IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN **CASE NO. J3865/00**

In the matter between:

RUSSELL MC DIARMID
APPLICANT

And

SECURICOR GRAY (SOUTH AFRICA) (PTY) LTD
RESPONDENT

JUDGMENT

ZILWA AJ

INTRODUCTION

1. In this matter the applicant contends that his dismissal by the respondent on its alleged operational requirements was both substantively and procedurally unfair. He claims payment by respondent a fair and equitable compensation, and a fair and equitable severance package. This matter is mainly based on section 189 of the Labour Relations Act No. 66 of 1995 ("the Act").

2. The respondent is a security company listed in the JSE Securities Exchange with several subsidiaries. Applicant was employed by the respondent since March 1996 as a managing

director of one of its subsidiaries, Gray Security Services Transvaal (PTY) LTD. From September 1997 to March 1999 he was a managing director of Gray Security Services Central (PTY) LTD. He was employed in the position of Management Development and Public Affairs Executive by the respondent with effect from the 1st April 1999 until his dismissal on the 31st March 2000. The applicant asserts that his dismissal was both substantively and procedurally unfair and seeks appropriate compensation and severance package.

3. This court is, therefore asked to determine the fairness or otherwise of the applicant's dismissal. I will deal with the issue of unfair dismissal and severance package separately.

SUMMARY OF EVIDENCE – UNFAIR DISMISSAL

4. At the trial the respondent has relied on the evidence of Alaister Mackintosh ("Mackintosh"), the executive director of the respondent and Hennie Pieters ("Pieters"), the National Human Resources Director. The applicant on the other hand relied on his testimony and that of Jenny Ibbotson ("Ibbotson"). However, Ibbotson's evidence is only related to the profit share dispute.

5. Mackintosh testified that the respondent was a subsidiary of its international company that had its presence in the United Kingdom, the United States of America and several other countries in Africa. He was an executive director for the South African Chapter ("the Company"), at the material time, which had six subsidiaries constituted in a flat structure. The subsidiaries had different boards to which he was chair and he in turn reported to the main board of the South African Chapter. The applicant reported to him.

6. He testified that the board had met at the end of November 1999 where it transpired from the financial information that it had failed to meet the financial targets set by its shareholders, and such situation was serious as a listed company. In the said

meeting the board scrutinized the structure of the company. It decided on a strategy that amongst other things that information technology expenditure must be shelved, that the company must push for more decentralization and with the attendant responsibilities to be executed by junior employees in the company. Positions which would not impact on efficiency of the company would have to be identified and a new organogram was to be prepared for the whole company.

7. This restructuring was intending to save about R10 million in that financial year.

8. The applicant's position and that of the Transformation and Development Manager which was held by David Mohosana were identified as non core as a sequel to the aforesaid strategy. With regard to the applicant's position it was believed that the structures were adequately in place to deal with the skills levy requirements and related institutions and legislations, and these functions and others performed by the applicant's could be assigned to other positions at no further cost to the company. The company was going to save between R1 million and R1.2 million a year of the total company cost by eliminating the applicant's position.

9. He testified that in December 1999 the respondent decided to eliminate the applicant's position which culminated in him writing a letter to the applicant dated 10th December 1999 which reads:

"Mr. Russell Mc Dairmid

Dear Russell

RE: <u>OPERATIONAL REQUIREMENTS / POSSIBILITY OF RETRENCHMENT</u>

- The projected operational climate requires the

company to be vigilant in controlling overheads of which salaries represent the most significant portion.

I must inform you that Directors have formed the view that the present structuring regarding your position and the functions performed by you for the company, are commercial unjustifiable and result in the company bearing an undue financial burden in respect of these functions. The directors have accordingly identified a commercial need for restructuring in terms of which certain of the functions performed by you, and more particularly the control aspects thereof, should be allocated as part of the duties of the existing Human Resources Director. From a commercial point of view, this would be in the better interest of the company.

It is their further view that the operational requirements for such restructuring would of necessity lead to redundancy of your present position. This in turn gives rise to the possibility of your retrenchment from the employ of the company, unless acceptable alternatives can be formed and agreed on.

I accordingly request that you attend a meeting to be convened at my office at 14H00 on the 17th December 1999 in order that we may consult with you on this issue and particularly to whether there are viable alternatives to retrenchment and to afford you an opportunity to make such presentations as you may wish in this regard.

YOURS FAITHFULLY

ALAISTAIR MACKINTOSH
EXECUTIVE DIRECTOR

10. The meeting schedule for the 14th December 1999 actually took place on the 21st December 1999, and Mackintosh was

joined by Pieters. In the said meeting the parties discussed amongst other things the redundancy of the applicant's position, the targets that the company did not meet. Applicant was then invited to give consideration on these issues and alternatives to retrenchment.

11. It is apparent from the applicant's response to the deliberations of the said meeting (document no. 16 of the bundle) that he was not convinced that his position was due to be scrapped moreso that he had received assurances from management as late as the 3rd November 1999 that his position was to be kept separate from that of Human Resources Director, and Transformation and Development and that there was a need for it. The relevant part of this document reads:

" ALTERNATIVE TO RETRENCHMENT

I would like to argue that there is a confirming need for my position, at least until the company and the Security Industry are aligned and the various NQF Structures (i.e. Standards Generating Body and Sector Education and Training Authority) are in place and functioning effectively. In the establishment process, both structures have required a considerable amount of focused time and effort. This commitment will need to continue as each structure is staffed and commences operations – to ensure that the interests of Gray Security Services are protected. This is not possible if the proposed restructuring takes place.

I would like the directors to consider the following alternatives to possible retrenchment in order of preference:

1. Gray Security Services lobby the larger players in the Security Industry to contribute towards my package on the basis that my work in the NQF arena is benefiting the entire industry;

2. A reduction in my overall package of 30%;

3. Management Development & Public Affairs and Transformation & Development be consolidated into one position (on the basis that these two positions are integral to Workplace Skills Plans in terms of the NQF and that the HR director will find it an almost impossible task to focus and dedicate the required time to these functions;

4. The company retains my services as a consultant with particular emphasis on the preparation and implementation of Workplace Skills Plans for the South African operations (in terms of the NQF).

In all the options above, the company would, in the first year of NQF implementation;
(April 2000 – 31 March 2001) be entitled to claim a grant equivalent to 25% of the levy which will be imposed on the total salary and wage budget.

12. Mackintosh further testified that the company had created the applicant's position in good faith, however, the board looked into the whole group including South Africa to improve its bottom line. The company had looked at all its subsidiaries to see if there was a viable position for the applicant but there was a viable position for the applicant but there was none available. The company further considered the applicant's proposals but they were not viable with regard to the intended savings of the company.

In effect Mackintosh respondent in writing to the

applicant's proposals as per his letter dated 4th January 2000, the relevant part thereof reads:

"Dear Russell

RE: <u>OPERATIONAL REQUIREMENTS / POSSIBILITY OF RETRENCHMENT</u>

1. .....

2. .....

3. These proposals have been rejected as not being viable for the following reasons: -

3.1 the first proposal is impractical of enforcement, and it reasonably can be anticipated that other security companies would have a profound resistance to making payments to a competitor on this basis.

3.2 the second proposal would not meet the operational requirements of sufficiently reducing the company's costs in respect of these functions.

3.3 the third proposal is not viable for the same reason applicable to the second proposal.

3.4 the fourth proposal, while not avoiding the termination of your employment due to retrenchment, may be the most practical course. Should you elect to operate as an independent consultant, we will use our best endeavors to lobby the other Substantial security companies so that they are aware of the availability of your services and the benefits thereof.

4. The number of employees likely to be affected is two, the job categories concerned being the position of Transformation & Development Executive and Management Development &

Public Affairs Executive (i.e. your position).

5. The method of selecting the employees for retrenchment was to identify employees carrying out functions for the company and in respect of which the cost of remuneration could not be commercially justified.

6. It is contemplated that your employment would terminate with effect from the 31st March 2000.

7. The severance pay proposed would be that prescribed by law i.e. the equivalent of 1 (one) week's pay in respect of each year of completed employment with the company.

8. The company will offer assistance as it can by furnishing you with a warm letter of reference and assisting in liaison with employment or recruitment agencies. Should you so wish we will cause enquiries to be made with other substantial operators in the security industry as to such managerial positions as may be available. In addition, should you operate as a consultant we will assist by undertaking the efforts referred to in paragraph 3.4 above.

9. As the need for the commercial rational underlying the operational requirement will remain for the foreseeable future we are not presently able to determine the possibility of future re-employment.

I request that you attend a meeting to be convened at my office at 10H00 on Friday, the 07th January 2000 in order that we may consult with you and

attempt to reach consensus on these issues. You will be afforded an opportunity to make representations as you may desire on these issues.

YOURS FAITHFULLY

ALIASTAR MACKINTOSH
EXECUTIVE DIRECTOR"

13. The applicant responded to Mackintosh's aforesaid letter before the scheduled meeting of the 7th January 2000, as per his letter of the 6th January 2000. In essence, in the said letter, the applicant disputed that he had been consulted in good faith and contended that the company had already decided on his dismissal before the consultations commenced on the 10th December 1999. On the selection criteria, the applicant re-iterated that he had been given assurances of the definite need of his position by the company and had done a good job for the company and the security industry at large. He stated that the reasons for his retrenchment appear to be the consequences of the business operations, decisions and management controls which are outside his area of influence e.g. the poor debtors situations in the African operations, the average performance of the U.K. and the American operations, therefore he had a problem accepting the motivations afforded by directors for their decision. On alternative to retrenchment, the applicant contended that the company did not offer any alternatives to retrenchment despite the fact that the South African operations continue to grow and presenting further opportunities. He could not understand why his proposal for the reduction of his salary was not accepted.

14. On the severance package, the applicant proposed, amongst other things: -

    1. 3 (three) weeks pay in respect of each year of

completed employment with the company;

2. 2 (two) months notice pay;

3. payment of a pro – rata amount of the profit share due to him. This was on the basis of the assurances given to him on his new position and that it was not his decision to leave the employ of the company.

4. that the restraint of trade that he had signed be cancelled.

5. that he retain the cellular phone and transfer the account into his name.

6. a letter of reference acknowledging his achievements in his position and the reasons for his retrenchment.

15. On the preferential re – hiring, the applicant submitted that he considered a reasonable time for preferential re – hiring to be six months and that the company should bear this in mind when positions become available which require his comparable skills and qualifications, these to include position of managing director of a subsidiary company or a position with similar duties to those that he had been performing.

16. A meeting took place on the 7th January 2000in the presence of Mackintosh, Pieters and applicant, and issues mentioned in Mackintosh's letter of the 4th January 2000 and those of the applicant's letter of the 6th January 2000 were discussed. The fact as to whether there was agreement reached on those issues is in dispute and the minutes of that meeting were not submitted before the court as evidence. The company contends that it looked at all the points raised by the applicant and it went

into the process with an open mind. However, it did not find any suitable alternatives and it also pointed out to applicant that it cannot deviate from the company policy in respect of severance pay as proposed to him.

17. On cross examination Mackintosh stated that he had assured applicant that his position is a real job in April 1999, however the situation changed with effect from the board meeting that was held in November 1999. He confirmed that the South African operations had been operating on target, however, the group was not operating on target and the review of the South African operations structure was commissioned by the board. He further stated that in his meetings with the applicant he only stated that the company had failed to meet its target but did not inform the applicant of the exact amount that the company wanted to save to enable it to reach its target. He further confirmed that the company first identified his position as being redundant before consulting the applicant about it. He submitted that the function of the applicant of claiming rebates for training was already factored into the company's budget as it already knew the amount it was to receive as rebates. He further confirmed that the company looked for suitable positions in the subsidiaries but could not find a suitable one.

18. It became apparent that the respondent that the respondent had filled certain posts on or about August 2000 without considering the applicant. These positions were National Operations Director, Managing Director, Gray Security Services North (PTY) LTD, Senior Managing Equities, Training Manager Equities, Training Manager, and the Operations Director, Kwa Zulu – Natal. Mackintosh testified that all these posts were filled internally and that the company did not incur an extra person in its payroll and further that the company implements a succession plan in respect of its positions, candidates are identified and groomed to fill those posts.

19. Mackintosh further sated emphatically that because of its

nature, the company did not practice bumping and applied the grooming concept as bumping would cause serious disruption of relations with clients which is vital in the industry and for stability.

20. Ultimately on the 14th January 2000 the respondent through Mackintosh informed the applicant in the form of a letter that:

1. his employment would terminate with effect from the 31st March 2000 and the notice period would commence on the 1st February 2000.

2. he will be paid a severance package of 1 (one) weeks pay in respect of each year of continued employment in the company.

3. he was to be paid due benefits in respect of salary, leave pay, allowances and other benefits.

4. the company was to furnish him with a letter of reference.

5. the cellular phone was to form part of the package.

6. the company was prepare to waive certain specific provisions of the restraint of trade clause.

7. he was to be considered for a comparable position in the near future.

8. the company was to assist in lobbying the

players in the industry for his appointment in a permanent position on the industry SETA.

21. Applicant, however, challenged the severance package offered to him and contended that it was not according to provisions of the Labour Relations Act and the Basic Conditions of Employment Act, and further that he had been discriminated against because other senior employee were offered better packages.

22. Mackintosh rejected his claim. In fact, during trial the applicant could not place facts before the court to prove that other senior employees offered different packages except the issue of profit-share which I shall deal with later in this judgment.

23. The evidence of Pieters mainly corroborated that of Mackintosh on the relevant issues. He confirmed that the applicant was a member of EXCO and that financial performance of the company was normally discussed in EXCO meeting and, therefore, the applicant was privy to the financial information about the company generally. _

APPLICABLE LAW

24. On procedural imperative, it is trite that in case of dismissal base on operational requirements of an employer, both the employer and employee ("the parties") are enjoined by Section 189 of the Act to embark upon a consultation exercise which is a joint consensus seeking process. The parties must seek agreement on the issues stipulated in the said section. However, the checklist approach has been rejected by our courts and they have emphasized the fairness of the process as primary in an attempt to reach the said consensus. See JOHNSON & JOHNSON (PTY) LTD V CWIU (1998) 12 BLLR 1209 (LAC) AND ALPHA PLANT AND HIRE SERVICES (PTY) LTD V SIMMONDS & OTHERS (2001) 3 BLLR 261 (LAC)

If consensus has not been reached then it must be established whether it is due to the fault of the employer or the employee. Either party could frustrate the process in a number of ways and the different possibilities depend on the facts of each particular case. In the event that the fault is attributed to the employer then such subsequent dismissal would certainly be procedurally unfair. (see the JOHNSON and ALPHA PLANT cases supra).

25. On substantive imperatives, the majority of the Labour Court decisions still follow the approach adopted by the Labour Appeal Court in SACTWU & OTHERS V DISCRETO – A DIVISION OF TRUMP AND SPRINGBOK HOLDINGS (1998) 12 BLLR 1451 (LAC), namely that the court will not second guess the commercial or business efficiency of the employer's decision that leads to retrenchments. It will simply investigate whether the decision is a genuine one and not a sham.

However, in BMD KWITTING MILLS (PTY) LTD V SACTWU (2001) 7 BLLR 705 (LAC), the court indicated that it may adopt a slightly sticker approach and enquire whether a reasonable basis exists for the employer's decision. By and large the courts have left it to the business management to restructure its business in order to make it more profitable.

FAIR REASON FOR DISMISSAL

26. It is trite that an employer may, based on economic reasons, restructure its business leading to the retrenchment of its employees. The onus is on the employer to prove the existence of such valid economic reasons. Further in terms of section 188 of the Act the employer must have a fair reason to dismiss an employee.

27. It has been clear from the evidence presented before this court that the applicant had been holding positions of Managing Director in the respondent's subsidiaries from early 1996 till he

was appointed in his incumbent position in April 1999. He enquired more about this new position before accepting it and he was assured by the company through Mackintosh and Pieters that it is a real job, which means that it was not less secure than the one that he occupied as a Managing Director of a subsidiary company.

28. It is also common cause that by the 3rd November 1999 the respondent was still giving assurance to the applicant about the definite need for the existence of his position. In my view it is clear from the applicant's attitude before he accepted this position and there after that if it had transpired to him that the position is "a nice to have" and that its existence is in fact temporary, in sense that, according to the respondent, it was to set up the structures to deal with NQF, skills levy legislation etc, he would not have accepted this position.

29. It seems to me that the respondent should have protected the applicant from dismissal in this relatively short period of less than a year after his acceptance of this new position by finding suitable alternatives to dismissal. My view is further supported by Judge Revelas in HEIGERS V UPC RETAIL SERVICES (1998) 1 BLLR 45 (LC). In this case the facts, briefly, were that the applicant four months after his employment with the respondent was promoted to a position of "Transformation and Improvement Manager" and headed a team the task of which was to transform the respondent into a world class organization. Shortly after his promotion, he took leave and on his return he was advised that his post had become redundant. He had not been consulted before the decision to render his post redundant. The court noted that the applicant's appointment to head transformation team had always been envisaged as temporary. It was, therefore, unlikely that the applicant would have accepted promotion had he known it would lead to his retrenchment. The court further pointed out that in the absence of an explanation for why the applicant was not properly protected from a situation where his promotion

would lead to redundancy, his selection for retrenchment was both unfair and untimely. In the circumstances the court did not accept the reliance on adverse trading conditions as a fair reason for dismissal by the respondent.

30. Besides the decision to retrench, it is clear from the respondent's evidence that the decision to render the applicant's position redundant was taken before his first consultation on the 10th December 1999. I am of the view that this step taken by the respondent is unfair, see NEWEN HUIS V GROUP FIVE ROADS & OTHERS (2000) 12 BLLR 1467 (LC).

SELECTION PROCESS

31. According to the evidence, especially the respondent's letter dated 4th January 2000, the respondent selected applicant for retrenchment simply on the basis that the cost of his remuneration could not be commercially justified.

32. Section 189 (7) provides that the employer must select employees to be dismissed according to selection criteria that have been agreed to by the consulting parties, or if no criteria have been agreed, criteria that are fair and objective. The applicant was holding a senior position with respondent and had been its employ since March 1996. I must determine whether the selection criteria used by the respondent was fair and objective, in my view it was unfair. It is generally accepted that changes in corporate structures may lead to difficult decisions having to be taken in deciding which senior or middle managers must be retrenched. In NEUWENHUIS case supra, the court held that seniority across the divisions of the group must be taken into account rather than just retrenching the relevant manager in the division to be closed in implementing bumping.

33. The respondent has contended that it does not practice bumping as same would disrupt personal relations with clients, stability and morale of its employees. It, in turn, implemented succession plans where identified candidates are groomed for those specific positions. However, the respondent did not state how exactly these disruptions would occur in reality. In fact, one wonders how the respondent would deal with sudden resignations of senior personnel without the successful completion of a grooming plan. Moreover, the applicant needed no grooming to take over from the position which he held prior to April 1999.

34. The Labour Appeal court in PORTER MOTOR GROUP V KARACHI (2002) 4 BLLR 357 (LAC), endorsed the fact that in determining a fair selection of employees for retrenchment 'bumping' has often been implemented. The court elaborated 10 principles, which are applicable in this process. I will not repeat these principles here, however, the overall impact thereof is that the employer and the employee must consult about it and if there are possibilities of disruptions the consulting parties must attempt to carry out a balancing exercise. The pool of possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of the company within parameters of its activities, national, international; fairness requires that the same circumference should define the limit for candidates to be bumped. Even if there has been no past practice of transferring between branches or departments, the employer must consider inter-departmental bumping unless it is injurious to itself and other employees.

35. In this matter the employer has failed to consult about bumping the applicant and has further failed to demonstrate how the bumping of the applicant specifically would result in injury to itself and other employee.

36. In view of the aforegoing I am persuaded that the fault for not reaching a joint consensus by the applicant and the respondent must be placed squarely at the door of the respondent.

PROFIT SHARE -

37. It is common cause that the applicant's employment agreement with the respondent provided for a profit share. However, the exact percentage that the applicant was entitled to and whether he was entitled to receive, a pro-rata portion calculated till the 31st March 2000 is in dispute. The financial year end of the respondent was August each year.

38. It is trite law that a severance pay is some kind of a solatium awarded to the retrenched employee by an employer because his services are terminated without his fault. It is not derived from the terms and conditions of the employment agreement, unless a collective agreement, if any, provides a formula on which severance pay will be calculated in the event retrenchment. If there is no agreement on the formula or an amount for severance pay then the minimum amount provided by the Labour Relations Act apply (Section 196 (1) of the Act).

39. The relevant section provides for the minimum of 1 (one) week's pay for each completed year of service by the employee to an employer. This is what the respondent has offered to the applicant in this matter.

40. In my view the applicant's claim for profit share is based either in common law contract or the Basic Conditions of Employment Act No. 75 of 1997 or both and does not form part of a severance pay. In the circumstances, the applicant is entitled to institute a claim for a profit share in terms of the abovementioned law. It is according to my finding that this court has no jurisdiction to rule on this issue due to the matter manner in which it has been presented before it.

I accordingly make the following order:

1. The applicant's dismissal is both substantially and procedurally unfair;

2. The respondent is ordered to pay compensation to applicant in the amount equivalent to 12 months salary being R 33 000-00 x 12 = R 396 000 – 00;

3. The respondent is ordered to pay costs of this matter including costs of all postponements.

ZILWA A J

DATE OF JUDGMENT	:	06 JUNE 2003
FOR APPLICANT	:	MR. DION MASHER OF BELL DEWAR & HALL INC.
FOR RESPONDENT INSTRUCTED	:	MR. DONALD GRAHAM BY IAN SUTHERLAND ATTORNEYS