**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case No JS1171/2010

In the matter between:

**PIETER STRYDOM** **Applicant**

and

**T-SYSTEMS SA (PTY) LTD** **Respondent**

**Heard:** **17 April 2012**

**Delivered:** **30 April 2012**

**Summary:**

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**JUDGMENT**

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Whitcher, AJ

Issues

[1] The Respondent has sought an order upholding its exception and ordering that the proceedings be stayed pending the joinder of Business Connexion (Pty) Ltd ("Business Connexion") as the Second Respondent herein, failing which an order dismissing a part of the Applicant's claim with costs.

Background and Submissions

[2] In pursuing a claim of unfair retrenchment against his new employer, T-Systems SA (Pty) Ltd [the Respondent], the Applicant employee, Pieter Strydom, alleged that, less than twelve months before this dismissal, his contract of employment was transferred from the old employer, Business Connexion (Pty) Ltd, in terms of section 197 of the Labour Relations Act (the LRA).

[3] The Applicant employee claims, *inter alia*, that the terms relating to the calculation of severance pay that ought to have applied upon his retrenchment by the new employer, were those that applied at the old employer. The enhanced severance pay he claims, in turn, accompanied the employee when he was transferred about ten years earlier to the old employer from an even older, original employer, Sasol Group Management.

[4] The new employer is the sole respondent in the unfair retrenchment dispute. The Respondent has applied for an exception on the basis that the old employer, Business Connexion, is not joined. The Respondent alleges that the old employer has a direct and substantial interest in the matter and/or has a legal interest in the subject matter of the retrenchment dispute which may be prejudicially affected by any judgment handed down.

[5] This interest is said to flow from the provisions of section 197 of the LRA which provides as follows:

'(7) The old employer must –

(i) agree with the new employer to a valuation as at the date of transfer of –

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirement

(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection (7) (a) as a result of the employee's dismissal for a reason relating the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.'

[6] The crux of the Respondent's pleadings is that, in the event that it is ordered to pay the Applicant any of the claimed severance pay, it will become a statutory debtor, jointly and severally liable with the old employer. As the Respondent enjoys a common law right to recover a *pro rata* contribution from the old employer, the old employer ought to have been joined in the matter. It is thus a potential *financial* interest in the outcome of the retrenchment dispute that is said to establish the necessity of joining the old employer.

[7] The Applicant disputes that the old employer has a direct, substantial and/or legal interest in the matter such that it must be joined of necessity.

[8] The Applicant cites a test set out by the Supreme Court of Appeal to evaluate the extent of a third party's interest such that joinder becomes imperative. In *Gordon v Department of Health: KZN*,[1] the SCA stated:

'In the Amalgamated Engineering Union case, it was found that the

1 (2008) 29 ILJ 2535 (SCA) at para 9.

> 'question of joinder should not depend on the nature of the subject matter but on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have *locus standi* to claim the relief concerning the same subject matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with an order made in the first instance. This has been found to mean that if the order or judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests of a party or parties not joined in the proceedings, then that party or parties that have a legal interest in the matter must be joined'.

[9] The Applicant argues that a direct and substantial interest is an interest in the *rights* at stake in proceedings and that a third party's mere financial interest in the relief claimed is insufficient to found a direct, substantial and/or legal interest for the purposes of joinder.

Analysis

[10] This matter turns on whether being a statutory co-debtor in terms of section 197 of the LRA obliges *an applicant* to join an old employer. To answer this question, regard must be had to ordinary civil procedure in respect of joinder by necessity as well as the rules of the Labour Court itself.

[11] It indeed seems to be the position in our civil law that the mere fact that a third party is jointly and severally liable for a debt does not qualify as a direct and substantial interest in *the right* that is the subject matter of the dispute. Joint liability for a debt does thus not trigger the joinder of such a party by necessity (See: *Shell Auto Care (Pty) Ltd v Laggar and Others* 2005 1 SA 162 (D)). Put differently, mere financial interest or prejudice has been held to be secondary and indirect (see: *Bohlokong Black Taxi*

*Association v Interstate Bus Lines* (Edms) Bpk *1997 (4)* SA *635 (O) at 644 A-B* and *National Union of Textile Workers v President of the Industrial Court* (1985) (3) SA 251 (C) at 255E).

[12] In this court, Rule 22 governs joinder and stipulates that a party may apply on notice to every other party for an order joining any person as a party in the proceedings if the party to be joined has a *substantial interest in the subject matter of the proceedings* (emphasis added). This confirms with the test developed by the High Court.

[13] It appears to me that, in the present matter, no order is sought against the old employer that directly and substantially affects its rights and interests *vis a vis* the Applicant employee. The Applicant is not seeking reinstatement to the old employer, nor a declaration concerning the applicability of section 197 to his move from old to new employer. The joint and several liability imposed, in principle, upon the old employer seems to me to be incidental to the relief that the Applicant employee claims from the new employer (the Respondent). Separate legal processes exist for determining whether in fact such liability exists and, if so, to quantify it.

[14] As such, with reference to *Gordon* the severance payments claimed from the new employer (the Respondent) in this matter can be sustained and carried into effect without necessarily prejudicing the interests of the party not joined in the proceedings.

[15] In applying the test for the existence of a direct and substantial interest suggested in *Gordon*, I cannot say that a ruling made in respect of the severance pay dispute between the Applicant employee and new employer (the Respondent) would render *res judicata* any subsequent recourse pursued by the new employer (the Respondent) against the old employer, Business Connexion, for a *pro rata* contribution thereto. These would be separate causes of action, involving separate parties.

[16] It bears mention in this regard that it is by no means a foregone conclusion that an old employer will be held liable for any portion of the relief ordered against a new employer in subsequent proceedings between these two parties. The finding of joint and several liability is in principle and the apportionment of liability depends on whether "the old employer is able to show that it has complied with the provisions of this section" [section 197(8) of the LRA].

[17] I am aware of a recently decided matter in which Steenkamp, J, ordered the joinder as respondents of two additional employer parties in a dismissal dispute, which these parties resisted.[2]

[18] The distinction between the facts of the present matter and *Steinmuller Africa* nicely illustrate the difference between a mere financial interest and a legal interest in the subject matter of legal proceedings. In *Steinmuller Africa,* the joined respondents employed some of the dismissed employees and had a hand, through shared HR services, in their dismissal. This was held to constitute a sufficient basis to justify their joinder. The respondents in *Steinmuller Africa* were thus directly involved in the factual and legal substratum of the dispute, with rights directly affected also by possible relief ordered, for instance reinstatement. It seems to me that respondents in such a position would *need* to be joined for the matter to be properly and fairly determined and for any relief ordered to be sustained or carried into effect, which is not the situation if they were merely, in principle, co-debtors.

[19] In considering the question of joinder, one must also be mindful of the effects of its being too easily exercised. The facility provided to creditors of targeting one debtor among many potential debtors is an established part of our law and fulfills important social and legal functions. This facility functions through orders of joint and several liability. It seems important, particularly in labour law where employee litigants are often not on the

2 See *NUMSA obo its Members v Steinmuller Africa (Pty) Ltd and Others* [2012] JOL 28637 (LC)).

same financial footing as employers when it comes to affording the costs of suit, to preserve the ability of an employee to elect to pursue a particular debtor. If the employee is successful, it is up to the targeted debtor to assume the administrative and financial burden of bringing any co-debtors to account. The new employer is the targeted debtor in this case and it may exercise its right of recourse against the old employer in a separate action, if it chooses to. In a similar vein, the facility of targeting a particular debtor means that, if the employee loses, he or she is not burdened with the costs of two legal teams.

[20] To some extent then there may be said to exist a tension between the important facility of targeting a debtor through an order of joint and several liability and the important principle that a party with a direct and substantial interest in a legal dispute must be joined. In the labour context, this tension is smoothed out, on a case-by-case basis, by measuring the extent to which the facts meet the test proposed in *Gordon* and set out in the Labour Court rules.

[21] In argument, the applicant, correctly in my view, distinguished this matter from *Zikhethlele Trade (Pty) Ltd v COSAWU and Others.*[3] There joinder was deemed necessary in circumstances where an uncited third party was found to have been the employer, however briefly, of workers moving from one labour broker to another. Significant, direct and new legal interests and potential obligations were entailed in such a finding and the LAC found that the third party ought to have been joined.

[22] I also agree with the views of Musi, AJ in *Kopeledi (Pty) Ltd v Madontsela and Others*,[4] wherein he opined that,

> 'Generally, in section 197 disputes, *depending on the nature of the dispute and the facts*, it is *advisable* to join the old and the new employer or the old employer and the putative transferee employer as the case may be'. (emphasis added).

3 (2007) 28 ILJ 2742 (LAC).
4 (2009) 30 ILJ 158 (LC***).***

It strikes me firstly that by using the word ‘advisable’, Musi, AJ, is speaking of joinder by convenience. The present exception is pleaded on the basis of necessity.

[23] Second, this matter is not properly a transfer of business (section 197) dispute but a retrenchment (section 189) dispute in which an aspect of section 197 is relevant insofar as it identifies, in principle, a co-debtor. The views of the learned judge, above, thus do not apply to the facts of the present exception which is applied for in a retrenchment (section 189) dispute.

[24] I hasten to add that where an employee alleges a ‘transfer of business’ as defined in the LRA and the putative new employer disputes this fact, the old employer will mostly need to be joined. In such a case the dispute would be about the applicability of section 197 to a set of facts relating to a change of employer. The old employer would have a direct and substantial interest in the *rights* of the matter, especially since it could be found that no transfer of business indeed occurred.

[25] The Respondent in this matter based its argument for joinder on the old employer, Business Connexion, being a potential co-debtor. Beyond that, it did not put the applicability of section 197 at stake. I was not referred to anything in the papers that established any other interest of the old employer in the subject matter of the retrenchment proceedings.

[26] Should the Respondent, as a matter of convenience, wish to avoid an unnecessary multiplicity of actions by bringing a potential co-debtor to *this* court for a declaration as to their contribution, that is up to the Respondent to serve what would amount to a third party notice upon the old employer (Business Connexion) and make the necessary application. It is not the Applicant’s duty to perform these tasks and accommodate these interests in terms of who it cites as a respondent.

[27] In order for the joinder of the old employer to be legally necessary, a

rather more substantial interest in the rights of the matter needed to be established than was pleaded.

[28] As a corollary, the manner in which and the extent to which the Labour Court's order in the eventual retrenchment matter may affect the interests of the old employer are not substantial or direct enough to deprive the Applicant of its ability to target only the new employer. The old employer may suffer, at most, an order that it is *in principle* jointly and severally liable for a portion of severance pay. If the new employer (the Respondent) seeks recourse against the old employer in terms of such an order, the old employer will still have its day in (another) court to argue whether it is liable and, if so, for how much.

[29] In argument, the Respondent raised an additional ground in support of joinder. This related to the Applicant's allegation that his transfer between old and new employer also constituted an automatically unfair dismissal in terms of section 187 (1) (g). As this allegation clearly implicated the old employer, the argument for the exception was said to be fortified. However, as pointed out by the Applicant this issue was not pleaded in the exception.

[30] In any event, to the extent that the Applicant has obviously elected to pursue whatever remedies might attach to such a *dismissal* claim only against the new employer (the Respondent), no order that could affect the interests of the old employer can be made.

[31] If the Respondent wishes to raise a defence that it is not the employer for the purposes of the allegedly automatically unfair dismissal, it should simply lead evidence to this effect. It seems to be an unnecessary complication to seek to embroil a party by way of joinder whom the Applicant has, for better or for worse, elected not to pursue.

[32] As the dispute between the parties is ongoing, neither party should pay the others' costs.

Order

[33] The exception is dismissed.

[34] There is no order as to costs.

Whitcher, AJ Acting

Judge of the Labour Court

Appearances:

For the Applicant: Adv Z/R Grundlingh

For the Respondent: Adv J Partingtom

Applicant’s attorneys: Bester and Roodie Attorneys

Respondent’s attorneys: Lindsay Keller Attorneys