REPUBLIC OF SOUTH AFRICA

INTHE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J482/14

In the matter between:

SANLIC HOUSE OF LOCKS (PTY) LTD **Applicant**

And

STRYDOM JOHANNES THEODORUS **Respondent**

Heard: 13 March 2014

Date of judgment: 8 April 2014

Summary: Urgent application – restraint of trade. Transfer of business as a going concern. Onus to show merger of two companies triggered the provisions of section 197 of the Labour Relations Act of 1995. *Locus standi* to enforce the restraint of trade by a third party and not the employer of the employee bound by the restraint of trade.

JUDGMENT

MOLAHLEHI, J

[1] This is an urgent application in terms of which the applicant seeks to enforce the restraint of trade agreement provided for in the employment contract of the respondent. The restraint of trade agreement which the applicant seeks to enforce applies across the country and extends over a period of two years.

[2] The respondent in opposing the enforcement of the restraint of trade contends firstly that the matter is not urgent as the urgency is self-created and secondly that:

i. The applicant does not have *locus standi* to enforce the restraint of trade clause of the employment contract.

ii. The restraint of trade is not enforceable because its duration is excessively long and covers the whole country.

iii. Applicant has not established a protectable interest.

<u>Background facts</u>

[3] The applicant, Sanlic House of Locks (Pty) Ltd, is a private company duly registered in terms of the company laws of South Africa and is involved in the business of importing and distributing motor vehicle keys across South Africa. The market in which the applicant conducts its business in is highly competitive and involves amongst others Massmart Group, the Mica chain hardware and Jack’s paint.

[4] It is common cause that the applicant previously operated under the name of House of Locks (Pty) Ltd (the House of Locks) under the registration number 2003/025 1143/09. During February 2012, the House of Locks concluded a merger agreement with another private company known as Sanlic Intentional Pty Ltd with the registration number 1944/017219/07 (1994 registration).The merger was finalised in September 2012. And thereafter Sanlic International changed its name and became known as the Sanlic House of Locks (Pty) Ltd (Sanlic).

[5] It is common cause that before the two companies merged the House of Locks distributed a range of blank keys including key cutting machines manufactured by Errebi a company based in Italy. Sanlic International on the other hand distributed similar products manufactured by a company known as Silca Line also based in Italy. The two companies based in Italy were in direct competition with each other. Subsequent to the merger agreement, the applicant took a decision to exclusively distribute only Silca products and to gradually discontinue the relationship with Errebi Lines. It is apparent that upon hearing about the decision to terminate the distribution of the Errebi products, the respondent decided to set up a business that would distribute those products in South Africa.

[6] It is common cause that the respondent was prior to the merger employed by the House of Locks as a sales manager. There is, however, a dispute as to whether his employment contract was transferred to Sanlic upon the conclusion of the merger agreement.

[7] The provisions of clause 3 of the employment contract deals extensively and set out in a detailed manner the terms and conditions of the restraint of trade.

[8] It is common cause that the respondents resigned from his contract of employment during January 2014. Prior to his resignation, he informed the respondent that he intended setting up a business that would take over the distribution of the Errebi products in South Africa.

[9] On 5 January 2014, the applicant under the letter head of Sanlic House of Locks (registration 1944) addressed a letter to the respondent reminding him of the restraint of trade agreement and that his plan of distributing the Erebi products would amount to a breach of the restraint of trade agreement.

[10] On 12 February 2014, the applicant charged the respondent with the following misconduct:

> 'TRANSGREESION: BREACH OF CONTRACT: ALTERNATIVELY INTENTION TO COMPETE AGAINST THE EMPLOYER.'

Preliminary points raised by the respondent

[11] The respondent has raised two preliminary points in his opposition to the urgent application. The first point relates to urgency and the second to *locus standi*.

[12] In relation to urgency the respondent contends that the urgency pleaded by the applicant is self-created because the applicant knew about his plan at the beginning of January 2014 and did nothing until the end of February 2014.

[13] It was conceded on behalf of the respondent that in general, matters involving allegations of breach of the restraint of trade are by their nature urgent. It was, however, contended on behalf of the respondent that in the present matter the applicant delayed in instituting the proceedings and thus agency was self-created.

[14] In the circumstances of this matter, the delay occasioned by having to wait for the outcome of the disciplinary hearing, is in my view, not unreasonable. Although he was serving notice as at the end of January 2014, the respondent was still an employee of the applicant. The intention of competing with the applicant, if at all, became more pronounced on the date of the termination of the contract. It is for this reason that I am of the view that the applicant's application deserve to be treated as one of urgency.

Locus standi

[15] The respondent contends that the applicant lacks *local standi* to enforce the provisions of the employment contract because he was not employed by the applicant but by the House of Locks (2003 registration).

[16] The applicant on the other hand contends that it took over the employment contract between the respondent and the House of Locks when the two

companies merged. In this respect, the applicant contends that subsequent to it and the House of Locks merging the respondent's employment contract was transferred to it in terms of section 197 of the Labour relations Act of 1995 (the LRA).

[17] The issue that arises from the above is whether the provisions of section 197 of the LRA came into operation by virtue of the merger of the two companies. Section 197 (1) of the LRA defines "business" and "transfer" in the following terms:

> '**Transfer of contract of employment**. – (1) In this section and in section 197 A
>
> (a) business" includes the whole or a part of any business, trade, undertaking or service; and
>
> (b) "transfer' means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –
>
> (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> (b) all the rights and obligations between the old employer and the employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
>
> (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer, and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

[18] In considering the concept "going concern" as envisaged in section 197 of the LRA, the Constitutional Court in *NEHAWU v University of Cape Town (NEHAWU)*[1] held that:

> 'The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation "so that the business remains the same but in different hands." Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.' [footnotes omitted][2]

[19] The question of whether the merger between Sanlic and House of Locks resulted in the transfer of the business as a going concern as envisaged in section 197 of the Labour Relations Act (the LRA) has to be determined

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[1] (2003) 24 *ILJ* 95 (CC) at para 56. See also *Aviation Union of South Africa v SA Airways (Pty) Ltd* (2011) 32 ILJ 2861 (CC) at 47 where Jafta J - in dealing with whether a transfer can be regarded as one envisaged in section 197 of the LRA had the following to say:'But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case.'

[2] The LAC in dealing with what constitutes transfer of a business as a going concern in *NEHAWU v University of Cape Town and Others (2002) 23 ILJ 306 (LAC)* at 338F, per Zondo JP, as he then was, stated the following: "Accordingly, each transaction must, in my view, be considered on its own merits in the light of all the surrounding circumstances of the transaction before a determination can be made whether they constitute the transfer of a business as a going concern."

objectively from the facts as presented by the parties in these proceedings. It is also those facts that will determine whether Sanlic has *locus standi* to enforce the restraint as set out in the employment contract.

[20] It is trite, as stated in *Primedia Outdoor, Devision (Pty) Ltd v Phala NO and Others*,[3] that the onus rests on the party instituting and prosecuting a claim to show that it has *locus standi.* Therefore, in the present instance, the onus rests on the applicant to show that it has *locus standi* to enforce the employment contract concluded between the respondent and the House of Locks.

[21] It is common cause that Sanlic and House of Locks merged. In my view, the merger on its own does not on the authority of *Ndima and Others, Sithukuza and Others v Waverly Blankets Ltd*,[4] automatically trigger the provisions of section 197 of the LRA. The authorities that have followed *Ndima's* decision draw a distinction between 'possession and control of business.' In this respect Sandi AJA in *Long v Prism Holdings*,[5] had the following to say:

> 'The transfer of possession and control do not trigger the operation of section 197 of the LRA.'

[22] In *Schutte v Powerplus Performance (Pty) Ltd*,[6] the Court held that the proper approach when dealing with the issue of "whether transfer as a going concern has taken place is to examine substance and not form." The question of whether the provisions of section 197 of the LRA have been triggered entails an objective assessment of the facts of each case.[7]

[23] The meaning and the factors to take into account when assessing whether "transfer as a going concern" has taken place is summarised by Tlaletsi JA, in *Hydro Colour Inks (Pty) Ltd v CCEPAWU*,[8] as follows:

[3] (JR 157/2011) [2012] ZALCJHB 94 (LC) (31 August 2012) at para 11.
[4] (1999) 20 ILJ 1563 (LC) at para 66.
[5] [2012] 7 BLLR 672 (LAC) at para 32.
[6] [1999] 2 BLLR (LC).
[7] See *Aviation Union of South African v SA Airways (Pty) Ltd* [2012] 2 BCLR 117 (CC).
[8] [2011] 7 BLLR 637 (LAC) at para 12. This is a summary of the principles set-out in both the minority judgment of Zondo JP in *National Education Health and Allied Workers Union v University of Cape Town* and Others 2002 23 ILJ 306 (LAC), and the Constitutional Court on appeal in the same matter,

'(i) Since the phrase "going concern" is not defined in the Act, it must be given its ordinary meaning unless the context indicates otherwise;

(ii) What is transferred must be a business in operation so that the business remains the same but in different hands;

(iii) A determination of whether a business has been transferred as a going concern is a matter of objective determination in the light of the circumstances of each transaction;

(iv) In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction,

(v) There are a number of factors that are relevant in determining whether or not a business has been transferred as going concern, such as, but not limited to: what will happen to the goodwill of the business, stock-in-trade, the premises of the business, contracts with clients or customers, the workforce, the assets of the business, the debts of the business, whether there has been interruption of the operation of the business and if so, the duration thereof, whether same or similar activities are continued after the transfer or not.

(vi) All the factors referred to above are not exhaustive and none of them is decisive individually.

(vii) These factors must all be considered in the overall assessment and should therefore not be considered in isolation.'

[24] The question in this matter was pertinently raised in *Securicor (SA) (Pty) Ltd and Another v Lotter and Others*,[9] where Froneman J in dealing with facts very similar to those of the present held that:

National Education Health and Allied Workers Union v University of Cape Town Others (2003) 24 *ILJ* 95 (CC).

[9] [2005] 10 BLLR 1032 (E) at para 7. In *Securicor*, Froneman J relied on the case of *Botha and Another v Carapax Shadespots (Pty) Ltd* 1992 (1) SA 202 (AD), a case which was decided before the introduction of section 197 of the LRA. The Learned Judge found that although the case was decided before the introduction of section 197, the principles enunciated therein apposite the interpretation of the provisions of section 197. He further found that the principles as set out in that judgment were in line with the decisions in *NEHAU v University of Cape Town and Telkom SA Ltd and Others v Blom and Others* (2003) 7 BLLR 638 (SCA).

'[7] In *Carapax* it was held that ordinarily the restraint of trade is entered into for the benefit of the business itself, as distinct from the personal benefit for the owner of the business. In such a case the benefit of the restraint is incidental to the business, and part of its goodwill. The owner of the business is vested with the contractual right to enforce the restraint and when he sells or disposes of the goodwill of the business the merx of the sale or disposition embraces the contractual right. The transfer of this contractual right takes place by way of cession. The cession consists of an obligatory agreement (to sell or dispose of the right) and an agreement of transfer (the delivery of the business to the new owner). The new owner then becomes entitled to enforce the contractual restraint."

What is comprised in the sale of goodwill is a business, and whether it includes the right to enforce a restraint, is however, the question of fact: "there is no fixed or invariable rule by which the benefit of an agreement in restraint of trade passes to the purchaser of the goodwill of the business (footnote omitteds)…."'

[25] In answering the question raised in this matter, namely whether the business of House of Locks was disposed of to Sanlic as a going concern, Froneman J in *Securicor* held that:

'[12] The legal position (consonant with *Carapax, NEHAWU* and *Telkom*) is thus that, in order to determine whether the restraint agreement survives the transfer of a business under section 197 of the Labour Relations Act, it needs to be determined as a matter of fact whether the restraint form part of the goodwill of the business and whether that will form part of the business been transferred as a going concern in terms of the section. This is an objective factual enquiry which will depend on the circumstances of each case.

If this factual enquiry establishes that the restraint form part of the transfer of a business, the employee's obligations under the restraint are owed to the new employer and the new employer is entitled to enforce the restraint against the employee. The content of the right so ceded and the obligations so delegated do not become greater or lesser by virtue of the provisions of section 197. What may happen is

> that, by virtue of the fact that this rights and obligations attached to the transferred business, their exercise and performance will be determined to some extent by the fortunes of the business after its transferred.'[10]

Analysis

[26] The essential question to answer, prior to considering the merits of this matter, is whether the of House of Locks was disposed of to Sanlic as a result of the merger and thus resulting in the contract of employment of the respondent also being transferred as a consequence. Put in another way, the question is whether the merger between the applicant and House of Locks triggered the provisions of section 197 of the LRA.

[27] The onus is on applicant to show that as a result of the merger the business of the House of Locks was transferred as a going concern to it. In this respect, the applicant relies essentially on four points in support of its contention that the merger triggered the provisions of section 197 of the LRA and those points can be summarised as follows:

a. upon the conclusion of the merger during September 2012 the House of Locks "was subsumed" by Sanlic.

b. the respondent's employment contract was transferred to the applicant as a result of the merger.

c. The respondent was a member of the executive of the applicant and was intimately involved in the discussion about the merger.

[28] In response to the issue of *locus standi* as raised by the respondent in its answering affidavit the applicant simply denies the averment that the respondent was not employed by it. The respondent contends in this respect that the applicant tendered his services and received remuneration from it.

[29] In my view, the evidence tendered by the applicant is insufficient to determine whether objectively speaking it can be said that a transfer as a going concern

[10] Ibid at para 12.

and particularly as envisaged in section 197 of the LRA has taken place. Except for stating that there was a merger with the House of Locks the fact as provided by the applicant are lacking to form a basis for characterising the transaction of the merger as having disposed of the business of the House of Locks as a going concern. There is in this respect no evidence as to whether the assets and liabilities of the House of Locks pooled into those of the applicant.

[30] It follows that the applicant has failed to show that the merger that it relies on triggered the provisions of section 197 of the LRA. In other words, the applicant has failed to show that it has a right to enforce the restraint of trade by virtue of the merger.

[31] In light of the above, the preliminary point raised by the respondent concerning the *locus standi* of the applicant to enforce the restraint is up held. There is no reason in law and fairness why the costs should not follow the results.

<u>Conclusion</u>

[32] The applicant's failure to establish its *locus standi* sufficient to enable it to enforce the restraint agreement entered into between the respondent and the House of Locks, which is a separate legal entity, renders it non-suited herein and in the result, the respondent's preliminary point stands to be upheld. In the result the applicant's application to restrain the respondent stands to fail. It is also for this reason that I do not deem it necessary to deal with the other issues raised in this matter.

[33] In the circumstances, the following order is made:

1. The matter is treated as one of urgency and accordingly failure to comply with the rules relating to time frames is condoned.

2. The applicant does not have *locus standi* to enforce the employment contract between the respondent and the House of Locks (Pty) Ltd.

3. The applicant's claim is dismissed with costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M A Lennox
Instructed by:	David Morgan Inc Attorneys.
For the Respondent:	Advocate G Kairiaos
Instructed by:	A Du Plessis Attorneys.