



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 64/18

In the matter between:

CUTHBERT SIPHO T. MASEKO

Applicant

And

CIVIL SERVICE COMMISSION

1st Respondent

GOVERNMENT OF SWAZILAND

2nd Respondent

**THE MINISTRY OF LABOUR AND SOCIAL
SECURITY N.O**

3rd Respondent

THE MINISTRY OF PUBLIC SERVICES N.O

4th Respondent

ATTORNEY GENERAL NO

5th Respondent

Neutral citation: *Cuthbert Sipho T. Maseko v Civil Service Commission & Others (64/18)[2018] SZIC 20 (March 23, 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions: 15/03/18

Delivered judgement: 23/03/18

SUMMARY---Labour Law---Compulsory retirement---Correct date of employee's retirement from the Civil Service---General Order A.635---Applicability of the General Order---Rationale behind General Order A.635.

Held---The rationale behind General Order A.635 is to curb or prevent the manipulation of dates of birth for the postponing the retirement age. The applicant's evidence clearly unbelievable and therefore rejected---Applicant's application accordingly dismissed with costs.

JUDGEMENT

1. This application that was instituted by the Applicant against the Respondents on Notice of Motion under a certificate of urgency. The Applicant is seeking an order in the following terms;
 - “1. Dispensing with the usual forms, procedures and time limits relating to the Institution of proceedings and allowing this matter to be heard as a matter of Urgency.
 2. That a **rule nisi** be issued calling upon the Respondents' to show cause on a date to be appointed by the Honourable Court why an Order in the following terms should not be made final:

- 2.1. That the Principal Secretary of the 3rd Respondent does not have the power or authority to submit the Applicant to compulsory retirement.
 - 2.2 The 3rd Respondent be and is hereby interdicted from terminating the services of the Applicant on the basis of compulsory retirement from his position of Assistant Commissioner of Labour under the Ministry of Labour & Social Security with immediate effect in terms of the instrument from the Principal Secretary of the Ministry of Labour & Social Security 28th December 2017.
 - 2.3 Interdicting the Respondents from advertising or employing any person in the post of Assistant Labour Commissioner pending the outcome of these proceedings.
 - 2.4 That prayer 2.2 and 2.3 hereto operate with immediate and interim effect pending the outcome of these proceedings.
 3. Costs be awarded against the Respondents.”
2. The Applicant’s application is opposed. An answering affidavit was filed and deposed thereto by Evert Madlopha, who stated therein that he is the Principal Secretary of the 4th Respondent. The Applicant thereafter filed his replying affidavit to the Respondents’ answering affidavit.

3. When the matter appeared before the Court on 09th March 2018, a Rule nisi was granted temporarily interdicting the Respondents from subjecting the Applicant to compulsory retirement and from advertising his post pending the determination of the application by the Court.
4. The Applicant is a civil servant serving under the Ministry of Labour and Social Security and is holding the position of Assistant Commissioner of Labour.
5. On or about 26th February 2018, the Applicant received a letter dated 28th December 2017 (**Annexure M1** of the founding affidavit) informing him about his imminent retirement on 18th March 2018 on the basis that he (Applicant) would have attained the compulsory retirement age of (60) sixty years. The Applicant is disputing the retirement date, hence the present legal proceedings which were initiated on an urgent basis. The Applicant stated in his founding affidavit that he was born on 18th March 1963 and not on 18th March 1958 and that he is not, therefore, due for compulsory retirement on the said date.
6. In his heads of argument the Applicant stated that the questions that the Court has to answer are whether or not the Applicant was born in 1963 or in 1958; whether or not when he was first appointed he furnished to the Respondent the information that he was born in 1958; whether or not the documents that the Applicant was born in 1958 were signed by the Applicant and lastly whether or not there is a

dispute of fact about the correct date of birth which may necessitate that oral evidence be heard to resolve the dispute.

7. During the submissions it became apparent that the real dispute for the Court to determine is the correct date of birth of the Applicant, and that once the Court determines that issue, *cadit queastio*.
8. The present application is not a difficult one for the Court to determine because it is governed by the *General Orders*. The applicable *General Order* is *Order A.635* which provides 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. (CM ESC 41/5) when determining his/her retirement.”

In casu, the document that the Respondents rely upon as indicating the date of birth of the Applicant furnished on his first appointment is **Annexure “AG1”** of the answering affidavit. In terms of this document under item number 6 the date of birth of the Applicant was entered as being 18th March, 1958.

9. Confronted with this information, the Applicant in his replying affidavit simply denied knowledge of this document. The Applicant stated in paragraph 7 of the replying affidavit that;

“I state that I did not furnish to Respondents the alleged particulars as per “AG1” ;in fact I am seeing the said document for the first time and I did not append my signature or fill the contents thereof.”

The Applicant denied having authored or signed this document. In fact the Applicant denied having authored any of the documents produced by the Respondents which had the information that he was born on 18th March 1958. The Applicant however did not explain how this information might have come to the knowledge or possession of the Respondents.

10. Having carefully considered the pleadings and the evidence before the Court and also the submissions by both parties, the Court will reject the Applicant’s version because of the following reasons:

10.1 The Applicant did not deny that he joined the Civil Service in 1988, the same year that appears in Annexure AG1. The Applicant also failed to produce any other document, other than Annexure AG1, that he filled and signed when he joined the Civil Service. The Applicant had the opportunity to do this when he filed his replying affidavit but he failed to do so.

10.2 In Annexure AG1 the author thereof filled the tax identity number as being N0.4305-01-5093872. The Applicant did not deny that this is indeed his tax identity number or his employment number. This number also appears in the

Applicant's driver's license, Annexure "M5". If this document was not filled in by the Applicant, the Applicant failed to explain how the author could have obtained this information.

*10.3 Again, the Applicant denied knowledge of the contents of his Staff Performance Appraisal Report, Annexure "AG5". In this document the date of birth of the Applicant was entered as **18th March 1958**. Even on this document the employment number of the Applicant was correctly captured. The Applicant simply denied the contents of the Appraisal Report but he failed to explain how was it possible, as a matter of practice, that he was appraised in his absence and without his knowledge. The Applicant failed to explain how did he get the promotion without first having been appraised by his supervisor.*

10.4 The Applicant did not dispute his academic certificates being Annexure "AG2" and Annexure "AG3". "AG2", the Junior Certificate shows that he got a second class pass in November 1975. "AG3", The Form five certificate shows that he completed high school education in 1977. If the Applicant says that he was born in 1963, it means that he completed his high school education at the age of (14) fourteen years, which is highly unlikely. Whereas, if the Applicant was born in 1958 it would mean that he completed his high school at the age of (19) nineteen years, which is the normal completion age.

10.5 If the Applicant completed his Form Three education (Annexure “AG2”) in 1975, it means that he finished his primary school in 1972. If he finished primary school in 1972, it means that he started Grade 1 in 1966. If the Applicant started Grade 1 in 1966, it means that he was three years old at that time. As schools open in January of each year, it means the Applicant was in fact (2) two years and ten months old when he started Grade 1. This was clearly highly unlikely.

11. During the submissions in Court, the Applicant’s attorney had no answer when asked how was it possible for the Applicant to start his primary education at the age of *(2) two years and (10) ten months*. From the evidence before the Court, the Court has no hesitation in holding that the Applicant’s argument is an absurdity too gross to be insisted on. From the evidence before the Court, there seems to be a pattern that all documents that have the Applicant’s personal particulars which were issued before 1992 show the Applicant’s date of birth as 18th March 1958. Thereafter, all documents that have the particulars of the Applicant issued after 1992, show his birth date as 18th March 1963. It seems to the Court, from the evidence before it that the Applicant purposefully engaged on a mission to alter his birth date in 1992 when he obtained his driver’s licence. Annexure “M8” does not take the Applicant’s case any further as there is no indication on that document as to when was it issued and when was the information therein supplied. Further, that document has not been certified as a true copy of the original.

12. The Court dealing with a similar issue in the case of **German Duze Lokotfwako V The Principal Secretary for the Ministry of Justice & 4 Others, case number 389/2003 (IC), Dunseith P**, as he then was, held as follows at paragraph 6;

*“The General Order is clearly intended to prevent the manipulation of birth dates in order to advance or postpone an officer’s date of retirement. The parties in this matter are in agreement that, in view of **General Order A.635**, the Court is not required to determine the Applicant’s actual birth date. He is bound by the date he “wrote on first appointment.....”*

In paragraph 13 the Court went on to hold that;

“This is not a case where the Applicant is a victim of an error or a bureaucratic mix-up. He himself is the architect of the confusion surrounding his birth date. He represented to the Government in 1993 that he was born in 1940. He obtained a driver’s license on the representation that he was born in 1940. He obtained a birth certificate reflecting his date of birth as 5th November 1939. When it suited him, he rejected all these dates, claimed he was born in 1949 and obtained a revised birth certificate. This is the kind of abuse that General Order A.635 seeks to prevent.”

13. Similarly, in this case the Applicant is the architect of the confusion surrounding his birth date. To address such situations the employer put in place General Order A.635.

14. Further, in the case of **Elias Velaphi Dlamini V Ministry of Justice and Constitutional Affairs & 3 Others, case No.06/2011 (ICA)**, the Industrial Court of Appeal addressing a similar question, and after having referred to General Order A.635, stated the following in paragraph 13;

“.....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.”

15. The General Orders are not cast in stone. An aggrieved party may apply to the Principal Secretary, Ministry of Public Service and Information to waive or vary any particular General Order. This is in terms of General Order 9.(2) which 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. If an officer considers that there are exceptional reasons why a particular General Order shall be waived or varied he shall place the relevant facts in writing, through the appropriate channels before the Principal Secretary, Ministry of Public Service and Information for consideration and decision.”

In casu, the Applicant did not write to the Principal Secretary, instead he directed his letter to the Executive Secretary of the Civil Service Commission. (See: Annexure “M3”).

16. However, *in casu*, even if the Applicant had properly directed the letter to the Principal Secretary, and the evidence before the Court placed before him, it is highly unlikely that the Principal Secretary would have waived General Order A.635.
17. Taking into account all the evidence before the Court and also all the foregoing observations and circumstances of this case, the Court comes to the conclusion that the Applicant's case has no merit in law and there are no equity considerations that may be taken into account to persuade the Court to weigh the probabilities in his favour. The Court will accordingly make the following order;
- a) The application is dismissed with costs.*
18. The members agree

A handwritten signature in black ink, consisting of a circular mark on the left and a series of connected loops and lines extending to the right.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : *Ms Q.N. Dlamini*
(Attorney at Musa M. Sibandze Attorneys)

For Respondents : *Mr. B. Nkambule*
(Attorney from the Attorney General's Office)