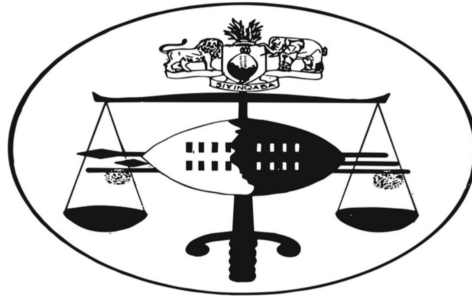

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

Case No: 6/2011

In the matter between

ELIAS VELAPHI DLAMINI	**Appellant**
and	
MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**First Respondent**
CHAIRMAN OF THE CIVIL SERVICE COMMISSION	**Second Respondent**
MINISTRY OF PUBLIC SERVICE AND INFORMATION	**Third Respondent**
PUBLIC SERVICE PENSION FUND	**Fourth Respondent**
THE ATTORNEY GENERAL	**Fifth Respondent**

Neutral citation: *Elias Velaphi Dlamini v Ministry of Justice & Constitutional Affairs* and Others (6/2011) [2012] SZICA 1 (22 March 2012)

Coram: RAMODIBEDI JP, ANNANDALE AJA, and MABUZA AJA

Heard: 7 MARCH 2012

Delivered: 22 MARCH 2012

Summary: **Labour law – Industrial relations - Compulsory retirement – The parties disputing the correct date of the appellant's retirement from the Civil Service – The Government General Order A 635 read with Order 9 (2) – The court a quo upholding the respondents' contention that the correct retirement date is to be calculated from the date of birth which the appellant furnished upon his first appointment – Whether an appeal lies to this Court on facts and not on a question of law only – Section 19 (1) of the Industrial Relations Act 2000 read with section 5 of the Industrial Relations (amendment) Act 2005 – Appeal dismissed with costs.**

THE COURT

[1] This appeal involves a determination of the correct date of the appellant's compulsory retirement from the Civil Service. The *court a quo* upheld the respondents' contention that the correct date is to be determined from the date of birth which the appellant furnished upon his first appointment, namely, 31 July 1950. That being so, the court held that the correct date of the appellant's compulsory retirement was 31 July 2010 and not 31 July 2014 as he now sought to convey. The appellant is aggrieved by that decision. Hence the present appeal.

[2] It is necessary to state in the forefront of this judgment that at the hearing of this matter this Court raised *mero motu* the question whether this appeal is

based on a point of law or whether it is purely based on facts. We are of the considered view that if the appeal is based on facts then it falls to be dismissed on that ground alone. In this regard section 19 (1) of the Industrial Relations Act 2000 read with section 5 of the Industrial Relations (Amendment) Act 2005 is decisive. It reads as follows:-

> " (1) *There shall be a right of appeal against a decision of the Industrial Court, or of an arbitrator appointed by the President of the Industrial Court under section 8 (8)* ***on a question of law to the Industrial Court of Appeal****."* *(Emphasis added.)*

[3] It is plain from the peremptory provisions of this section that an appeal from the Industrial Court to this Court is circumscribed. It only lies on a question of law. It does not lie on a question of facts. It need hardly be stressed that if the Legislature had intended the appeal to lie to this Court on facts it would have expressed itself in plain and clear language. On the contrary, the intention was clearly to limit disputes of fact to the Industrial Court. This was by design in order to ensure that disputes of fact do not delay finality in the resolution of labour disputes. It makes perfect sense, therefore, that the Industrial Court of Appeal should be confined to points of law only.

[4] As pointed out in paragraph [1] above the sole issue in this appeal is a determination of the correct date of the appellant's compulsory retirement.

This in turn involves a determination of his date of birth. Is it 31 July 1950 or is it 31 July 1954? There can be no doubt in our view that a determination of a person's date of birth is a question of fact to be decided on the evidence. In fairness to him, we did not understand Mr. Mthethwa for the appellant to argue a contrary proposition. It follows that the issue whether the appellant was born in 1950 or in 1954 is decidedly a question of fact and not law. Faced with this hurdle Mr. Mthethwa then argued that the court *a quo* came to a wrong conclusion on the facts. It was not suggested, however, nor could it be in the circumstances, that no reasonable court could have arrived at such a conclusion. In our view this is the only conceivable basis on which a point of law could arise. It is not necessary, however, to reach a concluded view on this point in this matter. As we shall endeavour to demonstrate shortly the court *a quo's* judgment on the facts cannot be faulted. The point, however, is that we are satisfied that this appeal is based on facts.

[5] Now, as is evident from section 19 (1) of the Industrial Relations Act 2000 read with section 5 of the Industrial Relations (Amendment) Act 2005 quoted in paragraph [2] above, no appeal lies to this Court on facts. This Court simply has no jurisdiction in a matter such as this. In this regard section 21 (1) of the Industrial Relations Act 2000 provides as follows:-

"21. (1) Subject to section 19 (1), the Industrial Court of Appeal shall have power to hear and determine any appeal from the Industrial Court."

The words "subject to" convey a clear meaning that section 19 (1) of the Industrial Relations Act 2000 read with section 5 of the Industrial Relations (Amendment) Act 2005 is dominant to section 21 (1). Put differently, section 21 (1) is subservient to section 19 (1). See, for example, S.V. Marwane 1982 (3) SA 717 (A).

[6] It follows from these considerations that the appeal falls to be dismissed on the ground that it raises a question of facts and not law. As will be recalled, the court *a quo* dismissed the appellant's case purely on facts. We proceed then to determine the correctness or otherwise of that decision.

[7] The facts in this matter are largely common cause. On 1 April 1975 the appellant was employed by the Civil Service Commission as a Clerical Officer in the Ministry of Public Works and Transport. He had admittedly signed an application form, annexure "EVD1" or "AG1", reflecting 31 July 1950 as his date of birth. It is not disputed that he "supplied" the information himself.

[8] The appellant's case both in the court below and in this Court is the following. During the year 1978 civil servants were requested by the Civil Service Board to provide their "exact" dates of birth. He says in paragraph 10 of his founding affidavit that this was necessitated by the fact that "most civil servants at that time were not [sure] of their exact dates of birth because there [were] no birth certificates." Following the request in question, the appellant says that he duly provided, as per annexure "EVD2" which is a driver's licence, his date of birth as 31 July 1954. He says that this was after "learning" from his father's younger brother, Hezekiel Dlamini, that he was actually born on that date. We observe at the outset that this allegation of the new date of birth is no more than hearsay. This is so because Hezekiel Dlamini has not deposed to an affidavit confirming 31 July 1954 as the appellant's date of birth. In fairness to him Mr. Mthethwa for the appellant very fairly and properly conceded this point in argument before this Court.

[9] Notwithstanding the foregoing, the appellant says that while working at the Ministry of Agriculture in 2003 the Principal Personnel Officer at the Ministry, one Joel Lukhele, told officers at the Ministry to submit their birth certificates "so that they may be placed in their personal files." He duly submitted his certificate as per annexure "EVD3" reflecting his date of birth as 31 July 1954. He says he did so using the affidavit of Hezekiel Dlamini.

We observe once again that no such affidavit has been attached to the record of proceedings in this matter.

[10] For the sake of completeness it is necessary to record that the appellant relies heavily on a document, annexure “EVD11”, entitled “Kingdom of Swaziland Government Systems Maintain Employee Details” dated 7 July 2011. It reflects the appellant’s date of birth as 31 July 1954 and not 31 July 1950 as the respondents maintain. It is clear, as it seems to us, that this document is a computer print-out. Evidently, the information contained in it was supplied by someone. As such it may not necessarily reflect the truth as to the correctness of the appellant’s date of birth without more. What is of paramount importance is the background preceding this document. It is to that aspect of the matter that we immediately turn our attention.

[11] On 26 February 2001, the Principal Secretary in the Ministry of Public Service and Information addressed a memorandum, annexure “AG4”, to all Principal Secretaries and Heads of Department informing them to request all Personnel Officers to update employees’ files. More importantly, this memorandum warned that birth certificates must bear “the same age as that which the officer filled in when he was first employed.” Because of its importance to a correct determination of this matter we take the liberty to reproduce the memorandum in question in full:-

"*MEMORANDUM*

From:	*Principal Secretary* *Public Service &* *Information*	*To: All Principal Secretaries* *Heads of Departments*
Date:	*26th February 2001*	
Our ref:	*HRMIS 1.7*	*Your Ref:*

We refer to the development of the Human Resource Management Information System which is going to substitute the manual handling of Personnel Information in the Civil Service. To be able to implement this system we will require intake of up to date data on each and every employee in the Civil Service.

The System will be beneficial to all of us in the sense that it will minimize the time taken in processing things like pension payout and will enable other Human Resources functions to be undertaken with minimal delays. It is in view of this that we request all Personnel Officers to update personnel files and should ensure that the copies of the following documentation are in the files of all personnel.

Certified copies of:-

1. *Birth Certificate (own and children)*
2. *Qualifications (University, College, O' Level, Form III, Drivers Licence etc)*
3. *Marriage Certificate, where applicable*

Please also note that the birth Certificate must bear the same age as that which the officer filled in when he was first employed. (Emphasis supplied.)

Grateful if this exercise could be done before 16th March 2001.

(signed)

B.S. MALINGA

FOR: PRINCIPAL SECRETARY".

[12] It is thus plainly evident that whoever fed the appellant's date of birth into the computer print-out, annexure "EVD11", erred by ignoring the memorandum in question. Based on the foregoing considerations the appellant's date of birth which should have been entered is 31 July 1950 and not 31 July 1954. Nor does the matter end there.

[13] It must be stressed that the phenomenon of people manipulating their dates of birth for their own alterior motives is not new in this country. See for example such cases as *German Duze Lokhothwayo v Principal Secretary, Ministry of Justice and 4 Others, Case No. 389/2003 (IC); Simon Fuza Shongwe v Chief Fire Officer of the Fire and Emergency Services and Others, Case No. 142/09 (IC).* Nor is the phenomenon unique to this jurisdiction. It seems that human nature being what it is, unscrupulous people will always take chances anywhere to gain unfair advantage in any given situation. It was precisely this mischief that prompted the

promulgation of the Government General Order A635 ("the General Order"). It reads 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 not accept such a certificate when determining his/her retirement."*

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 any 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. <u>If an officer considers that there are exceptional reasons</u>*

why a particular General Order should be waived or varied, <u>he shall place the relevant facts in writing</u>, through the appropriate channels <u>before the Principal Secretary, Ministry of Public Service and Information for consideration and decision</u>." (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.

[16] In our view, probabilities are overwhelming in the circumstances outlined above that the date of 31 July 1950 which the appellant supplied on 16 May 1975 in his application form for his first employment, namely annexure "EVD1" or "AG1", was correct. This is so because he stated in item 6 of the form in question that his age was 25 years. Now, a simple calculation will show that 1975 – 25 = 1950.

[17] Similarly, in a letter dated 9 November 1988 which he addressed to the Principal Secretary, Ministry of Labour and Public Service the appellant categorically stated, amongst other things:-

"*I am now 38 year[s] old*".

Once again a simple calculation will show that 1988 – 38 = 1950.

[18] What is equally of concern is that the appellant's date of birth was subsequently tampered with. For example in his "Personal Particulars of Employee", annexure "AG5" dated 1 June 1988, the year 1950 has been altered to read 1954 by superimposing figure "4" over the figure "0". Logic dictates that the alteration could only have been effected by someone who was pursuing the appellant's interests to postpone the latter's date of retirement.

[19] Faced with these difficulties, the main thrust of Mr. Mthethwa's argument in this Court was that Government accepted the document, annexure "EVD11", referred to in paragraph [10] above. He thus relied on waiver. In our view this submission is without merit in the circumstances of this case. As a matter of fundamental principle the onus of proving waiver burdens the party alleging it. *In casu* the onus is strictly on the appellant.

[20] It bears repeating what Innes CJ said, correctly so in our view, in Laws v Rutherfurd 1924 AD 261 at 263, namely:-

> *"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right decided to abandon it,*

whether expressly or by conduct plainly inconsistent with an intention to enforce it."

Notwithstanding the question of onus which burdened him, the appellant failed dismally to discharge such onus in the instant matter. Accordingly, the appellant's defence of waiver, which was not even pleaded, must fail. Furthermore, it is right to say that waiver is never presumed. It must be proved clearly. See, for example, Schierhout v Union Government 1926 AD 286 at 293.

[21] In the light of the foregoing considerations it is strictly not necessary to go further. The appeal is dismissed with costs.

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M.M. RAMODIBEDI
JUDGE PRESIDENT

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J.P. ANNANDALE
ACTING JUSTICE OF APPEAL

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Q.M. MABUZA
ACTING JUSTICE OF APPEAL

For Appellant : Mr. X. Mthethwa

For 1st, 2nd, 3rd and 5th Respondents: Mr. B. Tsabedze