

NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO D1060/2000

DATE 2001/12/07

In the matter between:

MJABULISENI JUSTICE NDLOVU

Applicant

and

MONDI KRAFT,
A DIVISION OF MONDI LTD

Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MR JUSTICE LANDMAN
ON 6 DECEMBER 2001

ON BEHALF OF APPLICANT

MR M J MATHENJWA

ON BEHALF OF RESPONDENT

MR A I J CHADWICK

J U D G M E N T**LANDMAN J**

1] Mr M J Ndlovu, the applicant in this matter, was employed by Mondi Kraft, a division of Mondi Limited, on 17 January 1985 as an assistant evaporator operator at the Mondi Plant Works. On 28 February 1986 he was appointed to the post of clerk: printing and photo-copying. Mr Ndlovu continued in his employment since his appointment to the printing and photo-copying division until 15 March 2000 when he was informed by letter that his position of training administration clerk, which was the new name for his position, had been declared redundant.

2] He says, in his pleadings, that Mondi did not offer him an alternative job, although Mondi is a big company with many job opportunities. He says further that after he had been dismissed, Mondi advertised other posts. His pleadings also make reference to the tender or outsourcing of the printing division to Nashua. Mr Ndlovu says that he was not offered the opportunity of acquiring that contract before it was awarded to Nashua. He also says that while he was in the employment of Mondi he obtained a Code 17 driver's licence but he was not considered for any alternative position. Presumably one which required the incumbent to be the holder of a Code 14 driver's licence. His Statement of Claim also alleges:

"When the Mondi Group training unit of the respondent was restructured all white employees, including temporal (sic) employees were offered alternative posts. Only black employees were not given alternative job. The applicant was discriminated and dismissed because of his race."

Mr Ndlovu also alleges that Mondi did not consult with him with the view

of avoiding retrenchment or finding an alternative job but it merely consulted in order to satisfy the required procedure. He, therefore, submits that he has been unfairly dismissed and he seeks to be reinstated in his position or in alternative work with Mondi. It was common cause that if reinstatement was not to be granted to him, that he wished to be compensated on the basis that his dismissal was automatically unfair and to receive an amount equivalent to 24 times his monthly remuneration at the date of his dismissal.

3] Mondi has defended this application. The parties have exchanged questionnaires and have reached agreement on facts that are common cause. These facts are set out in an annexure to the papers. I will deal very shortly with these common cause facts as they present the background against which this case must be decided.

4] Mr Ndlovu was based in the Mondi Kraft Training Centre and his duties consisted primarily of operating the photo-copying machine and delivering and collecting the photo-copied documents. The photo-copying instructions could be given by the various trainers in the centre directly to the printer, thereby bypassing an operator such as Mr Ndlovu. When it was known that his position would be made redundant on the basis of technological grounds, various consultation meetings took place. These took place, *inter alia*, between his head, Mr Slabbert, Mr Ndlovu and his representative at the time, Mr Hendrik Mavula. These took place on 29 April, 10 May, 20 May, 20 June and 8 July 1999. One of the topics discussed during those consultations related to a search for alternative

employment for Mr Ndlovu.

5] During this period Mondi, being aware of the literary standard of Mr Ndlovu, offered him the opportunity of taking part in an ABET literary course which would have improved his capabilities and have fitted him for higher paid employment.

6] During October 1999 Mr Ndlovu enlisted the support of another representative. This was Mr Dumisani Dladla, the General Secretary of UWUSA. On 28 October Mr Dladla wrote to Mondi. In his letter he alleged that Mondi's treatment of Mr Ndlovu was tantamount to unfair discrimination. This unfair discrimination was said to be on the basis of Mr Ndlovu's race, social origin and colour. On 7 December Mr Ndlovu referred a dispute to the CCMA alleging that an unfair labour practice had been committed against him on these grounds.

7] The effect of this referral was that the consultative process was put on hold pending the outcome of the conciliation hearing. Nothing came of that referral and the consultation process resumed.

8] During February 2000 Mr Ndlovu and all the other employees in the Kraft Training Centre attended a meeting. The purpose of the meeting was to discuss a proposed merger between the Mondi Kraft Training Centre and the Mondi Group Training Unit. The merger was due to take place on 1 March 2000. It became apparent, as a result of this meeting, that the employment of some eight persons was in jeopardy, including that of Mr

Ndlovu, as well as that of Mr Adolfus Mkhize who occupied the position of a training clerk in the Mondi Group Training Unit. He did the same work as Mr Ndlovu. Consultations continued and Mondi carried on the search of alternative employment for Mr Ndlovu. It is also common cause that in order to expedite this process Mr Ndlovu undertook to provide Mondi with his CV.

9] Correspondence was exchanged between Mondi and Mr Dladla. This correspondence related to the redundancy of Mr Ndlovu's post as well as the alleged racial discriminatory treatment of Mr Ndlovu.

10] On 3 April 2000 Mr Ndlovu referred a further dispute to the CCMA alleging that there had been a unilateral change in terms of conditions of employment. Again nothing came of this complaint. Further meetings were held. For instance on that day, 3 April, between Mr Slabbert, Mr van der Merwe, Mr Ndlovu and his representative, Mr Dladla.

11] This was followed up by a final meeting on 19 April, a result of that meeting Mr Dladla addressed a letter to Mondi, which essentially confirmed that the process had come to an end. Although Mr Dladla wished to seal it in writing, the impression created is that the parties had agreed that the end of the road had been reached.

12] Thereafter Mr Ndlovu was dismissed. He was dissatisfied with this action and he referred a further dispute to the CCMA which has resulted in this trial.

- 13] During the course of the trial, which commenced on 3 December, *viva voce* evidence was led by Mr van der Merwe who was the Human Resources Training Division Manager, Mr Slabbert who was the Manpower Manager, as well as evidence by Mr van Heerden, Mr Nagel, Mr Achmed and Mr Zumer[?]. These witnesses attested on behalf of Mondi. I found their testimony to be credible and acceptable. Mr Ndlovu gave evidence as well as Mr Mavula and Mr Dladla.
- 14] Mr Mavula impressed me as an honest witness and a man of integrity. I can accept the results of his testimony.
- 15] I have some difficulty with the evidence given by Mr Ndlovu and that of Mr Dladla in so far as it is apparent that there is a degree of contradiction between their evidence. It would appear that the cause of some of the contradictions relate in the factual information which Mr Ndlovu supplied to Mr Dladla. The result is that I must proceed with caution when I deal with Mr Ndlovu's evidence. To the extent that there is a conflict between his evidence and that of the other witnesses, I am constrained to prefer their evidence.
- 16] Two major issues arise for decision. The first is whether the dismissal of Mr Ndlovu was automatically unfair, i.e. was he dismissed on the grounds of race or for some other arbitrary ground? Related to this, in some slightly peripheral manner, is the question whether he was denied alternative employment on the grounds of his race. The second issue, if

the dismissal was not in account of racial discrimination, is it nevertheless a fair dismissal. This required Mondi to show that the dismissal was substantively and procedurally fair on the basis of Mondi's operational requirements.

17] Mr Ndlovu's post became at least partly redundant in about March of 1999 when modern computer technology enabled the trainees, as I have alluded to above, to communicate directly with the printer. This enabled them, without leaving their desks, to instruct the printing machine to photo-copy training manuals and to have them bound. These activities constituted a significant part of Mr Ndlovu's work and it follows that there was less work for him to do once this technology had been implemented. Mondi informed him timeously about this and commenced the consultation process.

18] While this consultation process was in progress Mondi decided to merge its Group Training Unit and the Kraft Training Centre. The effect of this is that some eight posts became redundant, including those of Mr Ndlovu and Mr Mkhize. Mr Ndlovu and Mr Mkhize were the only persons who operated the photo-copying machines and other ancillary machines in the two centres. Mondi had decided to save money after the merger by outsourcing the photo-copying function to the well-known company, Nashua. The result was that these two positions of trainer-clerks, in effect photo-copiers, became redundant. No selection was required because it followed automatically that once their positions were identified as being redundant they, as the only two incumbents of those

posts, were either to be offered alternative employment or to be dismissed.

19] During the consultation process with Mr Ndlovu, the main focus centred on the attempt to secure alternative employment. I should also add that this was also the focus of the consultation with Mr Mkhize.

20] It is Mondi's case that the following initiatives were explored and investigated with a view to finding an alternative position for Mr Ndlovu within the Mondi group.

(a) A position of an assistant training clerk became available. The job description relating to this position has been included in the bundle. It is a position which requires a fair degree of literacy, competence and communication skills. Mondi consulted to see whether or not Mr Ndlovu would be able to do this position. A complaint was made during argument by Mr *Mathenjwa*, who represented Mr Ndlovu, that Mondi knew that he would not be able to do this job. There is some merit in that but that does not detract from the fact that the position was explored with him. Mr Ndlovu turned down the position on the advice of his representative at that time. He clearly appreciated that he would not be able to fulfill this particular position and there is no suggestion that he could have been able to do it.

(b) Mr Nagel, who was himself a target of the redundancy exercise, communicated with Mr John Park about a CRU vacancy. It was thought that possibly Mr Ndlovu could qualify for this position. However, Mr Park indicated that these are lower end vacancies and are normally filled by

ex POTS trainees, who have at least an N3 qualification and some relevant experience. The POTS trainees refer to mainly affirmative action candidates who have been recruited by Mondi, who have matric with maths and science and who are given a one year training course and who are thereafter offered more specific training for various posts which become available.

- (c) Other posts were advertised on the internal notice board. Mr Ndlovu knew about this. He kept an eye on them. He made some inquiries but there was nothing which was suitable.
- (d) Mr Ndlovu made a direct attempt to obtain an alternative position by speaking to the manager of the laboratory power and recovery section but no position was available for him.
- (e) Mondi agreed to search for internal positions for Mr Ndlovu for a period of three months following on his dismissal. A list of vacancies which arose for this period is set out on a schedule which is attached in Bundle A at page 90. A great deal of attention was centred around this document. It is Mondi's case that Mr Ndlovu was not suitable for any of them. This is because either he did not have the necessary academic literacy or technical skills or because he lacked the necessary physical strength and stamina to do the jobs required.

21] Two points need to be made in this regard. The first is that from 1998 Mondi had been encouraging Mr Ndlovu to improve his literary skills. His skills had been measured at about standard four or standard five. Mondi enrolled him in its ABET training programme. Unfortunately, Mr Ndlovu did not complete the course and he dropped out. He says that he did not

complete the course because Mondi made no provision for someone to relieve him while he was away on this course. The course entailed that he should be away from his place of employment, which was incidentally next to the centre where the ABET training was conducted, for four hours per week. I assume in his favour that he was to be away four hours per week. In fact, according to the ABET programme he should have spent two hours of his own time engaging in the process.

22] Mr Ndlovu alleges that there was a high degree of unpleasantness between him and his manager while he was engaged in the ABET training programme because the work piled up in his absence and his manager shouted at him. There is a dispute about this. Mondi denies that he was ever taken to task and points out that the training staff were able to operate the photo-copying machines. If there was an emergency that they would have done their own work. Moreover, the evidence shows that relief staff was provided to those employed and engaged on the other programme, where the nature of their work was such that it took place in the context of continuous operations. Clearly, in that case, it was necessary to provide for relieving staff. Photo-copying activities was not such an activity.

23] I need not decide the issue as to whether or not there was some difficulty about Mr Ndlovu leaving his employment. If there was, it appears to me to be a relatively minor matter. If he was committed to improving his literacy standards so that he could obtain a higher level post, which would also have been a better paid post, then he would have

managed to circumvent any such obstacle. The impression gained is that he was not motivated and he was not committed to improving himself.

24] The second point that I should refer to is that by reason of Mr Ndlovu's failure to improve his literacy skills, he found himself at a disadvantage when he had to compete for alternative employment. He was also disadvantaged as against the POTS trainees who were clearly able to compete for the alternative jobs.

25] I have heard evidence in regard to the jobs on the alternative list. Some of those which may have been suitable were pointed out. These include such jobs as that of a shunter, pulp tester, knife grinder, coal plant operator, chip tester and straws multi-skilled clerk. I, however, accept that none of these positions were suitable for Mr Ndlovu and that Mondi cannot be faulted for not placing him in one of those positions.

26] Mondi also sought to secure work, of an entrepreneurial nature for Mr Ndlovu by considering whether he would be suitable for taking up work which was put out to tender or which was to be outsourced. Mondi consulted separately with Mr Ndlovu and Mr Mkhize about the possibility of their taking over the Nashua photostatting tender or contract. Mr Mkhize was interested and certain calculations and explorations were done but nothing came of it. Mr Ndlovu, on the other hand, was not at all interested. In fact he denies that it was discussed with him. I do not accept that this was the case and I find that there were discussions with him regarding this possibility. It appears, however, that Mr Ndlovu was

not interested in anything other than employment and was not prepared to consider this possibility.

27] There was also the possibility that Mr Ndlovu could operate or take over the car washing tender. This was considered. There is a dispute about whether or not details were provided to him or to Mr Dladla. That of course is not the crux of the matter. The initiative was taken up. It was mooted. Mr Ndlovu knew about it, so did Mr Dladla. No evidence was given that they pursued it, that they asked for further particulars or that they made any attempt to secure the contract for Mr Ndlovu. There were also other initiatives, such as the mail delivery service and the operation of the Spaza shops. Nothing came of those initiatives but they were considered. This was part of a very concerted attempt on behalf of Mondi to try and avoid or alleviate the consequences of dismissal.

28] The result is that I come to the conclusion that Mondi consulted properly and fairly over an extended period of time, that it explored all the alternatives to dismissal, that it investigated ways to alleviate the consequences of the dismissal when it was inevitable. The dismissal was procedurally and substantively fair and that it took place for operational requirements.

29] However, this finding does not mean that discrimination was not possible, even though I do find that the dismissal was for operational requirements. Because it may have been that although the dismissal was for operational requirements it was coloured by racial discrimination. Mr

Ndlovu's case is that he was selected on the grounds of his race and so was Mr Mkhize. There is no merit in this because it is quite clear that the reason why Mr Ndlovu and Mr Mkhize were selected for retrenchment is because they were the only persons operating the photo-copying machines and that these position had become redundant for the various reasons that I have discussed above. Racial considerations did not enter into the decision to close down the job or to dismiss the two incumbents.

30] Mr Ndlovu believes that he was dismissed because he was a black person. He says this took place because the other employees were offered alternative employment and were accommodated within the Mondi Group. It is quite correct that the other employees, who are white persons, were so accommodated. Some of them were accommodated on the basis that they were prepared to accept demotions in status and, as Mr *Mathenjwa* conceded, they were all well qualified and skilled employees and had something to offer to the Group. They were fortunate in obtaining alternative positions, even at some degree of sacrifice which is involved when one accepts a demotion. There is no objective evidence at all that Mondi ignored the plight of Mr Ndlovu because he was black. Indeed, the evidence shows that Mondi went to great lengths to try and accommodate him.

31] Mr Dladla was at pains to make out some case that Mr Ndlovu had been assaulted and victimised on the basis of his race at the training centre. If this was correct, and one assumes that this information was conveyed to him by Mr Ndlovu, then it is remarkable that these complaints were

not reflected in the referral form which was submitted to the CCMA. Moreover, which makes this allegation of discrimination totally incredible, is that according to Mr Dladla the principal culprit in the racial victimisation of Mr Ndlovu was one Mr Cooper, who had left the training unit prior to 1993. It is, therefore, totally inconceivable that he would have had anything to do with the victimisation of Mr Ndlovu on racial grounds in the year 2000. This seems to be a spurious allegation which was raised for purposes which are not entirely clear. It may have had something to do with the *quantum* of relief which can be granted in the case of an automatically unfair dismissal, but there is no enough evidence to make that finding.

32] I find that Mr Ndlovu was not dismissed or in any other way subjected to unfair treatment on the basis of his race or for any other arbitrary grounds. I realise that it is quite probable that Mr Ndlovu will feel aggrieved that his complaint of racial discrimination has not been upheld, but there is no objective basis on which such a complaint can be entertained. There is no shred of evidence whatsoever which supports his case. So, although he may still nurture the belief that this was the cause of his misfortune, objectively this was not so and he is not entitled to any relief. In the result, the application must fail.

33] Mr *Chadwick*, who appeared on behalf of Mondi, submitted that costs should follow result. This seems to me to be an appropriate case because the facts in this case were known to the parties before the matter came to court. There was not even an arguable case. It is clear

that Mondi has been put to considerable time and effort to defend this particular matter. It is unfortunate that I should award costs because Mr Ndlovu is presumably still unemployed. But on the basis of the facts of this case it would be unfair towards Mondi if an order for costs were not to be made. Therefore, on the grounds of law and fairness, it is imperative that I award such costs.

34] In the premises, therefore, this application is dismissed with costs.

Signed and dated at BRAAMFONTEIN on this ____ Day of January 2002

A A Landman

Judge of the Labour Court of South Africa