

**IN THE LABOUR COURT OF SOUTH AFRICA
PORT ELIZABETH**

CASE NO. P402/10

In the matter between:

NKOSINATHI JOHNSON MBOLO

Applicant

and

MAGWA ENTERPRISE TEA (PTY) LTD

Respondent

JUDGMENT

LALLIE AJ

Introduction:

[1] The applicant seeks an order declaring the respondent's refusal to increase his salary during the 2009 general salary increment as unfair discrimination.

Background facts:

[2] The applicant started working for the respondent's predecessor as a general worker in 1989. In 1992 he was promoted to the position of a boiler

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attendant. In 1997 he became a liaison officer and was remunerated as an employee on grade C-3. When the role of liaison officer was done away with owing to the introduction of a human resources department, the applicant was redeployed to the boiler room in May 2002. His terms and conditions of employment including his salary were not affected. In a letter dated 18 December 2002 the applicant was appointed as a withering assistant.

[3] It is common cause that ownership of the Magwa Tea business changed from time to time. When the business was taken over by the respondent from

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Mgwa Tea (Pty) Ltd, the applicant was one of the employees the respondent inherited. He was already remunerated as an employee on grade 3-C.

[4] In August 2009 the respondent gave its employees including those on grade C-3 a general salary increment. The applicant did not receive the salary increment and he lodged a grievance. The grounds for his grievance were that the respondent's refusal to extend the salary increment to him was unfair treatment, discrimination and an unfair labour practice. The respondent reacted to the grievance by telling the applicant that the reason for its refusal to extend

the

increment to him was that he was earning double the remuneration of other boiler assistants as a result of having been incorrectly graded by the respondent's predecessor. The respondent further informed the applicant that its policy was equal pay for equal work.

[5] The applicant found the respondent's response unacceptable and referred an unfair discrimination dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA). On 20 November 2009 the CCMA issued a certificate of the non-resolution of the dispute. The applicant launched this application which

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contained his condonation application on 12 July 2010. The respondent opposed both the main and condonation applications.

Condonation of the late filing of the this application

[6] No time limit has been set by the Employment Equity Act 55 of 1998 (the EEA) within which disputes based on discrimination should be referred to the Labour Court. However in *NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC) it was decided that the EEA

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incorporates section 136 (1) of the Labour Relations Act 66 of 1995 (the LRA) by reference. Disputes should therefore be referred to the Labour Court within 90 days from the date on which a certificate for the dispute to be referred to arbitration is issued.

[7] The applicant filed his application more than 4 months late. In determining whether the applicant has made out a proper case for condonation I have considered that counsel for the applicant sought to rely on *Silber v Ozen Wholesalers* 1954 (2) SA 345 (A) where it was decided that a party seeking

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condonation had at least to furnish an explanation for its default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives.

[8] The explanation furnished by the applicant is that he resides and works away from major cities where he could get legal assistance and advice. When he could not find the appropriate legal assistance in his home town he had to travel to Mthatha where he found and consulted with his attorneys of record during the first week of February 2010. After the consultation it became difficult for him to

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attend a follow up consultation owing to distance and financial constraints. He further explained that from the first week of March the respondent's employees embarked on a strike which affected his ability to travel to Mthatha as the respondent invoked the no work no pay policy.

[9] The applicant's explanation shows that when he consulted with his attorneys in February 2010 the 90 day period in which he should have filed his papers at the Labour Court was about to expire. The strike started after the 90 day period had elapsed. The applicant knew or should reasonably have known

November 2009 when he received the certificate of the non-resolution of his dispute that he would need money for legal fees if he wanted to pursue the dispute at the Labour Court. At the end of February 2009 the applicant received his full grade C-3 employee remuneration. He gave no reason for not affording to travel to Mthatha and to pay legal fees from 20 November 2009 to the end of February 2010.

[10] According to the explanation the applicant furnished the strike by employees of the respondent started during the first week of March 2010. He

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does not disclose when it ended. He consequently did not disclose when his financial problems came to an end. The applicant gave no explanation for the delay from the second week of March to 12 July 2010. He effectively gave no explanation for almost the entire period of the delay.

[11] The applicant's explanation that the delay in referring this matter to the Labour Court was due to financial difficulties is inadequate and unacceptable. It is insufficient and fails to enable me to understand how it really came about. I therefore conclude that the applicant had no valid reason for referring his case

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late. The Labour Appeal Court has expressed the importance of the explanation for the delay by finding in a numbers of cases that where the explanation for the delay is unacceptable the prospects of success become irrelevant. See *NUM & others v Western Holdings Gold Mine* (1994) ILJ 610 (LAC) and *Mgobhozi v Naidoo NO & others* [2006] 3 BLLR 242 (LAC).

[12] Arguing for the grant of the condonation application, counsel for the applicant relied on *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD) where it was stated that factors to be consider in deciding condonation

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applications include the degree of lateness, explanation thereof, prospects of success and importance of the case. An objective conspectus of all these factors was found to be necessary in making the determination. The degree of lateness is about 4 months. I have already found that the explanation for the lateness was unacceptable. The applicant's founding affidavit is silent on his prospects of success and the importance of the case. Even on this test the application for condonation cannot succeed.

[13] I accordingly grant the following order:

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- a) The application for condonation of the late filing of this application is dismissed with costs.
- (b) The main application is dismissed with costs.

LALLIE A J

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Date of hearing : 2 March 2011

Date of judgment : 18 April 2011.

Appearances:

For the Applicant : Adv Luzipo

Instructed by : Zolani Gwama Attorneys

For the Respondent : Adv Wade S.C.

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Instructed by : Chris Baker & Associates

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