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

Not reportable

Case no: JS 2000/2011

In the matter between:

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| **GENERAL INDUSTRIAL WORKERS UNION OF SOUTH AFRICA** | **First Applicant** |
| **MOSES PRINS AND 6 OTHERS** | **Second and Further Applicants** |

and

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| **JOHANNESBURG FOUNDRY CC** | **First Respondent** |
| **JOHANNESBURG FOUNDRY (PTY) LTD** | **Second Respondent** |

**Heard: 8 February 2017**

**Delivered: 17 February 2017**

**Summary: Joinder application. First Respondent liquidated. No application to join liquidator or notice to liquidator. Joinder application dismissed.**

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**JUDGMENT**

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**PRINSLOO J**

Introduction

[1] The Applicants referred an unfair retrenchment dispute to this Court citing Johannesburg Foundry CC (the Respondent) as the respondent. The Applicants subsequently filed an application to join Johannesburg Foundry (Pty) Ltd (the Company) as Second Respondent in the matter pending between the Applicant and the Respondent.

[2] The application for joinder is opposed.

Background facts

[3] The affidavits filed by the Applicants in support of the joinder application are sketchy and in some respects the application is defective, which I will deal with *infra*. However, from a perusal of the founding and opposing affidavits, the background facts to this application appear to be that the Respondent operated a foundry that manufactured goods that were sold to the Company. The Respondent stopped doing business on or about 10 May 2011 and it terminated the contracts of all its employees, including the individual Applicants in this matter.

[4] The Applicants referred an unfair retrenchment dispute to this Court in 2011.

[5] During October 2011 the Respondent was liquidated.

[6] The Applicants seek to join the Company on the basis that the Respondent was transferred to the Company as a going concern.

[7] In opposing the application, the Company took issue with the fact that there was no proper citation of the Company and no proper service of the application and it was impossible to determine whether the papers were served on the Respondent or the Company. These complaints are not entirely without merit, but in my view these defects had been cured to a large extent. I say so for the following reasons: the application is opposed and the deponent to the opposing affidavit is Mr van Dyk (van Dyk), who describes himself as a director of the Company and duly authorised to oppose the application on

behalf of the Company. He was also the only member of the Respondent. His opposing affidavit and the capacity in which he opposed the application, constitutes proof of service on both entities and I am satisfied that the Respondent and the Company are aware of this application and had the opportunity to oppose it.

[8] In the application for joinder the founding affidavit is deposed to by Mr David Cartwright, an attorney who acted on behalf of the Applicants. Mr Cartwright, in support of the application, made allegations relating to the physical address of the Respondent, its assets, customers and business.

[9] In his opposing affidavit van Dyk denied that the facts Mr Cartwright deposed to fall within his personal knowledge. The Applicants filed no replying affidavit and Mr Grundling on behalf of the Company submitted that no weight could be attached to the allegations set out in the Applicants' founding affidavit and that the application for joinder has to be decided solely on the basis of what is contained in van Dyk's opposing affidavit.

[10] Mr Cartwright deposed to the affidavit in support of the application for joinder without setting out how the facts fall within his personal knowledge and why he is in a position to state under oath that the Respondent's business was transferred to the Company in August 2011 as a going concern. At best this is what the Applicants told Mr Cartwright and he cannot be said to have personal knowledge of what he has been told. There is no confirmatory affidavit deposed to by someone who indeed has personal knowledge of the allegations made by Mr Cartwright.

[11] In *President of the Republic of South Africa and others v M&G Media Ltd*[1] the Constitutional Court held that a deponent's assertion that the information is within his or her personal knowledge is of little value without some indication, at least from the context, how that knowledge was acquired. An indication of how the knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. The mere assertion that

[1] 2012 (2) SA 50 (CC) at paras 28 and 107.

he has personal knowledge is without value as evidence of the fact in issue. The deponent has to tell the Court how he acquired personal knowledge.

[12] I cannot attach any weight to the averments made by Mr Cartwright and will consider what is stated in van Dyk's opposing affidavit to decide this application.

<u>The application for joinder</u>

[13] The Applicants seek to join the Company on the basis that the Respondent was transferred as a going concern to the Company. In support of their application, the Applicants made the certain allegations. I have already alluded to the fact that no weight could be attached to the averments. Be that as it may, those averments are:

13.1. That the physical address of the Respondent is now the physical address of the Company and they use the same telephone and fax numbers;

13.2. The Respondent's assets in terms of buildings and machinery are now under the control or ownership of the Company;

13.3. Customers of the Respondent are now customers of the Company;

13.4. The business that was conducted by the Respondent is now conducted by the Company;

13.5. The Respondent's business has been transferred to the Company in terms of the provisions of section 197 of the Labour Relations Act[2] (the Act) and consequently the liabilities in the pending unfair retrenchment proceedings have been transferred to the Company;

13.6. The Company has a direct and substantial interest in the matter.

[14] Van Dyk explained that he was the only member of the Respondent. Sinvac Investments (Pty) Ltd owns 51% of the shares in the company and the remaining 49% shares are owned by van Dyk and the Abacus trust. Van Dyk, his wife and his son are the trustees of Abacus trust.

[2] 66 of 1995.

[15] Van Dyk denied that the Respondent was transferred as a going concern as it is not legally possible for a close corporation to be transferred as a going concern to a private company. He explained that:

15.1. The Respondent and the Company conducted separate businesses from the same premises;

15.2. The Respondent and the Company shared services for example telephone and fax facilities;

15.3. The Company was a marketing company that bought goods manufactured by the Respondent and sold it to clients;

15.4. The moveable assets of the Respondent were transferred to the Abacus Trust on 28 February 2011 and on 30 April 2011 all the stock of the Respondent was transferred to the said trust;

15.5. In May 2011 the Company took over the moveable assets and stock from Abacus Trust;

15.6. Seven days after the Respondent stopped doing business, the company commenced with a foundry business on the same premises;

15.7. The Company entered into contracts of employment with some of the Respondent's former employees;

15.8. The Company has not taken over customers as it was the Respondent's only client.

[16] It is trite and in accordance with the provisions of rule 22 of the Rules of this Court that in order for parties to be joined to particular proceedings, they must have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. Whether a section 197 transfer indeed took place is relevant to decide whether the Company has a direct and substantial interest and whether it would be directly affected by the outcome of the trial and the Court's order.

[17] In my view the question whether or not there was a transfer as contemplated in section 197 of the Act, should only be considered after the question whether there are proceedings to which the Company could be joined, has been decided.

[18] The question whether the Company has a direct and substantial interest, only becomes relevant if it is competent to join the Company to the pending proceedings.

Joinder

[19] Rule 22 of the Rules of this Court provides for joinder as follows:

> "(1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.
>
> (2)*(a)* The court may, of its own motion or on application and on notice to every other party, make 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.
>
> *(b)* When making an order in terms of paragraph *(a)*, the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs."

[20] This Court may join 'persons as parties in proceedings' and in considering any application for joinder, the point of departure is to establish whether there are proceedings to which parties could be joined.

[21] In *Du Preez v LS Pressings CC & Another*[3] this Court has confirmed that joinder in terms of rule 22 is in respect of proceedings before Court and that the purpose of a joinder is to allow participation in live proceedings.

[22] *In casu* it is undisputed that the Respondent was liquidated in October 2011.

[23] Section 359(2)(a) and (b) of the Companies Act[4] provides that:

> "2(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of

[3] (2013) 34 ILJ 634 (LC) at paras 12 and 17.

[4] Act 61 of 1973. See sections 358 and 359.

> enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.
>
> (b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs."

[24] The Applicants have not notified the liquidator as per the prescripts of the Companies Act, nor have they filed an application to join the liquidator in these proceedings. In terms of the provisions of the Companies Act the proceedings shall be considered to be abandoned.

[25] Even if the Applicants were not aware of the liquidation of the Respondent in October 2011 or at the time when they filed their statement of case in 2011, they certainly became aware of the liquidation in October 2014 when the Company filed its opposing affidavit and therein specifically stated that the Respondent was liquidated on 13 October 2011.

[26] The liquidation that came to the Applicants' knowledge in 2014 should have sparked some action and should have alerted the Applicants' attorneys to the fact that they should notify and join the liquidator. Unfortunately for the Applicants this was not done and the status of the proceedings before this Court is and remains 'abandoned'.

[27] The joining of the Company is dependent on whether the principal matter is live before Court and whether the joining of the Company would allow for participation in live proceedings.

[28] There are no live proceedings between the Applicants and the Respondent as the proceedings are abandoned and there are no proceedings to which the Company could be joined. There are no live proceedings in which any of the Respondents can participate and be afforded the opportunity to be heard.

[29] In view of the fact that the Applicants are unable to cross the first hurdle for joinder, it is not necessary to decide whether the Company has a direct and

substantial interest in the matter or whether a section 197 transfer indeed took place, albeit *prima facie.*

[30] In the absence of live proceedings, the relief sought by the Applicants is not competent and cannot be granted. Mr Grundling argued that the application should be dismissed with costs. I can see no reason to deviate from the general rule that the cost should follow the result.

Order

[31] In the premises I make the following order:

1. The application for joinder is dismissed with costs.

C Prinsloo

Judge of the Labour Court of South Africa

Appearances

Applicants: Mr Bayi of Bayi Attorneys

Second Respondent: Adv R Grundlingh

Instructed by: Maritz Smith Inc Attorneys