

SOUTH AFRICA / JUDGMENT

Msani v Mpact Operations (Pty) Ltd (JS 903/21) [2023] ZALCJHB 11 (6 February 2023) [2023] ZALCJHB 11

COURT

Labour Court Johannesburg

BEFORE

S Nindi

CASE / FILE NUMBER

JS 903/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

case

no: JS 903/21

In

the matter between:

SIBUSISO
MSANI
Applicant
and
MPACT
OPERATIONS (PTY)
LTD
Respondent

Heard:

06 July 2022

Delivered:

06 February 2023

Summary:

Special plea – alleged unfair discrimination in terms of Employment Equity Act, 1998 – when the conduct complained of is continuing and repetitive there is no need to apply for condonation.

JUDGMENT

NINDI AJ

Introduction

- [1] Before me is a special plea arising from unfair discrimination action instituted by the applicant in terms of section 10 of the Employment Equity Act[1] (EEA). The applicant is alleging that the respondent unfairly discriminated against him on the basis of his race in contravention of section 6(1) of the EEA.
- [2] In its response, the respondent raised a special plea contending that the applicant has referred his dispute outside of the six months' time period prescribed by section 10(2) of the EEA.

Background

- [3] For an appropriate appreciation of this matter, it is prudent that I briefly highlight its relevant factual background.
- [4] The applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on or about 3 August 2021. The matter was conciliated on 27 August 2021 whereafter the matter remained unresolved. The certificate of outcome indicates that condonation is not applicable and that the applicant should refer the matter to the Labour Court.
- [5] The applicant referred the dispute to this Court on or about 24 November 2021.
- [6] The applicant has been employed by the respondent since 2014. He commenced his employment as a Production Learner, then as a Lister. Since January 2017, the applicant has been employed as a Process Engineer in Training. The applicant alleges to have been appointed as a Process Engineer in Training for over four years.
- [7] The applicant further alleges that he was overlooked for three promotions:
- 7.1 He was appointed as a Process Engineer in training together with his colleague Antonie Brink (Antonie). However, within two years Antonie was promoted to the position of Process Engineer starting in January 2019.
- 7.2 In 2020, Hestie Brink, who had worked as a Process Engineer in Training from a failed division of the respondent, had been integrated as an Optimising Engineer (a role similar to Process Engineer) in 2020 when she joined the applicant's division.

7.3 In 2020, Karina Van Der Merwe was also appointed as a Process Engineer in Training. The respondent confirmed that Karina was promoted to being a Junior Process Engineer on 1 July 2021, eighteen

(18) months following her appointment with the respondent.

[8] The first complaint relating to Antonie Brink occurred in January 2019. The second complaint relates to Hestie Brink which occurred in 2020 and the last complaint relates to Karina van der Merwe which occurred on 1 July 2021.

[9] The respondent filed a response to the applicant's statement of case on or about 15 December 2021. Although the respondent's special plea contends that the conduct complained of occurred outside the six months' period and the applicant did not obtain condonation, the heads of argument concedes that the complaint relating to Karina van der Merwe falls within the prescribed six months' period.

[10] In the absence of the applicant having sought condonation for referring his dispute out of time, the respondent submits that this Court does not have jurisdiction to entertain the dispute.

Submissions

[11] The applicant did not oppose the special plea.

[12] The applicant contends in his statement of case that only after he referred an unfair discrimination matter to the CCMA did the respondent offer the post of Junior Process Engineer to him. This offer, the applicant alleges, is an indication that the respondent was aware of the fact that the applicant's years of service and experience are beyond the current position he holds, the position of a Process Engineer in Training.

[13] The respondent is adamant in its contention that condonation was imperative since the dispute was referred outside of the time bar

prescribed in terms of the section 10 (2) of the EEA.

[14] The respondent submitted that the applicant relies on single acts of alleged unfair discrimination and these acts of alleged unfair discrimination, in respect of Brink and Hestie, occurred in 2019 and 2020 respectively. Subsequent to the appointment of Brink and Hestie, the applicant was aggrieved, however, he accepted the explanations provided to him by the respondent and undertook to partake in development opportunities thus electing not to refer a dispute at the time.

[15] The respondent submitted that the applicant does not make out a case for continuous unfair discrimination. In this regard, reference was made to *SABC v CCMA and Others*,^[2] *Mngadi v Jenki No and Others*^[3] and the *Amalungelo Workers Union obo Mayisela and Others v CCMA*.^[4]

[16] With the referencing to the SABC matter, the respondent submitted that it was distinguishable from the current case. The basis of the SABC case constituted differential treatment in that a salary scale was adjusted for certain artisans and not for others, while all the concerned employees performed similar work and had similar qualifications. In casu, the applicant claims that he should have

been appointed into one of three specific positions.

[17] It is clear ex facie the pleadings that, even though the applicant mentioned the incidents that occurred in 2019 and 2020, he is also alleging that the impugned conduct and behaviour of the respondent is continuing and repetitive. The applicant asserts in paragraph 3.10 of his statement of case that, “the applicant is more experienced tha[n] the majority of the white employees who have been made Process Engineers yet he is still overlooked without any reasonable grounds. However, who have less experience than the Applicant are being appointed as Process

Engineers.”[5] [My underlining]

[18] In the case of *Moqhaka Local Municipality v The South African Legal Government Bargaining Council and*

Others,[6] the Court found that an application for condonation in an unfair labour practice dispute relating to demotion was not required.

Although the act of demotion was a single act, the consequences thereof, namely the depletion of the employee’s duties, were

continuous and therefore an application for condonation was not required.

[19] In the matter of *South African Police Service v Solidarity obo Conradie and others*,[7] the applicant (SAPS) entered into a collective agreement regarding a promotion process in respect of its members. In order to achieve

representivity, it promoted the most senior members in each race and gender category. Members who did not qualify for promotion lodged grievances, but SAPS objected that the grievances were lodged out of time. Acting on behalf of its members employed by SAPS, the first respondent (Solidarity) disagreed and referred a dispute to the CCMA. SAPS raised a jurisdictional point, contending that the CCMA lacked jurisdiction as the referral was made out of the six month time period stipulated in the EEA and no application for condonation had been brought. Solidarity's contention was that once it was accepted that discriminatory acts, within the employment context, can be once off and/or continuous in nature, any attempt to "silo" and "label" specific acts of discrimination to always be a once-off or always be of a continuous nature ought to be rejected. This view was supported by Mahosi J, who held that:[8]

“Such an approach, which in my view is correct, would unnecessarily restrict the established principle of discrimination being

a continuous and/or repetitive act in some instances. I therefore agree with the view that this Court ought not to determine

dispute only with reference to the date of non-promotion, but that regard should be had to all the relevant facts and circumstances

surrounding the matter...

This is clearly not an ordinary case of promotion or non-promotion. The dispute comprises of over 180 instances of alleged unfair discrimination in the context of non-promotions. Moreover, the decision not to promote Solidarity's members was informed by agreement 2/2011 which was reached between SAPS and recognised Unions, including Solidarity.”

[20] In casu, I take note of the respondent’s contention that the act of promotion or non-promotion is a single act. However, from the applicant’s statement of case, it is clear that he is alleging a number of discriminatory acts on the part of the respondent over a period of time. In my view, I support the Solidarity judgment that regard should be had to all the relevant facts and circumstances surrounding the matter, in this instance, the 2019 and 2020 incidences. Failure to promote has ongoing consequences for the employee’s welfare and in particular his remuneration. The consequence of the alleged discriminatory act is therefore continuous. In other words, when an employee is not promoted, the benefits that would have accrued to that employee had they been promoted, is not accruing to that employee, at least from the time the discriminatory act occurred.

[21] It is an act of discrimination which the applicant alleges has been repeated three times. I am, therefore, of the view that an application for condonation is not necessary because of the ongoing or repetitive nature of the alleged discrimination.

[22] Flowing from the above, I therefore determine that the alleged incidents of discrimination of 2019, 2020 and 2021, as outlined above, are all crucial facts that the court must consider when the merits of the matter are to be determined before issuing judgment.

Conclusion

[23] It follows that this Court has jurisdiction to adjudicate the matter in terms of section 10(6)(a) of the EEA. As such, the respondent’s special plea must fail.

[24] In the premise the following order is made:

Order

1. The special plea is dismissed.
2. There is no order as to costs.

S. Nindi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: No appearance

For the Respondent: Mr Michael Balie

Instructed by: Norton Rose Fulbright South Africa Inc

[1] Act 55 of 1998, as amended.

[2]

(2010) 31 ILJ 592 (LAC).

[3]

(2021) 42 ILJ 768 (LAC).

[4]

(2022) 43 ILJ 600 (LAC).

[5] See: Pleadings bundle, page 6.

[6]

[2013] ZALCJHB 218.

[7]

(2019) 40 ILJ 1849 (LC).

[8] Ibid at para 40 and 41.

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