

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

**CASE NO P299/99**

In the matter between:

**NONDUMISO MAHLANYANA**

Applicant

and

**CADBURY (PTY) LTD**

Respondent

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**JUDGMENT**

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**JAMMY AJ**

1. The Applicant in this matter, alleging that her failure to be appointed to fill a vacancy which existed within the Respondent company for a Factory Accountant was a consequence of racial discrimination against her, constituting an unfair labour practice as contemplated in Schedule 7, s2(1)(a) of the Labour Relations Act 1995, seeks relief from this Court which, in her Statement of Claim, she describes in the following terms:

- "1. To be appointed as factory accountant: alternatively**
- 2. The position of Factory Accountant to be declared null and void and re-advertised *de novo*."**

2. Implicit in the second of those two claims is the requirement that the appointment by the Respondent of the person or persons identified for the position in question, be set aside.

3. Notwithstanding this litigation, and as is apparent from the result which she seeks, the Applicant is still in the employ of the Respondent. She has worked there as a Cost Analyst since 1993, prior to which she was employed by another company in a position which she described in her curriculum vitae as "Credit Controller" but which she conceded in the course of her testimony could more accurately be defined as a Debtors' Clerk.
4. On or about 11 March 1999, she testified, she learned that at a production meeting, at which she was not personally present, an announcement had been made by Mr Mark Taunton, the Manufacturing Finance Controller in the company, that two of her white colleagues, Ms Jeanette McNaughton and Mr Winton Frost, had been appointed Factory Accountants in the context of a restructuring and development programme within the company which was then being put into effect and that a third appointment, of an "outsider" not yet in the employ of the company, was also to be made in a similar position. She was at no time informed or consulted directly by the Respondent's management on any aspect of these appointments or the restructuring necessitating them.
5. Aggrieved at these developments, the Applicant testified, she approached Mr Taunton with a request that he inform her of details of the restructuring and the appointments made pursuant thereto and eventually, in a meeting with him on 15 March 2000, he informed her that the restructuring had become necessary because of past losses, and the building of a new plant at Olympus. He confirmed that Mr Frost, and Ms McNaughton, the latter on probation, had been appointed as Factory Accountants and that a third appointment, of certain Mr Steve Volker, was to be made thereafter.
6. According to the company's recruitment policy however, everyone must be given an opportunity to apply for vacancies which occurred in the company and she, the Applicant stated, was given no such opportunity. She had been a Cost Analyst for seven years, six of them in practical work and a seventh in study, and considered herself qualified for the position in question. She accordingly

decided to lodge a formal grievance with the Managing Director of the company, which was copied to Mr Taunton on 16 March 1999. In the course of their earlier discussion Mr Taunton had informed her that she would be appointed as assistant to the three Factory Accountants. She was not qualified for those appointments because she needed further training, he had said, but she disputed this. She had, she stated in the grievance document, "been doing the job for six years and therefore I do not need training." When she requested that she be given a fair chance to fill the positions, Mr Taunton had responded that she must first prove herself as an assistant. She questioned Mr Taunton's assessment of her capabilities in the context that he was "new with the company and never gave himself a chance to know me better." Not once in the three months of his employment in that position, had he ever discussed her job or other related issues with her. The grievance concluded as follows:

**"Lastly, after telling Mark of this unfair treatment, he told me that I am open to apply for this position if I wished to. My questions are, why should I apply? Did my colleagues apply? Was the position advertised on the notice boards? Is restructuring not meaning that the people involved must be consulted? This never happened to me."**

7. No resolution of her grievance within the three-day period prescribed for that purpose in the company's grievance procedure resulted, the Applicant continued, and on 24 March 1999 she addressed a further memorandum to management, describing that state of affairs as a "residual unfair labour practice in terms of the Labour Relations Act" and recording that she felt "discriminated against on the basis of my race." She had no alternative, she stated, but to refer the dispute to the CCMA and this she formally did on 26 March, defining her complaint as an unfair labour practice arising from the fact, as therein described, that "my colleagues were appointed as Factory Accountants, whereas I was appointed as an Assistant Factory Accountant" and listing one of a number of special features as discrimination against her "on the basis of my race."

8. At least one aspect of the Applicant's grievance resulted in a response from the Respondent. Its management was advised by its Human Resources Department that in order for appointments to be made to the positions in question they had first to be advertised internally, with any applicants to be interviewed in the context of a selection process before final appointments were made.
9. On 19 March therefore, the vacant Factory Accountant posts which had been the subject of the earlier informal appointments were now formally advertised and displayed on internal notice boards. Applicants were invited to submit their curriculae vitae to the Human Resources Department by 26 March 1999. Applications were received from the Applicant, Winton Frost and Jeanette McNaughton.
10. Testifying for the Respondent, Mr Taunton explained that during the week following 26 March 1999 the three candidates for the position were interviewed both by himself and by Mr Andre Van Tonder, the Site General Manager. The structure of each interview and the questions presented in each case were identical and designed, he stated, to establish the applicants' suitability and experience level measured over six key areas, with a scoring table devised and applied to each.
11. Winton Frost, said Mr Taunton, was so clearly superior to the other two candidates that his appointment was, in effect, a foregone conclusion. I do not intend, in the context of this judgment, to review the detailed analysis by Mr Taunton of the comparative assessment of each of the key areas as between Ms McNaughton and the Applicant. Suffice it to say that in the end result, the former outscored the latter by a significant 52 points. The identification of the key indicators and the strengths and weaknesses of the respective candidates which they illustrated, Mr Taunton testified, was designed to, and did, remove any possible bias in the evaluation process which, in consequence, was scrupulously fair and objective in all respects.

12. In the result Frost and Ms McNaughton, together with an outside appointee, Volker, who possessed particular expertise in the specific field of computerised accounting, were appointed to fill the three vacancies. It is common cause that shortly thereafter Ms McNaughton resigned for what Mr Taunton described as personal reasons and that her position was re-advertised internally within the company with a request to applicants to submit their CV's by 10 June 1999. It is not disputed that the Applicant has not done so, notwithstanding that the vacant position is similar in all respects to that for which she initially unsuccessfully applied.
13. The Applicant contends that at no time has she ever been formally advised that her initial application in response to the March 1999 advertisement was unsuccessful. That is her explanation for not having applied for the current position. This evidence was disputed by Mr Taunton, who testified that shortly after the interviews had been conducted, he met individually with all three candidates and advised them of the result. He specifically informed the Applicant, he said, that her application was unsuccessful, specifically because of her lack of adequate experience - an advertised prerequisite for the position.
14. He proposed to her that she should be appointed an Assistant Factory Accountant, a position which he would specifically create for her in order to expose her to the relevant methodology and techniques with a view to gaining experience in factory accountancy. That position would have been senior to the position currently held by her with a higher remuneration package but the suggestion was rejected out of hand by the Applicant who informed him that she was not prepared to "run around" as a junior to the others. The discussion was a positive one, he said. He advised her not to be too hasty and to establish "foundations and stepping stones." She had seemed relaxed and they parted on good terms. His perception was that she accepted the position and that the issue had become "defused."
15. The Applicant's testimony that he developed a negative attitude towards her was without foundation, said Mr Taunton, and in fact, positive steps had been pursued to enable her to advance in her career with the company. The

opportunity to attend a management course had been presented to her but could not as yet be implemented as a consequence of operational pressures. That opportunity remains however and she will be sent on a course as soon as practicably possible.

16. There can be little doubt that notwithstanding the emotional groundswell of genuine commitment, following the advent of the new South African democratic era some six years ago, to the eradication of historical prejudices and discrimination based on race, residual pockets of racism remain manifestly in existence in this country. The bitterness and sensitivity of persons historically and, directly or indirectly, still subjected to those prejudices is therefore understandable. Where perceptions of their existence are shown to to have been justified, it is right and proper that, wherever and whenever they are established, mechanisms should exist to address them remedially, therapeutically, and where appropriate in the context of their social and legal unacceptability, even punitively.
17. Correlative to that concept however, is the necessity for responsible avoidance of a hypersensitive inclination or tendency in adverse circumstances, to classify as racial discrimination otherwise unimpeachable conduct by members of one race towards those of another where no rational basis for doing so exists.
18. The Applicant in this matter, presents as an educated and intelligent person, confident of her own ability and ambitious in her career objectives. Those are commendable qualities and her resentment and disappointment at the irresponsible and ill-considered manner in which the issue of the appointment of Factory Accountants within the company was initially addressed, was to my mind understandable. I am left in no doubt, from the evidence on that issue, that Mr Frost and Ms McNaughton were perceived by Mr Taunton and his fellow managers as the right persons for the jobs in question from the outset. The defects in the procedures then followed however, do not render that perception unjustified but this notwithstanding, those defects were acknowledged, the

informal appointments were withdrawn and proper procedures were put in place to regulate the position.

19. Mr Taunton, to my mind, was in that context a responsible and credible witness and I am left in no doubt that the basis upon which the subsequent advertisement, interview and selection process was conducted by him, was designed to identify the best candidates for the job, whether or not it proved to be an endorsement of his initial evaluation in that context.

19. His technical analysis of that process was an emphatic one and was not challenged on any rational grounds. That the Applicant, in the

absence of any pragmatic basis for doing so, has sought to base that challenge on purportedly racial criteria, whilst perhaps understandable in an emotional context, is in my view unjustified and unfounded on

the basis of the evidence before me. Apart from his allocation of scores to each key indicator in the process, she conceded, she was happy with Mr Taunton's interview. She could not comment on the fact that a person of colour had been offered the vacant position occasioned by Ms McNaughton's departure but had accepted a better offer. She could not dispute that Ms McNaughton's interview had been conducted on exactly the same basis as her own. All she could do was to persist in her contention that the issue had been prejudged and that Mr Taunton was inherently biased.

21. A further and final significant factor in this assessment, it seems to me, is that at no stage in the prior history of her relationship with the Respondent had the Applicant ever raised issues of racial discrimination or indicated any grievance in that context. She is, moreover, still in the Respondent's employ, thereby maintaining by her own volition, a relationship which, if her contention that she is the victim of racial discrimination is valid, one would expect that she would find untenable.

21. For all of these reasons I have concluded, on the *conspectus* of the evidence

before me, that the Applicant has failed to discharge her acknowledged onus to establish the discrimination which she alleges and that she has not been subjected to any practice on the part of the Respondent which, in the context of Schedule 7 to the Labour Relations Act 1995, can validly be determined as unfair. For those reasons the order that I make is that her application is dismissed. I was informed at the conclusion of closing argument by the legal representatives of the parties that neither of them sought an order for

costs against the other and accordingly no such order is made.

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**B M JAMMY**

**Acting Judge of the Labour Court**

21 July 2000

Representation:

For the Applicant: Mr N J Rhodé: Rhodé Attorneys

For the Respondent: Mr D Van der Merwe: White & Williams, Attorneys