IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Case no. C 487/98

In the matter between:

BHG (BRIAN) MACKAY	Applicant
AND	
ABSA GROUP	1ST Respondent
CORTAL DIRECT (PTY) LTD	2ND Respondent

JUDGMENT

MLAMBO J.

1. BRIAN Mackay was employed by the 1st Respondent ("ABSA") on 1 November 1994. On 30 September 1997 he was employment as Manger: Sales (Western Cape) by the Second Respondent ("Cortal"). Cortal was, at that stage, a fully owned subsidiary of Absa. On 30 March 1998 Mackay received details of a salary increase he was awarded. He was not satisfied with the increase and instituted a grievance, the details of which were:

1. unilateral award of three merit joints;

1. 2. salary increase of 2.5 % while the for job bands with a three merit point should

have been more than 9% .

3. insufficient resources to fulfill this task efficiently.

2. It is not in dispute that the grievance went through all the preliminary phases and was not resolved. The final stage of the grievance consisted of a meeting chaired by Mr Grobelaar ("Grobelaar"). Grobelaar resolved the grievance in Mackay's favour. Grobelaar's findings can be summarized as follows:

2.1 He found that the applicant's grievance with regard to the inadequacy of his salary increase was justified. He also found that it was common cause that management unilaterally allocated the applicant's performance point and increase in a way that contradicted the Respondent's procedure;

2.2 Grobelaar also found that the logistical support that management should reasonably have given to Mackay in order to enable him to perform adequately, was not given to him in time;

2.3 Grobelaar found that management's intransigent and even threatening attitude with regard to Mackay was unfair and unrealistic;

2.4 Grobelaar found that, even measured in terms of international standards and norms, it was impossible in the circumstances to expect of the Western Cape office of the Second Respondent to break even in the short existence of that office, let alone being profitable. Therefore the applicant's grievance was also well founded in this regard.

Grobelaar's recommendations were:

2.5 Mackay's salary should be approximately increased with effect from 1 April 1998;

2.6 Mackay should be placed in an alternative position within his field of experience, which post should preferably fall geographically within the metropolitan area of the Western Cape and which should maintain the applicant's terms and conditions of employment on post level M or P. In this regard, the applicant was to be given at least two qualifying alternative positions.

3. Mr Griessel ("Griessel") the Respondent's Chief Executive Officer wrote to Mackay on 20 April 1998 stating that:

3.1 Mackay would be awarded a salary increase of 9.33% retrospective to 1 April 1998;

3.2 Mackay and Absa would identify another suitable position within Absa in the Western cape area. Mackay was requested, in this regard, to contact Ms Laetitia Van Dyk ("Van Dyk") the Group General Manager: Absa Human Resources;

3.3 in the event that the attempts to find a suitable alternative position for Mackay within 3 months were not successful his dismissal in terms of the Absa retrenchment policy would be considered.

4. Thereafter Mackay telefaxed his curriculum vitae to Van Dyk, Hennie Geldenhys and to Johan Swanepoel. He was also interviewed by Kobie Marie Hamman ("Hamman"). It is common cause that Mackay was advised on 23 June 1998 by Haman in particular, that she could

find no alternative suitable position for him within Absa. On 15 July 1998 Mackay received a letter dated 20 July 1998 from Absa stating, inter alia, that:

"TERMINATION OF EMPLOYMENT

I refer to my letter dated 20 April 1998 and regret to advise that, although your CV was forwarded to other departments within ABSA Group, we were not successful in securing an alternative position for you within the Western Cape Metropolitan area, as per your preference, your services at Cortal Direct will, in consequence of our letter dated 20 April 1998, be terminated on 20 July 1998 due to operational requirements. Your last working day will be 31 August 1998. You are not required to report for duty, or perform any official duties during your notice period being August 1998."

5. A similar letter, also dated 20 July 1998 was sent to Mackay this time from Cortal. On 16 July 1998 Mackay sent a letter to Griessel, wherein he disputed the fairness of his dismissal and gave notice that he would contest it. He referred a dispute to the Commission for Conciliation mediation and Arbitration ("the Commission") on 12 August 1998 for conciliation. The dispute could not be resolved by the Commission and Mackay caused it to be referred to this court for adjudication.

6. Mackay's case is that:

6.1 his dismissal is automatically unfair in terms of section 187(1)(d) of the Act, as the reason for the dismissal is that he took action against his employers by exercising his rights in terms of the Respondent's grievance procedure and the act;

6.2 his dismissal was substantively unfair, as the reason for dismissal was not a fair reason based on the employer's operational requirements; and

6.3 that the dismissal was not effected in accordance with a fair procedure.

7. Section 187(1)(d) of the Labour relations Act no 66 of 1995 ("the Act") provides that:

"A dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to section 5 or, if the reason for the dismissal is that the employee took action, or indicated an intention to take action, against the employer by-
(i) exercising any right conferred by this Act; or
(ii participating in any proceedings in terms of this act."

8. If Mackay is to succeed on this ground the court must be satisfied that he exercised a right conferred by the Act by taking action against the Respondents or that he took action against the Respondents by participating in any proceedings in terms of the Act. In essence Mackay's claim is that he was dismissed simply because he initiated a grievance against the Respondents.

9. In prosecuting his grievance Mackay followed Absa's grievance procedure dated 1995. The introduction to the grievance procedure states that whenever an employee encounters a work related problem or feels that he has been unfairly treated he must not complain against any other person nor must he keep quiet. The grievance procedure further provides that any employee of Absa is entitled ("gerigtig") to bring his grievance to the attention of management. It also provides that an employee has the right, under no circumstances, not to be prejudiced or victimized as a result of the fact that he lodged a grievance.

10. Section 187(1)(d) can be said to relate in essence to rights of a collective nature. For instance section 5 confers rights on employees and persons seeking employment protection

against victimization for trade union activities. There are other rights conferred by the act such as the right to strike and participate in protest action. An employee who exercises any of these rights is protected by section 187(1)(d) from victimisation by the employer. Proceedings in terms of this act can relate to an employee taking part in conciliation and arbitration proceedings, taking part in the formation and establishment of a workplace forum, representation of a fellow employee in an internal disciplinary process etc. On the face of it all the above rights and processes have nothing to do with Mackay's claim that he exercised a right conferred by this act when he lodged his grievance. It can probably be said that when he lodged his grievance he had a right not to be unfairly dismissed as a result thereof.

11. On the other hand can one find that the lodging of a grievance by Mackay amount to taking action against the Respondents by participating in proceedings in terms of the Act. Nowhere does the Act make explicit provision protecting an employee who lodges a grievance against his employer in terms of an internally agreed document such s a grievance procedure or code. A provision of the act that mentions grievances specifically is section 115(3)(d) which provides:

"If asked, the Commission may provide employees, employers, registered trade unions, registered employers' organisations, federation of trade unions, federations of employers' organisations or councils with advice or training relating to the primary objects of this Act, including but not limited to preventing and resolving disputes and employees' grievances."

On this basis therefore it appears that, on the face of it, there is no explicit provision regarding the lodging of a grievance being regarded as a proceeding in terms of the Act.

12. Does it mean therefore that the absence of specific provisions regarding the lodging of a

grievance by an employee cannot be regarded as a right conferred by the Act or being regarded as a proceeding in terms of the Act. Was this specific conduct intended to be excluded from the ambit of the act. If this was the intention how are claims based on this situation to be dealt with? A quick glance at section 191 of the act reveals that he scenario in casu is not contemplated. This scenario is also not contemplated in item 2 of schedule 7 of the Act. Could this mean that the Commission and this court cannot arbitrate or adjudicate a dispute of this nature because the Act does not refer to it in specific terms?

13. Section 3 enjoins any person applying the Act to interpret its provisions:

1. to give effect to its primary objects;

2. in compliance with the Constitution; and

3. in compliance with the public international law and obligations of the Republic".

This means in short, that one should interpret the act in a manner that does not lead to absurd consequences.

14. One of the main objects of the Act is to give effect to and regulate the fundamental rights conferred by section 27 of the Interim Constitution of the Republic of South Africa which is now section 23 of the Constitution of the Republic of South Africa Act no. 108 of 1996, as well as to promote the effective resolution of disputes. (Section 1(a) and (d) of the Act). The Constitution is the supreme law of the land and in section 27 it entrenches the following rights: "Every person shall have the right to fair labour practices" (clause 23(1)).

15. The act is intended to regulate and govern the relationship between employee and employer. Hence therefore the act has no application between an employer and an independent contractor. In keeping with the act's main objects all disputes arising from the employer employee relationship must be effectively resolved. Such disputes are resolved through conciliation, arbitration and adjudication, and those of a collective nature through collective bargaining. In the light of the aforegoing it is clear that it could never have been intended that some disputes arising out of the employer employee relationship are incapable of resolution in terms of the Act. One of such disputes is Mackay's claim which he has chosen to base on section 187(1)(d) of the act.

16. This court is the chief custodian of the responsibilities of resolving labour disputes. It must comply with the Constitution in its quest to guarantee the right to fair labour practices. Clause 39 of the Constitution enjoins any court, forum or tribunal when interpreting the Bill of Rights, to promote the values that underline an open and democratic society based on human dignity, equality and freedom, and to consider international and foreign law. In the same clause the Constitution enjoins courts , when interpreting any legislation, to promote the spirit, and objects of the Bill of Rights.

17. This court must further comply with the public international law obligations of the Republic. The Republic is a signatory to the International Labour Organisation and must therefore comply with its conventions. Convention no 158 article 5 provides:

"The filing of a complaint against an employer is specifically mentioned. It is also noteworthy that the provisions of article 5 are mirrored in section 187(1)."

18. Therefore in keeping with the main object of the Act i.e. of resolving all labour disputes effectively, and with the constitutional guaranteed right to fair labour practices it must follow that a purposive interpretation of section 187(1) would mean that the exercise of a right conferred by a private agreement binding on the employer and employee as well as participation in any proceeding provided for by such agreement was also contemplated in that section. As in casu, the participation by an employee in a privately agreed grievance procedure, must have been contemplated as a proceeding in terms of this Act i.e. when section 187(1)(d) was enacted. This is on the basis that the disputes specifically mentioned in section 187(1) are of the same kind as the dispute in casu.

19. I now return to the fact of this case. It is not in dispute that Mackay was one of the best performers in Absa's employ. It also common cause that he crossed swords with a very senior member of management in the person of Ben Solomon. Bad blood between them, according to Mackay, started when he objected to the increase he was given as well as the merit rating he received. In this regard Mr Solomon did not testify in this court and there was therefore no evidence to contradict Mackay's version of the tension and conflict between them. I must therefore accept Mackay's evidence that Mr Solomon failed to provide him with the necessary resources, including the appointment of an assistant, to enable him to meet the Respondent's expectations of him in the Western Cape office of Cortal. I must also accept his evidence that on more that one occasion Mr Solomon threatened him with dismissal. It cannot be disputed therefore that the integral part of Mackay's grievance was Mr Solomon's predisposition towards

him.

20. My Grobelaar's finding regarding Mackay's grievance should have been regarded by the Respondent's management as a serious indictment against them in the way they had till then treated Mackay. [Rather than have this affect the result of the grievance process had the opposite effect.] It is not in dispute that Grobelaar's findings as regards Mackay's grievance made no mention of Mackay's dismissal or the possibility thereof. Grobelaar's recommendation was that a suitable position for which Mackay was qualified and relatively experienced in should be identified and offered to him within a reasonable period of time. Grobelaar also stated that it was in the discretion of management as to how the logistics involved in the recommendation would be carried out.

21. Mr Griessel testified that it was his responsibility to see to it that the grievance process was finalised and the recommendation properly actioned. He said that in his view the only way in which the recommendation was to be actioned was to try and find a position for Mackay and if no position was found that his dismissal be considered in terms of the Respondent's retrenchment policy. Mackay was required to sign Griessel's letter in acceptance of these conditions which he didn't because, according to him, these conditions were not acceptable to him.

22. Despite Mackay's failure to sign the letter Griessel's decision was actioned. In the following three months no position could be found, so we are told, which was available and for which

Mackay was suitably qualified. Throughout the three months period every person he met mostly at his initiative, informed him that there were no posts available where he could be employed. It was also at his initiative to telephone the same people about positions he had become aware of . He would however be advised that they are not available or had already been filled internally. What is notable throughout the three month period is that at no stage did the Respondents' managers have exhaustive meetings with Mackay to appraise him of the position regarding posts. In fact no proper meeting took place where Mackay would have had an opportunity to make constructive suggestions having been furnished with adequate information. Considering what happened holistically the inescapable conclusion one comes to is that when Griessel wrote to Mackay on 29 April 1998 advising him that should no post be found his retrenchment would be considered, the clock started ticking for Mackay.

23. It is perhaps prudent to consider in some detail the efforts taken to place Mackay. Frederick Bezuidenhout, who was responsible for sales and marketing met Mackay after being requested to do so y Christo Pieters. I accept Mackay's testimony that it was his initiative to request Pieters to arrange the interview with Bezuidenhout. Bezuidenhout testified that there was no position available for Mackay and that Mackay's lack of banking experience was also a problem. He conceded that Mackay was amongst the best performing employees of Absa. He conceded that he awarded Mackay a certificate of excellence in 1996/97 and that in the same year Mackay notched the highest sales figures in units trusts. He also mentioned that Mackay's salary package was higher than any sales manager in his team in the Western Cape.

24. Laetitia Van Dyk, the Absa manager of human resources was contacted by Beit Griessel to interview Mackay and try and place him. She testified that she had succeeded in placing the majority of employees who had to be re-assigned as a result of the brand merger of Absa throughout the old United Trust Bank, Volskas etc. She stated that only a few had to accept packages. She met with Mackay and also received his curriculum vitae from him by telefax. She then telephoned Christo Pieters to try and place Mackay. She did nothing else to try and assist in finding a position for Mackay until he was dismissed.

25. Another person who came into contact with Mackay regarding the efforts to place him was Herman Swanepoel. He was a regional manager of the Absa Trust Division. He described Mackay as an excellent employee. He conceded that he had contact with Mackay about twice or thrice when Mackay requested him to see if there was no post where he could be accommodated. He stated that there was only a slight possibility but Mackay could not be helped because that position was filled by another position. Swanepoel confirmed that when Mackay was still employed in his division he was once the national winner in sales and received 5 merit points as a result.

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26. Christo Pieters also featured in this regard. He confirmed that he was contacted by Van Dyk to try and place Mackay. He confirmed the contact with Bezuidenhout and that no position was available. He also mentioned that product knowledge was critical in the commercial banking section which he apparently headed. He stated that Mackay did not have such product knowledge and as a result they could not accommodate him, hence he contacted Bezuidenhout.

H also contacted other persons who, in his view, could help such. Leon Stoop, Johan Swanepoel, Riaan Meyer were some of the persons he contacted and no position could be found to accommodate Mackay. He also referred Mackay to the Center for Human Development which was staffed by persons who consulted employees undergoing some trauma.

27. Kobie Marie Hamman also testified. She was the head of Absa investment services("aims'). She had also met Mackay with a view to assisting him find a suitable position where he could be accommodated. She confirmed that Mackay had applied for an advertised position of Regional Manager Western Cape. She stated that she informed him of her concern over his lack of experience in any other specified filed other than unit trusts. Despite this concern she informed him that he would be considered for appointment as a consultant. She testified that Mackay was not prepared to accept a consultant's position. She stated that the issue of Mackay's salary package was never discussed. She confirmed that it was at Mackay's initiative that she met him i.e he sent his curriculum vitae after he saw the advertisements. The advertisement to which Mackay responded was the following:

"Sales management experience in the financial services industry, established relationships with Absa Brokers. In depth knowledge of mechanics and dynamics of financial instruments, e.g. unit trust, money market instruments. FILPA qualification an advantage, but willingness to require the qualification a requirement. Superior communication skills written in verbal Afrikaans and English. Inter-personal skills, financial planning skills, hands-let's do it attitude.-----: Job title: Sales Manager
Division/Region: Absa Investment Management Services
Job Band: M
Physical Location: Gauteng, Bloemfontein, Natal and Cape Town

: Job Requirements:

: Matric essential

: Sale management experience in the financial services industry preferably linked products. With good track record. Established relationships with Absa Broker would be an advantage.
: In depth knowledge of echichs-- and dynamics of financial instruments (e.g Unit trust, money market instruments, insurance products. Etc.)
: FILPA qualifications a definite advantage, but willingness to acquire the qualification a requirement.
: Superior communication skills (written verbal, Afrikaans and English all levels; outstanding interpersonal skills. Hand -on "let us do it" attitude.

: Duties:
: Plan and control sales activities in area.
: Mange team of executive sales consultants.
: Ensure that financial objectives are set (new business. Income and expenditure."

28. As it turned out Herman was a very unsatisfactory witness. Initially when she gave evidence in chief her evidence flowed betraying no doubt or hesitation on her part. Under cross-examination all of a sudden she was not sure of herself. On several occasions she stated that she could not remember crucial facts. On several occasions she tried to evade answering certain questions directly. Her discomfort on the witness stand can be understood on the basis that she was unable to justify her failure to appoint Mackay to a position he was more than qualified to occupy. Her main and probably only justification for not appointing Mackay is that he was not experienced in a specific related industry. This in itself is not correct because it ignores Mackay's experience in Sanlam where he once worked.

29. The other witnesses called by the Respondents did not contribute much. Mr Theodorus Steenkamp was a consultant at Bankfin. He met Mackay in August subsequent to his dismissal and informed him about what Bankfin did. Charles Louis Young also testified, a regional manager at Bankfin. He testified that he met Mackay in September i.e. after his dismissal. He

testified that there were two positions available at that moment. He stated that Mackay was not interested in one of those positions as it was a consultant's position. He was initially interested in a management position in the Eastern cape but later did not accept it. He confirmed that he was contacted by no one before Mackay's dismissal to try and accommodate him.

30. Having considered the evidence of the Respondent's witnesses it is clear that despite their evidence to the contrary there was no honest attempt to find a position for Mackay. Each one of them met Mackay once and spoke to him only on that occasion. It is clear too that each one of them was eager to pass Mackay's issue to the next and wash their hands off the matter to Van Dyk who passed it on to Pieters who in turn passed it on to Bezuidenhout. It cannot be disputed that most of the persons who interviewed him did so after being contacted by him.

31. In my view there was no genuine attempt and effort by the Respondents to either find a suitable position for Mackay or to source his views in an endeavour to create a position where he could be accommodated. The lack of a genuine effort to place Mackay points to Mackay's fate having been sealed already. It is inconceivable that a massive institution such as the First Respondent would not have a position for an employee who had proven himself to be among the best in his portfolio. Of all the positions badied---- around the most crucial is the one at AIMS under Hamman. If there is a position to which Mackay was suitably qualified and had experience in it the position of regional manager which he is alleged not to have ben appropriately experienced for. The lie to Hemman' protestation to the contrary is the fact that more of the people who were eventually appointed had similar qualifications as Mackay as well

as his 5 star track record.

32. It appears justified therefore to find that once Mackay initiated the grievance he effectively sealed his fate as an employee of the Respondents. That Mackay's grievance was genuine is demonstrated by Grobelaar's findings and the lack of challenge thereto by the Respondents. In my view other employees of the Respondents who know about the Mackay saga have a chilling lesson: to challenge senior management even through the grievance procedure will not be tolerated. This cannot be countenanced. It is the duty of this court to ensure that employees are able to exercise any of their rights without fear of losing their jobs or being ill treated in any way. In my view it is a tragedy that the Respondents compensated Mackay's initiation of a grievance with dismissal. It unfortunately demonstrates the ease with which decisions to dismiss are taken. It cannot be denied that a decision to dismiss an employee for whatever reason always leads to tragic consequences for the individual and his immediate family and to the economy.

33. In my view it is with these consequences in mind that the Constitution has a Bill of Rights and the Act guarantees the right not to be unfairly dismissed. The message is loud and clear and it is that only dismissals that are necessary should be carried out and such dismissals should be for a fair reason and should be carried out in a fair manner. What this means is that considerable restraint needs to be exercised before the decision to dismiss is taken. Looking at the matter before me there is no doubt in my mind that Mackay's dismissal was not necessary nor justified. In my view it is clear that the sole reason for his dismissal was the fact that he initiated a grievance against management. In my view this is a dismissal contemplated in section 187(1)(d)

of the Act.

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34. As regards to the argument that Mackay's dismissal can be justified for operational reasons, I can also not agree. In my view Mackay's position at the Second Respondent became redundant as a direct result of the Respondents' own omission. It was clear to Mackay and everyone else involved that without proper resources he would fail to make the Western Cape office viable. He was promised these resources but did not receive them and it is therefore no surprise that the decision was taken to close the operation.

35. Having closed the Western Cape office and having received Grobelaar's findings and recommendations the respondent simply decided to conduct a suspicious search for other positions to justify the dismissal that was surely to follow. Even if the Respondents had been genuine and honest in trying to find positions for Mackay nothing absolved them from consulting Mackay at the end of the three month period with a view to explore ways to avoid his dismissal. After all that is all that is the most important objective of section 189 of the act. The Respondents gave Mackay no information which would assist him to make meaningful suggestions about alternatives to dismissal. The Respondents possessed all the information including information on future plans and new business initiatives which could be very helpful to Mackay. In a nutshell the Respondents also failed to comply with section 189 and this failure was unfair and cannot be justified on any basis.

36. Mackay's dismissal was a tragedy that should never have taken place. It is therefore my

duty to award him the maximum compensation allowed by the act for an automatically unfair dismissal. The considerations set out in the **Johnson & Johnson v CWIU** case are of no relevance to me in this case.

37. The order of the court is therefore:

1. The dismissal of the applicant was unfair within the contemplation of section 187(1)(d) of the act.

2. The Respondents are ordered jointly and severally to pay the applicant compensation totaling 24 months salary calculated at his rate of pay at the time of his dismissal.

3. The Respondents are ordered to pay the applicant's legal costs.

MLAMBO J.

Date of judgment: 28 July 1999.

For the applicant: Mr A Steenkanp of Cheadle Thompson & Haysom.

For the respondents: Mr H. Bell of Edward Nathan & Friedland Inc.

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