IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Case no: J2502/06

In the matter between:

JOHANNES H MARITZ **APPLICANT**

and

CALIBRE CLINICAL

CONSULTANTS (PTY) LTD **1ST RESPONDENT**

SILVER FALCON (PTY) LTD **2ND RESPONDENT**

JUDGMENT

AC BASSON, J

[1] The 1st Respondent (Calibre Clinical Consultants (Pty) Ltd – hereinafter "Calibre" or "the 1st Respondent") is a company with limited liability incorporated in terms of the Companies Act of South Africa. The 2nd

Respondent (hereinafter referred to as "Silver Falcon" or the "2nd Respondent") is likewise a company with limited liability incorporated in terms of the Company's Act. The core business of the 1st Respondent is to offer disease management (HIV-management) to companies. In doing so, it makes use of the services of various doctors to assist in managing patients. Apart from its core business, at least up until end of November 2005 (when the Applicant was retrenched), Calibre also did fraud investigations into medical aid fraud.

[2] The Applicant, Mr. Maritz (hereinafter referred to as "the Applicant") was initially employed by the 1st Respondent as a case manager. He later initiated the establishment of a fraud investigation unit (hereinafter referred to as "the fraud unit") within Calibre – a position which he held until his dismissal on the basis of operational requirements on 22 November 2005. At this point I must point out that the Applicant was employed by Calibre in 2001 and after a brief period during which he worked in the claims department, he and Mr. Casper Vorster (hereinafter referred to as "Vorster") persuaded Calibre to start a fraud investigation department. They were then entrusted with the setting up and operation of this department. Vorster resigned shortly after the inception of this department, and only completed one fraud investigation for Calibre. Mrs. Kruger (hereinafter referred to as "Kruger"), an employee of Allcare (a separate entity from the Respondents), assisted the Applicant with the fraud investigations to earn an extra income. She did so with the permission of

her employer.

[3] It was not disputed that the reason given for the dismissal of the Applicant was the closure of the fraud unit (of Calibre). It was, however, in dispute whether or not the fraud unit continued after the closure of the fraud unit but under the auspices of another legal entity (the 2nd Respondent – Silver Falcon (Pty) Ltd – hereinafter referred to as "Silver Falcon" or the "2nd Respondent").

[4] As already pointed out, this fraud unit was run by the Applicant. Only in August 2005 (merely two months before the Applicant's dismissal) was he joined by Oliver in the fraud unit. Once Oliver joined, the Applicant's commission earned for successful fraud investigations was halved as he had to share any commission earned for successful fraud investigations with Olivier.

[5] As already pointed out, the Applicant was appointed as an investigator in the fraud department of Calibre. It was common cause that the fraud department mainly served one client only namely, Commed Medical Aid (hereinafter referred to as "Commed"). Mr. Matlou (hereinafter referred to as "Matlou") was at the material time the principles executive officer of Commed. Commed had at no stage any legal ties with Calibre and was the only client of Calibre in respect of their fraud investigations. In brief the fraud unit investigated medical aid fraud in respect of Commed and would identify medical practitioners who were submitting fraudulent

claims. Once the investigation was completed the investigators would furnish Commed with a report.

Dispute before the Court

[6] Before turning in more detail to the relevant facts, it is necessary to briefly refer to the dispute before the Court. In terms of the statement of claim the Applicant's cause of action was (initially) twofold: He contended that his dismissal was unfair on the following basis:

(i) His dismissal was automatically unfair in terms of section 187(g) of the LRA. The Applicant requested the Court to award him compensation in the amount of 24 months' salary should this Court find that the Applicant was unfairly dismissed due to the transfer of the business between the 1st and the 2nd Respondent. The Applicant, however, abandoned this cause of action with the result that this Court will make no finding on whether or not there was a transfer of a business between the 1st and the 2nd Respondent as contemplated in section 186(1)(g) of the LRA. This dispute was only abandoned when the trail commenced. The Respondent argued that the Court award costs against the Applicant for abandoning the claim. I will consider the issue of costs hereinbelow.

(ii) *In the alternative*, it was contended that the dismissal was substantive and procedurally unfair in that the 1st Respondent did not in fact prove a fair reason based on its operational requirements and on the basis that the 1st Respondent did not follow a fair procedure as contemplated

in section 189 of the LRA. This was therefore the only cause of action before this Court.

General principles

[7] Before turning to the facts of this matter, it is necessary to again refer to the general principles underlying the retrench process as they are relevant in deciding this matter. In *Trevor Shuttleworth v Afgri Producer Services (A Division Of Afrigri Operations Limited)* unreported judgment (JS799/05) the principles underpinning the obligation imposed by the legislature's to ensure procedural and substantive fairness in retrenching employees were set out as follows::

> ***"General principles***[1]
>
> [1] *It is accepted that an employer has the managerial prerogative to make important financial decisions that affect the financial viability and profitability of its business. It is also accepted that often these decisions will lead to the need to reconsider the structure of the business which in turn may result in the restructuring, reorganising, downscaling or even the closing down of the business. An unfortunate, but not necessarily an unfair consequence of such a business decision, is often that an employee's job security is affected. It is thus not surprising that it has been emphasised in numerous decisions by this Court that, because a dismissal*

[1] See for a general discussion: Grogan *Workplace Law* 9th edition page 223 *et seq*.

on the basis of operational requirements is a no fault dismissal, employees, who are affected by a possible or anticipated retrenchment, are entitled to a high degree of fair treatment. The requirement of fair treatment is also firmly entrenched in sections 188 and 189 of the LRA. It is required in section 188(1)(a) and (b) that, not only should there be a valid and fair reason for the retrenchment, but that the dismissal must also be effected in accordance with a fair procedure.[2] *A crucial element of procedural fairness is the requirement that a fair and proper consultation process*[3] *should precede a final decision on whether or not to retrench. Section 189(2) of the LRA requires that consultation must take place on appropriate measures to avoid dismissals; measures to minimise the number of*

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[2] See *Chetty v Scotts select S Shoe* (1998) 19 *ILJ* 465 (LC) here the Court emphasized the importance of following procedures prior to a retrenchment in the following terms: *"We must accept…. That the legislature intended that the procedure regarding dismissal for operational requirements should be governed by law, rather than by guidelines. This means that the duty to follow procedure on the employers is significantly higher in regard to dismissal for operational requirements than it is in regard to dismissal for other reasons."*

[3] See *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A): *"I agree that consultation, if circumstances permit, should be geared to achieve that purpose (bearing in mind that problem solving is something distinct from bargaining and that the final decision, where consensus cannot be achieved, always remains that of management). Such a course would best serve the objectives of the Act and be conducive to industrial peace.*

The approach approved above is the one that should be followed as a general rule in a matter such as the present in order to achieve the required degree of fairness necessary to avoid falling foul of the unfair labour practice definition. It must be emphasized, however, that whether an employer has, in a retrenchment matter, complied with the duty of prior consultation will inevitably depend upon the peculiar facts and circumstances of each individual case. The scope and extent of consultation may be attenuated in certain circumstances because of eg considerations of urgency or confidentiality or some equally compelling reason (cf Administrator, Transvaal & others v Zenzile & others 1991 (1) I SA 21 (A) at 40C-E) ((1991) 12 ILJ 259 (A))."

dismissals; measures to change the timing of the dismissal; measures to mitigate the adverse effects of the dismissals and severance pay. It is trite that consultations should commence once an employer contemplates a dismissal. The rationale behind this requirement is clear. The consultation process gives the employee an opportunity to challenge the merits of, or need for the proposed retrenchment. An employee should thus be placed in a position where he or she, through a process of constructive proposals and counter-proposal, may be able to divert the need to retrench. The question whether retrenchment is the only reasonable option in the circumstances should thus be subjected to the consultation process. Although it is accepted that the ultimate decision to retrench rests with the employer and that an employer may even approach the consultation process with a certain point of view, the employer should nonetheless approach the consultation process with an open mind, especially with regard to possible measures to ward off a retrenchment.

[2] *It is also fundamental to the consultation process that the employer must give reasonable notice of the need for the proposed retrenchment to those employees who may be affected by the proposed retrenchment. The notice should*

contain sufficient information in order to allow the employee (or his or her union) to engage in meaningful consultation.

[3] *Although it is not required that the procedural guidelines contained in section 189 of the LRA be followed to the letter, it is nonetheless expected of the employer to engage in this process meaningfully and with an open mind. The important question that the Court will ask is whether or not the employee, who is ultimately retrenched, had a proper and fair opportunity to consult over all issues that are relevant to his or her retrenchment and which may have an effect on his or her continued employment. It is thus for that reason that the LRA lists as topics for consultation appropriate measures to avoid the dismissal; measures to minimise the number of dismissals and selection criteria. There is thus a very thin dividing line between the requirements for a substantively and procedurally fair retrenchment.*[4] *Where selection criteria is found to be unfair or not objective or where an employer fails to consult or consider proper alternatives to retrenchment, this Court may well come to the conclusion*

[4] See *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) the Labour Appeal Court was of the opinion that there is no clear dividing line between the decision to retrench and the implementation of that decision and that the entire process must be considered in deciding whether or not the process was fair and whether the termination of employment was the only reasonable option in the circumstances.

that the dismissal was also substantively unfair. Contextual support for the contention is to be found in section 189A(19)(c) (albeit in the context of large scale retrenchments). Although it is accepted that non-compliance with some of the procedural requirements will not necessarily lead to a conclusion that a dismissal is also substantively unfair, a retrenchment which is procedurally unfair may also, in certain circumstances, impact on the substantive fairness of the dismissal. See in this regard Keil v Foodgro (A division of Leisuret Ltd) [1999] 4 BLLR 345 (LC) at paragraph [10] where the Court held:

> *"it is through the constructive engagement implicit in this process that the need to retrench is confirmed as well as the selection of those employees who are to be retrenched."*

[4] *Lastly, an employer must consult over severance pay. The employer is also obliged to consult over proposals made in respect of severance pay (see SACCAWU & Others v Sun International SA Ltd (A division of Kersaf investments Ltd (2003) 24 ILJ 594 (LC). See also Kruger v Jigsaw Holdings Ltd & Others [2006] 7 BLLR 670 (LC). Where an employer offers a reasonable alternative to retrenchment, the employee who rejects such an offer will not be entitled to*

severance pay (see Pretorius v Rustenburg Local Municipality & others (2008) 29 ILJ 1113 (LAC)). "

See also *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC) where a similar approach was followed:

"[48] The Labour Relations Act 66 of 1995 ("the Act") makes a distinction between "unfair dismissals" and dismissals that are "unfair only because the employer did not follow a fair procedure" (section 193(2)(d) and section 194(1)). In my view this distinction does not justify an inference that substantive fairness and procedural fairness will always fall into separate, impermeable compartments. There may be circumstances in which the procedural fairness and the substantive fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. There may also be circumstances in which it will be impossible after the event to determine that the dismissal was fair despite the failure to follow a fair procedure.

[49] The procedure prescribed in section 189 of the Act is relevant in this case. The section obliges employers who contemplate dismissing one or more employees for reasons based on operational requirements, to follow the consultative process prescribed in the section (section 189(1)). The purpose thereof is to endeavour to achieve consensus as to, among others, appropriate measures to avoid the dismissals (section 189(2)(a)). The consultative process is a measure aimed at ensuring that the dismissals themselves are fair. An employer who decides to dismiss an employee for

operational reasons without consulting in terms of section 189, may find it impossible to prove that nothing the other consulting party could have said could have changed the decision as to the need to dismiss. To hold otherwise will reduce the consultative process to a mere formality that can be ignored at the risk only of paying compensation as provided for in section 194(1) of the Act."

Relevant facts

[8] It was common cause that the Applicant was employed by the 1st Respondent. The 1st Respondent therefore bears the onus to proof that the dismissal of the Applicant was fair (see *Marapula and others vs Consteen (Pty) Ltd* (1999) 20ILJ 1937 (LC) and *SA Chemical Workers Union & others vs Afrox (Ltd)* (1999) ILJ 1718 (LAC)). In discharging this onus, the Respondent commenced and called two witnesses Mr. Chris Valster (hereinafter "Valstar") and Mr.Charles Parsons (hereinafter "Parsons"). Valstar confirmed that Calibre is a consulting company which operates largely within the medical aid environment. Amongst others, it also conducted medical fraud investigations primarily for Commed. The agreement between Calibre and Commed was a "loose" or informal agreement. The investigations were done against doctors who also rendered a service to Calibre in accordance with its core business. Valster testified that Calibre had a meeting or a discussion with some of its major clients, who raised their concern about the conflict of interest in

Calibre by virtue of the health care services it provided to those clients and at the same time having being required to investigate the doctors who serviced those clients. As a result of this conflict of interest, Calibre resolved that it would close down the fraud investigation unit or department. Only two employees were employed in the fraud investigation unit (namely the Applicant and Olivier). They were both employed as investigators in that unit. When a decision to restructure was taken and resolved that the unit needed to be closed down because of the conflict of interest, the two positions held by applicant and Olivier were declared redundant.

[9] On 6 November 2005 the Applicant was phoned by Peterson and requested to come to the office. On 10 November 2005 received a letter (dated 8 November 2005) informing him of the intentions of the 1st Respondent to close down the fraud investigation unit.

[10] Before turning to the remainder of the facts in respect of the retrenchment process, it must be pointed out that Calibre only called one witness – Valstar – to testify about the procedures that were followed during the retrenchment process. It appears from the evidence of Paterson that he was not involved in the retrenchment process and that he left everything to Valstar and a certain Mr. Dixon (hereinafter referred to as “Dixon”). Dixon, a labour practitioner was not called as a witness and the Court was therefore not privy to his version about how the retrenchment process was conducted. Valstar, on his own evidence, stated that he was not a labour

specialist. He was, however, present at the retrenchment meetings as a company representative.

[11] In essence it was the Applicant's case that he was not properly consulted about alternatives to retrenchment. More in particular it was his evidence that he was not offered proper alternatives.

The letter dated 8 November 2005

[12] Valstar gave the Applicant this letter on 10 November 2005 at the offices of the 1st Respondent. This letter gave him notice that, due to a number of operational reasons, 1st Respondent's management had decided to enter into a consultation process with the Applicant to discuss management's decision to *restructure* the fraud department. It further informed the Applicant that there existed a possibility that the fraud investigation department and the positions in it would become redundant.

Written proposals submitted by the Applicant on 14 November 2005

[13] On 14 November 2005 the Applicant submitted a letter to Calibre (more in particular to Dixon and Valstar) setting out two proposals. The one proposal dealt with his further employment and the other with "*reasons not to terminate his service*". (i) Under reasons not to terminate his services, the only issue that was raised by the Applicant was his motor vehicle which he said that he needed assistance with because if he were to sell it, it would have a negative impact on the selling price by virtue of the

extensive travelling mileage on it. The Applicant testified that he was not in favour being transferred to another department because it would have financial implications for him. He, however, testified that he would have had no choice. (ii) The other proposal dealt with alternatives regarding future employment. In respect of these alternatives, the Applicant put two proposals on the table: Firstly that he be transferred to another department within the company. Secondly, and more importantly, he proposed that he take over Silver Falcon (the 2nd Respondent) and that that he take over the daily running and business of Silver Falcon in order to continue the service to Commed.

[14] In passing it should be pointed out that it was in dispute whether or not Valstar had offered the Applicant his old position in case management – a move that would have resulted in a severe drop in his salary. The Applicant was adamant that this alternative was not offered to him. On the probabilities I am satisfied that no such an alternative was offered to the Applicant. Although Valstar was present at meetings he, by his own admission, was only there as a company representative. No minutes were kept of the meetings and Dixon was not called as a witness to verify the fact that alternatives were presented or offered to the Applicant. More importantly, in the letter by Dixon in response to the proposals of the Applicant regarding alternatives (see the next paragraph), no mention whatsoever was made about an alternative position in the call centre. In fact, this letter merely states that Calibre was not able to offer the

Applicant any other alternative position (see the discussion further hereinbelow).

Employer's response to the proposals

[15] On 18 November Dixon (the labour consultant) responded on behalf of Calibre to the proposals made by the Applicant. The letter confirms the fact that two proposals were made (firstly that the Applicant be transferred to another department and, secondly, that he take over "Silver Falcon Investigations"). In respect of the first proposal, the Applicant was informed that no positions were available at that time. In respect of the take-over of Silver Falcon, the following was conveyed to the Applicant on behalf of the Calibre:

> *"As to the take over of Silver Falcon Investigations**,** we are advised that this company **will cease to operate**[5] with the pending withdrawal of Commed from the equation. This still needs to be confirmed but following my enquiries, I am at liberty to state that this will indeed be the case".*

Apart from the fact that this letter significantly contradicts the evidence of Parsons that Silver Falcon was merely a shelf company with no assets, with no bank account and that it "*didn't exist*", this letter specifically informs the Applicant that Silver Falcon "*will seize to operate*". I will

[5] My emphasis.

hereinbelow refer to the evidence which clearly shows that Silver Falcon did not in fact seize to operate but that it had continued with fraud investigations without interruption. This fact was further confirmed by Kruger who testified that she just continued as before with her functions in respect of the fraud investigations. There is a further important point to be made and it ties in with this Court's conclusion that Silver Falcon played a significant role within the operations or alongside the fraud investigations of Calibre: If Silver Falcon was so independent and if it did not exist, why was a labour specialist (Dixon) at liberty to tell the Applicant that it is not a viable option. Why did Dixon not just tell the Applicant that this was a separate legal entity with no ties whatsoever with Calibre? Furthermore, why was it necessary to state an untruth to the Applicant in respect of the fraud operations of Silver Falcon? I will return to this point hereinbelow.

[16] It is also relevant to point out that Olivier, who was the Applicant's junior in the fraud unit and at Calibre with no more suitable qualifications than Applicant and with a much shorter period of employment at Calibre than the Applicant, was accommodated in another company, all the shares of which are owned by 1st Respondent. If the remuneration of the Applicant and Olivier are compared as at date of Applicant's dismissal, it was very similar. Yet the Applicant was simply informed that he was not suitable for the post in which Olivier was appointed at Northpark Pharmacy. No such an attempt was made to accommodate the Applicant within the structures

of the 1st Respondent.

Notice of termination

[17] On 22 November 2005 the Applicant was handed a letter containing notice that his employment was terminated with immediate effect. It is instructive to note that Dixon again, on behalf of Calibre, informed the Applicant that *"[t]he option of Silver Falcons has been agreed and confirmed that it is* ***not an option due to its imminent closure****".*[6]

The conversation with Matlou on 8 February 2006 and the events thereafter

[18] On 8 February 2006, Matlou (the principal officer of Commed – see the discussion above) phoned the Applicant and asked him why he was not receiving the usual monthly fraud investigation reports from the Applicant and that while Matlou was still receiving invoices for payment in respect of fraud investigations. The Applicant told Matlou that he had been retrenched by the 1st Respondent. Matlou testified that nobody had informed him that Calibre had closed its fraud investigation department. It was then that the Applicant started to become suspicious and question the reason for his retrenchment and the information that was provided to him during the consultation process. The Applicant and his wife then

[6] My emphasis.

investigated Silver Falcon's website. It was discouvered that the website (with the photograph and contact details of the Applicant) was still as the Applicant had left it when he had been retrenched. The Applicant then phoned the toll free telephone number for Silver Falcon which had before his retrenchment activated a telephone instrument to ring in his office at the 1st Respondent's offices. Olivier (the person who was supposed to have then been working at the Pharmacy after his retrenchment – see the discussion above) answered the phone. The Applicant again later spoke to Olivier on this telephone number.

[19] Matlou testified that he also enquired from Calibre about the status of the fraud investigations after his conversation with the Applicant and was informed that the fraud investigation unit had been closed. Valstar then visited Matlou at his office and introduced Casper Vorster to him, saying that Silver Falcon had always been "*part*" of Calibre and that it was now doing the fraud investigation in its own name. Vorster was introduced as the person in control. A service agreement was later entered into between Commed and Silver Falcon. At some stage in 2006 after Matlou put the matter to the Board of Commed. Vorster represented Silver Falcon during this process.

[20] Significantly, as already pointed out, Kruger had carried on with her work of profiling, as part of the fraud investigations, during November and December 2005. Even more significantly is that fact that Matlou had been receiving regular invoices for fraud investigations on an uninterrupted

basis. However, in December 2005 the name of the investigating entity on the invoice had suddenly changed from "*Calibre Clinical Consultants*" to "*Silver Falcon Investigations previously under Calibre Clinical Consultants*". It is also clear from the investigations that Silver Falcon continued with new fraud investigations – it was thus not a question of merely wrapping up existing fraud investigations which had commenced under the auspices of Calibre. The evidence of the Respondent's witnesses that, apart from two cases, all investigations were concluded before the Applicant's retrenchment is therefore patently false. It is furthermore clear from the evidence that numerous new investigations were conducted after the retrenchment. It is further significant that the commission paid by Commed to the fraud investigation entity for the three months immediately after the Applicant was retrenched, was consistently larger than the amount paid for the invoice dated 15 November 2005 when the Applicant was still employed by the 1st Respondent

Meeting in January 2006

[21] Kruger testified that she was invited to a meeting in a restaurant in Sandton in January 2006. It was attended by Messrs. Dawid van Zyl, Parsons, Valstar, and a Black lady. At this meeting Parsons said that. Kruger and Van Zyl each get one third of the shares of Silver Falcon and that he (Parsons) keeps the other third. No price was asked for the shares. She testified that Van Zyl later told her that Parsons had told him

that he (Parsons) was giving his shares to Casper Vorster. The evidence further was that this conversation took place in Van Zyl's office at Allcare. Vorster was present and said that he would share his third of the shares with one Sydney Thomas. At a much later stage Kruger took over all the shares in Silver Falcon. She finally had the company liquidated in January 2009.

Procedural fairness of the dismissal

[22] Mr. Mohare on behalf of the Respondents strongly argued, and I am in agreement with him, that it cannot be said that no procedure at all was followed. He therefore urged the court to come to a conclusion that there was at least substantial compliance with the procedures as required by section 189 of the LRA.

[23] I cannot agree with this submission. Although the Applicant did receive a retrenchment notice and although the employer held a meeting with him this does not necessarily constitute substantial compliance with the procedures as envisaged by the LRA. The consideration of alternatives especially is a crucial component of the retrenchment process. As already pointed out, it is the very purpose of consultations to attempt to avoid dismissal and in doing so the employer *must* consider alternatives in order to avoid the dismissal of the employee. Although I accept that there was an operational rational to close the fraud unit of Calibre (see the discussion about the substantive fairness of the dismissal hereinbelow),

the evidence clearly support a conclusion that Calibre did not properly consider the option of the Applicant taking over Silver Falcon. Instead of considering the proposals, Calibre chose to mislead the Applicant in thinking that Silver Falcon was (as was held out to the Applicant) either non-existent (Parson's evidence) or closed (as per Dixon's two letters). I am of the view that this is a prime example of an employer approaching a consultation process with *mala fide* intentions. Put differently, by misleading the Applicant that the alternative of Silver Falcon was out of the question (because it had closed down), Calibre made certain that dismissal was the only option left. The result of this deceitful conduct was that the Applicant was left without employment. I will in the following paragraphs also refer to facts which show how the Applicant in fact worked to build the image of Silver Falcon as an investigation company into white collar crime and fraud. I will also refer to the evidence which clearly shows that Silver Falcon merely continued with the fraud investigations previously done by the Applicant under the auspices of Calibre. As already pointed out, even Kruger who assisted the Applicant continued as usual under the auspices of Silver Falcon. I am therefore not persuaded that there was substantial compliance with the procedures as required by the LRA. All of this was withheld from the Applicant. I am of the view that there cannot be compliance with procedural fairness (and substantive fairness – see the discussions hereinbelow) where an employer deliberately misleads an employee by concealing important

information during the consultation process. It was only when the Applicant had a discussion with Matlou of Commed in February 2006 that he (the Applicant) suddenly discovered to his surprise that Silver falcon was in fact operating and was in fact doing the very same fraud investigations that he did and this after he was brought under the impression that Silver Falcon was non-existent and that Silver Falcon would cease to operate after his retrenchment (see the letter of Dixon *supra*).

[24] I am therefore of the view that the dismissal of the Applicant was (at least) procedurally unfair. I will deal with an appropriate remedy after I have considered the substantive fairness of the dismissal.

[25] Before I do so I must, however, point out that Mr. Mohare argued that the fact that the Applicant did not complain about his retrenchment until 3 months after his retrenchment was indicative that he was satisfied about the manner in which the retrenchment was done. It is common cause that the Applicant only referred a dispute about the fairness of his dismissal to the CCMA after he (the Applicant) had a conversation with Matlou of COMMED on 08 February 2006. The applicant readily conceded in his evidence that, had it not been for the allegation that the fraud investigation unit did not close down, he would have not referred an unfair dismissal dispute to the CCMA. He in fact conceded that the only reason why he referred the unfair dismissal dispute to the CCMA was because of this allegation that the fraud unit was not closed down but was sold as a going

concern. I am despite this submission, satisfied that the dispute that was conciliated before the CCMA concerned not only the substantive fairness of the dismissal but also the procedural fairness of the dismissal. I should further point out that the pre-trial minutes (paragraphs 3.4, 3.4.1 and 3.4.2 and 3.5 thereof) records that the facts that are in dispute before this Court was whether the Applicant's retrenchment was substantively and procedurally fair as contemplated by section 189 of the LRA. This was also the case that the Respondent knew that it had to meet if regard is had to the statement of case.

[26] One of the issues pertinently raised by the Applicant in the statement of claim is the allegation that there was a sale between Calibre (the 1st Respondent) and Silver Falcon (the 2nd Respondent). I am in agreement with the Respondent that the Applicant has the onus to prove this allegation and that the Applicant was not able to prove that there was a sale between the 1st Respondent and the 2nd Respondent. It is, in fact, still unclear to this Court exactly what the legal relationship between these two legal entities was at the time of the Applicant's dismissal. It was, however, not necessary for this Court to make a finding in respect of whether or not there was a transfer of a business as a going concern (see paragraph [6] *supra*).

Substantive fairness of the dismissal

[27] I have already indicated that I accept that the fraud unit in Calibre had

ceased to exist and that Calbre had, because of the perception of conflict with clients of its core business, a valid economic rationale for closing the fraud unit down. On behalf of the 1st Respondent it was argued that the Applicant cannot rely on procedural fairness or substantive fairness where the applicant has failed to discharged the onus that there was a sale and that such a sale occurred as a going concern. It was further argued that in view of the fact that the whole case of the Applicant is dependent on the allegation that a sale took place as a going concern, the Applicant's case to the effect that his dismissal was unfair due to operational requirements must fail. It was thus argued that the Applicant cannot rely on procedural and substantive unfairness when the sole reason why he declared the dispute was that the fraud investigation unit was sold to the 2nd Respondent as a going concern.

[28] I have already indicated that it is unclear from the evidence precisely what the legal relationship between the 1st and 2nd Respondent was. The witnesses on behalf of the Respondent was also not very helpful and was in fact at great pains to convince the court that Silver Falcon was merely a shell and that it was actually non-existent. As will be pointed out, the evidence points to a completely different scenario. The fact that Vorster was not called as a witness to clarify the legal relationship further added to the confusion in respect of the legal relationship between the two entities. I am, however, of the view that the Respondents are solely to be blamed for this confusion as it could have assisted the court in clarifying the nature of

the legal relationship. What is, however, clear from the available evidence is the fact that Silver Falcon continued uninterrupted with the fraud investigations (albeit under the auspices of a separate legal entity) after the closure of the fraud unit which operated under the auspices of Calibre. However, Kruger who was previously involved with the unit under Claibre, merely continued as if nothing had happened, with the investigations under the auspices of Silver Falcon. Moreover, as will be indicated hereinbelow, the Applicant prior to his retrenchment actively took part in advertising the services of Silver Falcon. In other words, although there were two legal entities their activities and operations were closely linked. I am thus not persuaded by the evidence of Parsons that Silver Falcon was merely a shell company and that it did not exist. I am also in agreement with the submission of Mr. Oosthuizen (on behalf of the Applicant) that Parsons was an evasive and that he, in some instance, proven to be an unreliable witness. He gave long, rambling answers under cross-examination and he often avoided actually answering the questions put to him in cross-examination. He was, as already pointed out, at great pains to underplay the importance of Silver Falcon as a factor in the business of the 1st Respondent and, as already pointed out, at one stage even testified that Silver Falcon didn't "exist". It will, however be pointed out in the following paragraphs, that the evidence point to a conclusion that there was in fact a close relationship between the 1st Respondent and the 2nd Respondent (although, as already pointed out, the exact nature of the

legal relationship is still unclear). Moreover, although it is unclear exactly what the legal relationship between the two companies was, it is clear from the evidence that the Applicant had actively participated in efforts to establish Silver Falcon as a fraud investigation company. On the evidence before this Court there must therefore have been (at least at the time of the Applicant's employment) some link between Calibre and Silver Falcon.

[29] I have already pointed out that if the evidence is analysed, it is clear that the 1st Respondent was during the retrenchment process at great pains to conceal from the Applicant the fact that there was an intention to proceed with the fraud investigations through another entity. The following facts support this conclusion: The Applicant testified that during September / October 2005 there was a extraordinary advertising campaign to promote Silver Falcon as a fraud investigation entity – presumably to take care of the conflict of interest that existed within Calibre with its core business. The Applicant also testified that during that time, he prepared proposal documents (which were presented to the court) and that he also arranged for complimentary pens and brochures for distribution as part of the advertisement campaign. From the proposal documents it is clear that Silver Falcon will do fraud investigations. Parson is listed as the Chief Executive Officer of Silver Faslcon and the Applicant is listed as the Fraud Investigator. The mobile number of the Applicant is also listed in the proposal. It is further clear from the evidence of Kruger that she knew about the promotional pens. Matlou also confirmed the existence of

pamphlets that were distributed amongst members and officers of Commed. Despite their confirmation, Parsons denied any knowledge whatsoever about any campaign. He also specifically denied that he gave any instruction to the Applicant to promote Silver Falcon as an investigation campaign. Mr. Oosthuizen submitted that the evidence of Parson in respect of the advertisement campaign is clearly false. I am in agreement with this submission. The evidence clearly point to a different conclusion. As I already indicated, although it is unclear exactly what the nature of the legal relationship with Calibre was, it is clear from the evidence that Calibre regarded and intended Silver Falcon to play a significant roll in continuing with the fraud investigations after the fraud investigations unit within Calibre was closed down. Furthermore, although Parsons and Volster tried to convince the court that Silver Falcon was an entity separate from the 1st Respondent, the evidence show clearly, in my view that Silver Falcon played an important and integral part in the continuation of the fraud investigations formerly conducted by the Applicant. Although it is accepted that Silver Falcon is legally a separate entity, it is clear from the evidence that throughout 2005 Silver Falcon was visible and operative within the operations of Calibre to such an extent that the Applicant promoted its services to the outside world and that whilst he was working for Calibre. This does beg the question: Why would the Applicant (an employee of Calibre) promote another entity which will perform exactly the functions as those which he was doing whilst he was

working for Calibre if he did not expect to continue with the activities under Silver Falcon? The fact that Calibre tried to persuade the Applicant (and even succeeded in doing so until the Applicant was contacted by Matlou) that Silver Falcon would cease to operate or that it was non-existent can only lead to one conclusion and that is that Calibre intended to exclude the very person who initially started up the investigation unit under Calibre and who was also promoting the fraud investigation business (the exact work he did) with him as an investigation officer to the outside. I am thus persuaded on the evidence that Parsons knew all along that Silver Falcon would continue with the investigations: Apart from the fact that Kruger knew about the campaign and even confirmed in her evidence the existence of promotional pens for Silver Falcon, it is, in my view, highly improbable that the Applicant would have designed promotional documents containing the name of Parsons as the person who would be the Chief Executive Officer of Silver Falcon investigations and include the company registration number of Silver Falcon if Parsons did not either know about it or instructed him to do so. From the proposals which were given to prospective clients, the following appears. Firstly, Silver Falcon was advertised as an investigation entity into medical aid fraud. The address of this entity is the same as that of the 1st Respondent. The telephone numbers are also the same as that of the 1st Respondent. The contact e-mail is indicated as henrichm@calibre.co.za the very same address used by the Applicant during his employment with Calibre.

Secondly, the Chief Executive Officer of Silver Falcon Investigations was indicated as Parsons. The Applicant was indicated as the fraud investigator of Silver Falcon. Thirdly, a website to advertise Silver Falcon was also designed. On this website a photograph of three individuals appears. These individuals are the Applicant (with his calibre contact numbers); Oliver (with his calibre contact numbers); and Matlou (of Commed). It is also this website that the Applicant saw and investigated after he had a discussion with Matlou in January / February 2006 when he came to realise that Silver Falcon was in fact doing fraud investigations. In one of the promotion documents the name of Mr Casper Vorster (who was not even employed by Calibre) (apart from Olivier) was also included as a person who is part of the investigation unit. Why would the Applicant have advertised himself, Olivier (his colleague employed by the First Respondent); Parsons (the CEO of Calibre) and himself as fraud investigator as "Silver Falcon", if he was not authorized thereto by his employer? It is, in my view, highly improbable that the Applicant would have undertaken this campaign without the authority and knowledge of Parsons. Moreover, apart from these promotions pens, an article appeared in the Star Newspaper about Silver Falcon being a fraud investigation unit which investigated fraud committed with medical aid claims. Although this article was not presented to the Court its existence was not denied. Lastly, I have already referred to the sudden name change in December when the investigation unit suddenly changed from

"*Calibre Clinical Consultants*" to "*Silver Falcon investigations previously under Calibre Clinical Consultants*".

[30] Returning to the substantive fairness of the dismissal. It is trite that the LRA requires that an employer must have a valid and a fair reason to dismiss. The reason proffered by Calbre for the retrenchment was the closing down of the fraud unit because there existed a conflict of interest between the core business of Calibre and the doctors who provide service to patients of Calibre. This rationale was never challenged with the Respondent. In fact, Kruger, who testified on behalf of the Applicant, confirmed that there was talk of such a conflict of interest. On the evidence I am thus, as already pointed out, satisfied that Calibre had a valid and fair reason to retrench – at least to close down the fraud investigation unit. Is this fact sufficient to render the dismissal substantively fair in the present case? I have in the introductory paragraphs pointed out that the courts have consistently required a high degree of fair treatment in retrenchment cases because it is recognised that the employee is being dismissed through no fault of him or her. Integral also to the whole retrenchment process is the requirement that the employer approach the process bona fide and with an open mind especially with regard to measures and proposals to avoid retrenchment. An employer who approaches *mala fide* or with a closed mind in respect of alternatives or measures to avoid retrenchment can hardly come to court and argue that the dismissal was substantively andurally fair. In the

present case there was a viable option available to the Applicant. The evidence shows that Kruger continued with the fraud investigations as if nothing had happened. The Applicant could likewise have continued with the fraud investigations albeit under the auspices of another entity – an entity which he had actively promoted before his retrenchment whilst he was still employed. Instead of offering the Applicant this opportunity, Calibre mislead the Applicant into believing that Silver Falcon was non-existent (which was clearly not the truth). I cannot in light of these facts come to the conclusion that the retrenchment of the Applicant was substantively fair.

Remedy

[31] In light of the finding that the retrenchment of the Applicant was substantively and procedurally fair, I am of the view that the Applicant is entitled to the maximum compensation allowed for by the LRA. The Applicant is accordingly awarded compensation equivalent to 12 months' remuneration calculated at the applicant's rate of remuneration at the time of his dismissal and as set out in paragraph 3.5.2 of the Applicant's heads of argument and amounting to R 159 571-56. I can find no reason why costs should not follow the result. The Applicant is, however, ordered to pay the costs of the withdrawal of the claim based on automatically unfair dismissal.

[32] In the event the following order is made:

1. The dismissal of the Applicant was substantively and procedurally unfair.
2. The Applicant is ordered to pay the Applicant compensation in the amount of R 159 571-56 which is equal to 12 months' remuneration.
3. The Respondents are ordered to pay the costs of this application.
4. The Applicant is ordered to pay the costs of the abandonment of the claim based on automatically unfair dismissal.

AC BASSON, J

26 January 2010

For the Applicant:

JJS Prinsloo SC: Instructed by Martin Henning Attorneys

For the Respondent:

Adv WR Mokhare: Instructed by Werksmans Incorporated