Cleaner in the Ministry of Public Service and Information, Mbabane. She is still in the service of the said Ministry up to this day. She said when she was employed in 1977 she furnished her employer with all essential personal details and documents and was also made to fill her personal information in Form TF188 A94 which Form is commonly used by the 1<sup>st</sup> Respondent when recruiting its employees. This was denied by the 1<sup>st</sup> Respondent. In its Answering Affidavit the 1<sup>st</sup> Respondent stated that Civil Servants in the rank of Cleaners do not fill this Form, but are only required to furnish personal details on a Form specifically designed for the different needs in the different Ministries. The 1<sup>st</sup> Respondent averred further that such a Form was not in the personal file of the Applicant.

[5] During 1985 the Applicant was promoted from Cleaner to the position of Messenger. She said in 2008 she heard about the employer's intention of retiring Civil Servants who would be turning sixty years including herself. The Applicant then took up the matter and approached the Under Secretary in the Ministry to protest that her retirement was not yet due. The Under Secretary duly took up the complaint by the Applicant and started to investigate the matter. The Under Secretary as part of his investigations also wrote to the Ministry's Legal Advisor. The Memorandum that the Under Secretary wrote is annexed and is marked "JSD1". The Applicant on making follow ups on the matter, she was assured that the matter was being resolved. On 06<sup>th</sup> July 2010 the Applicant submitted an affidavit verifying her date of birth together with a certified copy of her birth certificate which indicated that she was born on 04<sup>th</sup> December 1953. On 27<sup>th</sup> September 2010 the Applicant was served with a letter advising her of her date of retirement on 04<sup>th</sup> December 2010 on the basis that she had reached sixty years as the information that the 1<sup>st</sup> Respondent had was that she was born on 04<sup>th</sup> December 1950. The Applicant thereafter instituted the present proceedings to ask the Court to stop the retirement process as she had not yet reached sixty years having been born on 04<sup>th</sup> December, 1953.

[6] The 1<sup>st</sup> Respondent's case before the Court is that the Applicant was due to retire on 04 December 2010 because she was born on 04<sup>th</sup> December 1950. Mr. Hlophe argued that the

1<sup>st</sup> Respondent got the information that the Applicant was born on 04<sup>th</sup> December 1950 from various sources within the 1<sup>st</sup> Respondent's Departments. He said from the Income Tax Department they gathered that the Applicant gave her date of birth as being 01<sup>st</sup> December 1950. He said from the Government payroll it appears that she gave her date of birth as being 04<sup>th</sup> December 1950. Mr. Hlophe further argued that in terms of **General Order A.635**, Government will accept as the true date of birth of an officer, the date that the officer wrote on first appointment.

[7] **General Order A. 635** appears as follows:-

***“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 officer 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 accept such a certificate when determining his/her retirement.”***

[8] This General Order is clear and unambiguous that for the purposes of determining an officer's retirement age, the date of birth that the Government will consider is the one given by the officer on first appointment.

The documents relied upon by the 1<sup>st</sup> Respondent as showing the date of birth of the Applicant being 01<sup>st</sup> or 04<sup>th</sup> December 1950, do not emanate from the Department/Ministry under which the Applicant was first appointed. They emanate from another Department under which the Applicant was not appointed to work in. The first appointment of the Applicant was with the Ministry of Public Service and Information and not with the Commissioner of Taxes.

Secondly, the Memorandum to which these documents are attached was written by a certain M.M. Lukhele who signed as the Acting Commissioner of Taxes. In this Memorandum Lukhele wrote that;

*“INFORMATION: Date of Birth of Sibongile Jane Dlamini  
Employment No. 3133570.*

*I refer to your enquiry concerning the above matter.*

*Please be informed that according to our records the date of birth of one Sibongile Jane Dlamini is 1 December 1950 and she registered for the Graded Tax Number on 1 July 1985. Annexed hereto are extracts from our Computer Master Files.”*

The writer of the Memorandum stated that Sibongile Jane Dlamini registered for the Graded Tax Number on 1 July 1985. The Applicant was however first appointed by the 1st Respondent as a Cleaner on 17<sup>th</sup> February 1977. The dates of 1<sup>st</sup> and 04<sup>th</sup> December 1950 referred to by M.M. Lukhele were given not on the first appointment of the officer in 1977 but in 1985, eight years after her first appointment. The 1<sup>st</sup> Respondent therefore cannot, in light of the provisions of **General Order A. 635**, purport to retire the Applicant based on the information from the Commissioner of Taxes Department because;

- 8.1 *The Applicant's first appointment was not with the Commissioner of Taxes Department, but was with the Public Service and Information. The acceptable date therefore will be the one that she gave when she was first appointed in this Ministry.*
  - 8.2 *The dates that appear on the computer extracts from the Commissioner of Taxes Department were furnished to that Department on 01<sup>st</sup> July 1985, eight years later after the Applicant's first appointment on 17<sup>th</sup> February 1977 in the Ministry of Public Service and Information.*
- [9] The Applicant stated both in the Founding Affidavit and the Replying Affidavit that she did fill Form TF 188 A94 wherein she wrote her birth of date as being 04<sup>th</sup> December 1953. She

stated that as late as 27<sup>th</sup> September 2010, her personal file did have this Form which had her personal details and that the 1<sup>st</sup> Respondent was deliberately concealing the information with a view to jeopardize her employment. It is indeed telling that the 1<sup>st</sup> Respondent failed to produce the personal file of the Applicant in Court. The Applicant annexed “JSD2” being a minute that was written by the Under Secretary, Jabulani S. Mamba, directed to the Legal Advisor. Mr. Hlophe objected to the production of this document on the basis that it was not clear how it came to the hands of the Applicant as it was not copied to her. It was clear to the Court why Mr. Hlophe strongly objected to this document. In this document the Under Secretary acknowledged that he had uncovered from the Applicant’s personal file information that the Applicant was born on 04<sup>th</sup> December 1953. This date corresponds with the date that appears on the Applicant’s certified copy of her birth certificate, Annexure “JSD1”.

[10] The Court will admit in evidence the document objected to by Mr. Hlophe as proof that the Under Secretary during his investigations did find information in the personal file of the Applicant indicating her date of birth because;

*10.1 From the evidence before the court, it is not difficult to see how this document may have come to the hands of the Applicant. The Applicant was the one who was dealing with the Under Secretary when she complained to him*



*that the employer was purporting to retire her based on wrong information regarding her date of birth. The Applicant stated that she would from time to time go to the Under Secretary to enquire about the progress of the matter.*

*10.2 This court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings. It may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice. (See: **Section 11(1) of the Industrial Relations Act, 2000** as amended.)*

*10.3 There was no evidence that any prejudice or miscarriage of justice could result if the document were admitted in Court.*

*10.4 There was no evidence or any suggestion that this document was obtained by unlawful means from the Ministry where she works.*

[11] There was also before the Court a certified copy of entries in the Register of Births, Annexure "JSD2". The authenticity of this document was not put in issue. On the face of it, it was properly issued and certified a true copy of the original. This document shows that the date of birth of the Applicant is 04<sup>th</sup> December 1953. This case is therefore clearly distinguishable

from the cases of **German Duze Lokotfwako vs The Principal Secretary for the Ministry of Justice & 4 Others case No. 389/2003**, and that of **Simon Fuza Shongwe vs. Chief Fire Officer of the Fire and Emergency Services & 3 Others case No. 142/2009**. In those cases the Applicants gave the Court different dates of birth and were found to be not credible witnesses. In the present case the Applicant mentioned only one date of birth and her evidence was credible. In the Fuza Shongwe case, the Applicant presented questionable documents that raised more questions than answers, thus the Court rejected his evidence.

[12] In the present case the Court accepts the Applicant's evidence that she was born on 04<sup>th</sup> December 1953. It will therefore be inequitable to require her to retire before she reached her compulsory retirement age of sixty years on 04<sup>th</sup> December 2013, unless she applies for voluntary retirement.

[13] Taking into account all the foregoing and also all the circumstances of this case the Court will enter judgement in favour of the Applicant in the following terms:-

- a) **The rule nisi issued on 13.10.10 is hereby confirmed.**
- b) **The purported compulsory retirement of the Applicant on 04<sup>th</sup> December 2010 is declared null and void.**

**c) The 1<sup>st</sup> Respondent is to pay the costs of suit.**

The members agree.

**NKOSINATHI NKONYANE**  
**JUDGE OF THE INDUSTRIAL COURT**