IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JS 444/05

In the matter between:

STEPHANUS PETRUS SWAN**EPOEL** **1ST Applicant**

JOCOBUS HERMANUS **2ND Applicant**

ENGELBBERTUS SMITH **3RD Applicant**

And

FIDELITY CORPORATE SERVICES (PTY) LTD **Respondent**

JUDGMENT

MOLAHLEHI J

Introduction

1] The applicants brought an unfair dismissal claim arising from their dismissals for operational reasons by the respondent

2] Condonation for the late filing of the statement of case of the applicants was granted by this Court on the 16 March 2008.

3] The issues for determination as set out in pre-trial minute are as follows:

3.1 Whether the applicants' dismissal were effected for a substantively fair reason and in a procedurally fair manner.

3.2 Whether the applicants' are entitled to any relief

3.3 Which party should pay legal costs?

3.4 Whether Section 189 (A) applies in this instance, and whether applicants are entitled to challenge the procedural fairness of their dismissal

4] At the beginning of the trial the parties agreed that the dismissals were in terms of section 189A of the Labour Relations Act, 66 of 1995 the (LRA), and therefore the issue to be determined by this Court should be limited to the issue of substantive fairness.

Background facts

5] It is common cause that both applicants are former employees of Fidelity Corporate Services (PTY) Ltd, (FCS) and were prior to their dismissal employed as investigators based in a department known as Fidelity Investigative Services.

6] It is also common cause that during September 2004, the Fidelity Group, for strategic reasons, particularly related to attracting black economic empowerment (the BEE) resolved to unbundle its various subsidiary companies. This decision was communicated in a letter dated 23rd September 2004. The relevant part of the letter reads as follows:

> *"An outcome of these discussions was the realization that, because of selective interests expressed by potential empowerment partners, and because of the different cultures, management styles, client profiles, and strategic focus, and employment legislation, in each of our three principal subsidiaries, (i.e. Fidelity Cash Management Services, Fidelity Springbok Security Services, and Fidelity Supercare Cleaning Services) that each should source its own BEE partner. This requires each company to operate more autonomously than at present. The Group will, therefore, be partly unbundled to allow each company to follow its individual strategic goals, as well as the more management a bigger and more direct investment stake in*

the business in which they are involved".

[7] It is further stated later in the same letter that:

> "*Fidelity Corporate Services has historically provided group services to operating subsidiaries. Following large acquisitions in recent years, certain functions have became duplicated in both the services and operating companies. It is logical that large operating companies' should assume responsibility and accountability for all their own functional activities. This is also a condition precedent to being able to issue shares in our principal subsidiaries to either BEE partner or to management."*

The letter further states:

> "*Each operating company will have to determine the internal structure necessary to fulfil the functions and activities currently provided by, and to be transferred from, Corporate Services. Department heads have been tasked to identify placement opportunities within each of the three subsidiary companies to ensure maintenance of standards, continuity of service, and as far as possible, and the retention of staff. As these arrangements can be unsettling, this exercise should be substantially concluded by the end of*

October."

7] On 5th October 2004, the applicants were issued with the letter indicating amongst others that their positions have become redundant and that there exists a possibility that hey could be retrenched. The letter also indicated that the retrenchment may take effect by the end of November, 2004 and for that reason consultation process was to commence with immediate effect. The letter further indicated that the group IR, Mr Myburg as well as departmental heads were tasked to identify placement opportunities within each of the three principal operating companies. The applicants were further advice to pursue placement opportunities on their own. It was however stated in the same letter that the respondent would not be responsible for any placement promises or expectations raised in the process of the individual's own initiative.

8] The respondent had prior to the unbundling provided services to other subsidiaries in the group including investigation services, which formed a department within the respondent. The three

subsidiaries to which the respondent provided the security services for were; Fidelity Cash Management Services, Fidelity Springbok Security Services and Fidelity Supercare Cleaning Services.

9] Consequent to the unbundling each of the large operating subsidiaries assumed responsibility for all their functions and activities including investigation services. The unbundling also led to the closing sown of the Corporate Services department which resulted in the positions of all the investigators becoming redundant.

10]Mr Dickenson the chairman of the group, who testified for the respondent stated in his testimony that all the employees were informed through written communication that Corporate Services would shut down and that they could apply to any of the operating companies for employment. Each employee was according to him advised of the procedure to follow in applying for positions in the operating companies. The decision whether or not to appoint an applicant was to be taken by management of each of the components operating as independent entities.

11]During cross-examination Dickenson testified that employees were required to submit their CV's to their managers. He further testified in this regard that those who were ultimately appointed would have undergone an interview. He would not however confirm when questioned on this issue whether every employee who was appointed underwent an interview. And with specific reference to the investigators he testified that he did not know whether people were interviewed or not.

12]It is common cause that of the eighteen (18) investigators, thirteen (13) were appointed investigators in the investigation unit which became a division of Fidelity Cash Management Services.

13]Mr Myburg the respondent's IR manager and Mr Landman the departmental head of the respondent were tasked in terms of the letter dated 05 October 2004, to assist in identifying placement opportunities within each of the operating subsidiaries.

14]The first applicant, Mr Swanepoel testified that the respondent convened a meeting during October 2004, where the employees were informed in general terms of the restructuring. They were

however, according to him not informed of available or alternative positions. There was also no mention of what requirements or criteria would be used for appointment to available positions.

15]Mr Swanepoel further testified how in some departmental meetings Mr Landman would make comments that investigators were, “in a comfort zone” and that the “old wood must get out”. He felt that the remarks were directed at him and the second applicant, Mr Smith as both of them had the longest service as investigators.

16]Mr Swanepoel was also unhappy about the response he received from Mr Landman when he approached him to enquire as to why he was selected for the retrenchment. According to him Mr Landman did not give him an answer as to why he was chosen for retrenchment but simply told him to enjoy his leave because it was not necessary for him to work his notice period.

17]Mr Smith testified that he assumed that reference, in the termination letter, that Fidelity Investigation Services (PTY) Ltd would become a division of Fidelity Cash Management (FMCS), meant that all investigators would be accommodated in the

restructured organisation.

18]Mr Smith further testified that Mr Myburg informed him when he enquired from him about his car and non appointment that he (Smith) did not want to work with W Bartman in the guarding division.

19]As concerning available alternative positions both applicants testified that they would have been willing to accept positions lower than those they occupied if same were offered by the respondent. They also testified that few of the employees within the respondent had services longer than theirs.

20]The strong challenge that the applicants mounted against the case of the respondent was mainly on the procedural fairness of the dismissal. It has already been indicated that the parties had agreed at the beginning of the hearing that procedural fairness was not in dispute.

21]In as far as the restructuring is concerned, the applicants concede during cross- examination that there existed a commercial rationale

for the restructuring of the respondent and it was for this reason that the respondent became a dormant company with no employees. The applicants further conceded that their positions no longer existed within the structure of the respondent and that there were no alternative positions in the structure of the respondent.

22]It would appear to me that the essence of the applicant's complaint is that they should have been offered employment by FMCS at the point it took transfer of the investigation services from the respondent. The other part of their complaint is that the respondent should have secured employment for them within FMCS. This complaint is understandable in the light of the fact that sixteen of the eighteen investigators were appointed by FMCS with effect from the December 2004. However this does not take the case of the applicants any further because these sixteen investigators were not employed on the basis of a transfer as going concern in terms of section 197 of the Labour Relations Act 65 of 1995 (LRA). They were appointed, it would appear after their applications for those positions were considered by FMCS as an autonomous entity independent of the respondent. The appointment was done by FMCS, and not the respondent.

23]The testimony of the applicants that some five months after their retrenchment, Mr Reddy who was not previously employed in the investigation unit was transferred from Durban to the FMCS offices in Gauteng does not take the case of the applicant any further because as on their own version this was done by FMCS and not the respondent. The same applies to the appointment of the two other investigators who were appointed after the transfer of Mr Reddy.

24]The two were appointed by FMCS and not the respondent. In this regard it was not the applicant's case that the unbundling and the creation of FMCS as an independent and autonomous entity was a sham, intended to undermine their fair labour practice rights. Therefore no case was made necessitating the upliftment of the corporate veil of FMCS. It has also to be noted that it was not the applicant's case that the FMCS took over the security services from the respondent as a going concern in terms of the provision of Section 197 of the LRA. I accordingly accept that FMCS was an autonomous entity and in appointing former employees of the respondent it did so independently of the respondent.

25] The applicants in support of their case relied on the decisions of both **General Food Industries Ltd v Fawu (2004) 7 BLLR 667 (LAC) and County Fair Food (Pty) Ltd v Ocgwa & Another (2003) 7 BLLR 647 (LAC)** In County Fair the Court held that:

> "*If the employer relies on operational requirement to show the existence of a fair reason to dismiss, he must show the dismissal of the employee could not be avoided. That is why both the employer and the employee or his representatives are required by section 189 of the Act to explore the possibilities of avoiding the employee's dismissal."*

26]They also relied on BMD Kniting Mills (Pty) Ltd SA Clothing & Textile Workers Union (2001) 22 ILJ 2264 (LAC) at 2269 -2270 where the Court held that:

> "*The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a Court is entitled to examine whether the particular decision has been taken in the manner which is also fair to the affected party. To this extent*

the Court is entitled to enquire as to whether a reasonable basis exist on which the decision, including the proposed manner to dismiss for operational requirements is predicated.

27]In my view the dismissals of the applicants were based on a fair operational reason founded in the need to restructure in order to leverage the business opportunities that existed at the time. The dismissal was therefore substantively fair.

28]In the circumstances of this case I do not think it would be fair to order costs.

29]In the result I make the following order:

1. The dismissal of the applicants was substantively fair.
2. The applicants' claim is dismissed.
3. There is no order as to costs.

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MOLAHLEHI J

Date of Hearing: 07 November 2007

Date of Judgement: 24 APRIL 2008

APPEARANCES:

For the Applicant: JD VERSTER LABOUR LAW OFFICES

For the respondent: SNYMAN ATTORNEYS