IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 947/13

In the matter between:

NEVILLE DE LUCIA **Applicant**

and

ETIENNE BESTER **First Respondent**

KAT DE BEER TRAINING (PTY) LTD **Second Respondent**

Heard: **21 April 2017**

Delivered: **01 August 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] With this *interlocutory* application, the applicant (De Lucia), seeks to join the second respondent, Kat De Beer Training (Pty) Ltd ('KDBT') in the trial proceedings initiated by the first respondent, Etienne Bester (Bester). Bester had approached this Court by way of a statement of case in October 2013, alleging that his dismissal by De Lucia was automatically unfair within the

meaning of the provisions of section 187(1)(g)[1] read with those of section 197(8)[2] of Labour Relations Act[3] (LRA).

[2] Initially, Bester had also cited KDBT as the second respondent, and both De Lucia and KDBT had opposed his claim. In July 2016, Bester, withdrew his claim against KDBT. He nonetheless did not seek leave to amend his statement of claim. On 6 October 2016, De Lucia launched this application to join KDBT to the trial proceedings, on the basis that it had substantial interest in the subject matter of the proceedings. Bester filed his intention to oppose that application, but as at the hearing of this matter he had not filed an answering affidavit. Substantive heads of argument were nevertheless filed on his behalf and he was accordingly represented in these proceedings. KDBT had however opposed that application by filing an answering affidavit. De Lucia had not filed a replying affidavit.

[3] Bester's statement of claim and De Lucia's application to join KDBT in the main proceedings came about against the background as summarised below.

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[1] Section **187. Automatically unfair dismissals**

(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is –

…

(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A;

[2] Section: **197. Transfer of contract or employment**

(1) In this section and in section 197A-

(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.

…

(7) The old employer must-

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

(i) the leave pay accrued to the transferred *employees* of the old employer;

(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 requirements; and

(iii) any other payments that have accrued to the transferred *employees* but have not been paid to *employees* of the old employer;

…

(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 to 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.

[3] Act 66 of 1995.

Background:

[4] Bester commenced his employment with KDBT as a Financial Director during March 2001. He left its employ in 2005 and was re-employed in the same position on 1 April 2009. De Lucia held 50% shares within KDBT which he had bought during 2005, and had also become its Director. From 1 March 2012, Bester was appointed as KDBT's Financial Director, and from February 2013, he worked via a so-called 'virtual office'.

[5] In June 2013, an agreement was signed between De Lucia and the shareholders of KDBT, in terms of which the former purchased the latter's franchise in respect of KDBT's territories as a going concern, excluding its operations within the KwaZulu-Natal. According to Bester and KBDT, the parties agreed on the transfer of contracts of employment in accordance with the provisions of section 197 of the LRA.

[6] Bester's intentions since May 2013 had always been that he would continue to work for De Lucia after the transfer. On 3 July 2013, De Lucia dispatched an e-mail to Bester, indicating that his current employment was with KDBT and not with him, and was further advised to deal directly with KDBT. The email *inter alia* recorded the following:

> "…
>
> I have purchased the right to sale Dale Carnegie business in Gauteng, North West, Free State, Limpopo, Mpumalanga, Northern Cape and Namibia from Joan Deer Beer.
>
> I have resigned from KdBT as a director and have sold my shares back to de Beers in KdBT effective 1st July 2013.
>
> I have signed the new franchise agreement with DC&A through my company PDP which I own 100%.
>
> It was agreed between Neil and myself that any business that has a signed training agreement will be invoiced through KdBT and all costs, trainers' fees and commission will be for KdBT. It was also agreed that the current public

process due to start this month will be invoiced under KdBT and that the costs for these classes will be for KdBT.

…

I did ask what your intention was to your possible involvement with me, should I be successful in my bid to purchase the right to sale Dale Carnegie training in my territory. Your reply was that Neil and my business agreement could cover your future involvement. Consequently as per the earlier comments your current employment is with, and through KdBT and I advise that you deal directly with KdBT in this regard moving forward.

…"

[7] Bester thereafter referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration for Conciliation (CCMA) on 11 July 2013, alleging that he was dismissed, which dismissal was automatically unfair. When conciliation failed on 8 August 2013, the matter was then referred to this Court for adjudication.

[8] The basis of Bester's claim was that;

a) Since De Lucia had purchased the business of KDBT as a going concern, the contracts of employment of employees of KDBT, and all rights and obligations of KDBT were taken over by De Lucia as a going concern in terms of the provisions of section 197 of the LRA;

b) De Lucia had further not accepted his services, and had thus terminated his services because of operational requirements emanating from the provisions of section 197 of the LRA transfers;

c) Notwithstanding the above, the dismissal was substantively unfair as it was not based on operational requirements, and further that there was no commercial rationale justifying his dismissal;

d) De Lucia ignored aspects of section 197 of the LRA transfer procedures by failing to consult with him;

[9] KDTB did not contest the correctness of the factual allegations made by Bester in his statement of case, and had conceded that the sale agreement concluded with De Lucia was always intended to and had the effect of transferring its business as a going concern, and that the parties had intended that the provisions and legal consequences of section 197 of the LRA would apply.

De Lucia's submissions in seeking a joinder:

[10] Contrary to Bester's contentions as summarised above, De Lucia denied that he had purchased the rights, titles and obligations of KDBT as a going concern and disputed that the provisions of section 197 of the LRA were applicable. He contended that only some of the marketing rights that KDBT held to a specific geographical area were taken over by him. He had further denied having employed Bester or ever having dismissed him, and denied liability for any claims.

[11] De Lucia had further pointed out that KDBT in its statement of defence prior to the claim being withdrawn against it, had contended that its agreement with him was intended to have the effect of transferring the business as a going concern, and had denied liability to Bester either individually, alternatively jointly and severally. He pointed out that KDBT had however admitted that in the event that the Court found that there was a transfer of a business between, and if it were further found that he had dismissed Bester for operational requirements within 12 months of the date of the transfer of the business, then there would be joint and several liability for the sums contemplated in section 197 (8) of the LRA.

[12] De Lucia further submits that the crux of the dispute revolves around the agreement entered into between him and KDBT, and whether it had resulted in the sale of KDBT's business as a going concern. He submitted that KDBT has a substantial interest in the subject matter of this case, and that in the event of the Court finding that the agreement did not provide for the transfer of the business as a going concern, then KDBT would be indebted to Bester for compensation for dismissal, and the balance of the relief claimed by him.

[13] De Lucia further submitted that in the event of the Court making a finding that there was a transfer of a business, and that Bester was dismissed for operational requirements within 12 months of the date of the transfer, KDBT would be liable to Bester, jointly and severally with him, for payment of leave pay, severance pay and all other payments which had accrued to Bester.

KDBT's response to the joinder application:

[14] KDBT opposed the application to join it to the proceedings on the basis that;

a) It has no direct, indirect or substantial interest in this dispute, and there was no basis upon which its joinder to the proceedings should be ordered;

b) To join it would merely result in it being obliged to endure the costs of a trial in circumstances in which no order would be made against it in favour of Bester, and further that the interests of justice would not be served by obliging it to be joined in proceedings and incur costs in a trial the outcome of which it has no interests in;

c) It has at all times agreed with Bester that the transfer of the business between it and De Lucia was intended to be and was in fact a transfer of a business as a going concern governed by the provisions of section 197 of the LRA, but had however disagreed with the conclusions contended for by Bester in his statement of claim as to the effects and consequences of the transfer;

d) Since Bester's claim was that he was dismissed by De Lucia on a date after the transfer of the business, and his other claims for payment related to claims which allegedly arose after the transfer of the business, the provisions of section 197 (2) (c) of the LRA which were applicable only to acts performed by an old employer prior to the transfer were immaterial to the claim;

e) Bester's claim was not predicated upon any term or condition of his employment which arose prior to the transfer of the business and thus the provisions of section 197 (9) of the LRA were not also applicable

f) Bester's claim was that he was dismissed as a result of the transfer of the business and not for operational requirements, and therefore no liability arose under the provisions of section 197 (7) of the LRA since there was no issue before the Court about whether or not Bester's services were terminated for operational requirements, and also since the issue was whether or not he was dismissed.

g) It was only if it were to be found that Bester's services were terminated by way of De Lucia's operational requirements that KDBT could under section 198 (8) read with 198 (7) (a) of the LRA be found to be jointly and severally liable. This was however unlikely in view of Bester's pleaded case that De Lucia refused to take him into service and that he was therefore dismissed, as opposed to the latter's case that it had no obligation to take him into its service and that he therefore was not dismissed;

h) Furthermore, Bester had not pleaded in the alternative that KDBT itself was to be found directly liable for his dismissal in the event that his primary cause of action against De Lucia was dismissed. Regardless of the fact that Bester claimed leave and severance pay, which were amounts KDBT would be liable to pay under section 197 (7) (a) (ii) of the LRA read together with section 197 (8) of the LRA, jointly and severally with De Lucia if his services were found to have been terminated for operational reasons, his pleaded case was not that his services were terminated for operational requirements, and KDBT could therefore not be found to be jointly and severally liable;

i) Even if Bester was found to be correct, he would be entitled to certain relief he sought against De Lucia, and except for payment of severance pay, this did not affect KDBT. If it was found that De Lucia was correct, then Bester would be entitled to nothing, and this also did not affect KDBT.

[15] Submissions made on behalf of Bester in regard to the joinder application were to the effect that his dismissal by De Lucia was substantively and procedurally unfair emanating from a transfer as a going concern as contemplated in sections 187 (1) (g) and 197 of the LRA. Having had regard to the provisions of section 197 of the LRA, he had a choice as to whom he wanted to pursue a claim against as his position was similar to that of a creditor who was entitled to proceed against co-debtors individually or jointly. He could therefore not be forced to proceed against both parties in the current action, and that furthermore, in the absence of proceeding against KDBT, the latter's rights did not stand to be prejudicially affected.

Evaluation:

[16] This application was brought before the Court in terms of Rule 22 (1) of the Rules of this Court[4]. The legal principles regarding applications for a joinder were confirmed by Nkabinde J in a dissenting judgment in *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others*[5] as follows;

> 'The test for joinder at common law is governed by the following principles:
>
> (a) There must be a legal interest in the proceedings and not merely a financial interest.

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[4] Which provides that;

> "**22 Joinder of parties, intervention as applicant or respondent, amendment of citation and substitution of parties**
>
> (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."

[5] *(2015) 36 ILJ 363 (CC)* at para 186. See also *Klaase and Another v van der Merwe N.O. and Others 2016 (9) BCLR 1187 (CC)* at para 45, where Matojane AJ held that;

> "The test for joinder is that a party must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. In ITAC, this Court confirmed the test and said that a party seeking joinder must have a direct and substantial interest in the subject matter. The Court held that the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation." (citations omitted)

(b) A party has a right to ask that someone be joined as a party "if such a person has a joint proprietary interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the Court's order" and "to avoid a multiplicity of actions and . . . a waste of costs".' (Authorities omitted)

[17] The above principles were followed in this Court by Molahlehi J in *Wallejee v FCSA Organisation Service (Pty) Ltd*[6], who had held as follows;

> "It is trite that the test to apply in considering whether a party should be joined in proceedings is whether the party sought to be joined has "substantial interest in the subject matter of the proceedings". The test was explained in *Gordon v Department of Health: Kwazulu-Natal* in the following terms:
>
> "…The issue in our matter… is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party, who is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated Engineering Union case, supra, it was found that "the 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".

[18] Whitcher AJ (as she then was) also had an opportunity in *Strydom v T-Systems SA (Pty) Ltd*[7] to determine an application for a joinder within the context of a section 197 of the LRA claim. Having had regard to the principles enunciated in *Gordon v Department of Health: KZN*[8], the learned Judge held

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[6] (2015) 36 ILJ 1943 (LC) at para 14.

[7] *(2012) 33 ILJ 2978 (LC)*

[8] *(2008) 29 ILJ 2535 (SCA)* at para 9, where the SCA held that;

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

that the position in our civil law was that the mere fact that a third party was jointly and severally liable for a debt did not qualify as a direct and substantial interest in the right that is the subject matter of the dispute, and further that joint liability for a debt did not trigger the joinder of such a party by necessity, and that mere financial interest or prejudice has been held to be secondary and indirect[9].

[19] In determining whether KDBT should be joined to the trial proceedings, the first observation as made on behalf of KDBT is that it is not clear from the joinder application as to in what capacity De Lucia seeks its joinder. For the sake of convenience however, and more particularly in view of the nature of Bester's claim, I will accept that De Lucia seeks to join KDBT as the second respondent in the main claim.

[20] It can further be accepted that once Bester had withdrawn his case against KDBT, and irrespective of the fact that he had not formally amended or sought leave to amend his statement of claim, his case against De Lucia and the relief claimed remains the same, as is the latter's response thereto.

[21] As to whether KDBT should be joined needs to be determined within the context of Bester's claim, the relief he seeks and De Lucia's responses thereto. To recap, Bester's claim was that he was dismissed by De Lucia on a date after the transfer of the business, and as a consequence of that transfer. His other claims for payment of severance and leave pay are related to those which arose after the transfer of the business. As it was correctly pointed out on behalf of KDBT, Bester's claim was not predicated upon any term or condition of his employment which arose prior to the transfer of the business. It therefore follows that the provisions of section 197 (9) of the LRA would not find application in this case. His further claim was that he was dismissed as a result of the transfer of the business and not for operational requirements, as there was no commercial rationale for the dismissal.

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] At para 11.

[22] De Lucia's principal defence to claim was that KDBT was never taken over as a going concern in terms of the provisions of section 197 of the LRA. He had further denied that he had ever employed Bester, and accordingly could not have dismissed him. He further contended that if the Court in the main action was to find that he did in fact take over KDBT as a going concern, and that Bester was dismissed for reasons related to operational requirements within 12 months of the transfer, then in that event, KDBT would be jointly and severally liable with it for leave and severance pay due to Bester.

[23] Having had regard to De Lucia's contentions, it is indeed apparent that they missed the nub of Bester's argument, which was that the termination of his services arose from the transfer of the business as a going concern within the meaning of automatically unfair dismissal as contemplated in section 187 (1) (g) of the LRA, which presents a different proposition if the argument was that the dismissal was based on operational requirements within the meaning of section 189 of the LRA. A second point which De Lucia missed is that Bester's claim is not based on the provisions of section 197 (9) of the LRA.

[24] In the light of the above observations, the first point to be made is that to the extent that the claim against KDBT was withdrawn, and since no relief is sought against it, it would not be possible for its legal interests to be prejudicially affected by any order, which could be made in due course. The fact that the question of joint and several liability may arise as contemplated within the provisions of section 197 of the LRA does not in itself automatically give rise to an apportionment of liability, moreso since Bester had not claimed it, as evident from the withdrawal of his claim against KDBT.

[25] Further on De Lucia's own submission, joint and several liability merely pertains to a claim under section 197 of the LRA and particularly in respect of leave or severance pay that may be payable to Bester. In line with the principles set out in *Gordon* and as further applied in *Intervalve*, *Strydom* and other authorities referred to, these financial considerations are clearly incidental to the primary relief sought by Bester, and cannot on their own lead to a conclusion that KDBT has a direct and substantial interests in the main proceedings.

[26] To the extent that Bester may be successful with the incidental claim, it would then be up to De Lucia to exercise his right of recourse against KDBT in a separate action, if he is of the view that some amounts may be recoverable from it. The mere fact that KDBT in its statement of defence as contended by De Lucia had conceded that it might be jointly and severally liable to the extent that Bester is successful with his claim does not further imply that it has a direct or substantial interest in the subject matter of the trial proceedings. It is merely an acknowledgement of the consequences of a finding that could be made as contemplated in section 197 (8) of the LRA. Be that as it may, the implications of Bester specifically abandoning his claim against KDBT is that he does not in any event seek such relief.

[27] To the extent that De Lucia had for mere convenience wished to avoid future litigation with KBDT (in the event that he held the view that the provisions of section 197 providing for joint and several liability found application, even though this is not Bester's case), it was correctly pointed out on behalf of Bester and KDBT that he could have issued a third party notice to KDBT in the main application by way of a Rule 13[10] application, and could at this stage of the proceedings compel KDBT to be a party to proceedings it has no interests in.

[28] A further factor to be considered is that of questions pertaining to whether Bester was an employee or not, or whether he was dismissed or not are matters for oral evidence, which KDBT clearly has no interests in. In the event that evidence would indicate that Bester was not employed nor dismissed by De Lucia, that would be the end of the matter, and I fail to appreciate how it can be said that KDBT has any substantial interest in that outcome. Furthermore, to the extent that Bester had withdrawn his claim against KDBT, that is a choice he would have to live with if his claim against De Lucia was unsuccessful.

[29] To summarise then, De Lucia has not demonstrated that KDBT has or may have a direct, substantial or legal interest in any order that the Court may make or if such order cannot be carried into effect without affecting or

[10] Of the Uniform Rules.

prejudicing it. KDBT is therefore not a necessary party and there is no basis upon which it can be joined in the trial proceedings. To hold otherwise would unnecessarily burden it with costs of a litigation which Bester as *dominus litis* had made a choice to avoid.

[30] It was correctly pointed out on behalf of KDBT that an employee is not obliged to proceed against both the old and new employer, and could choose which of the employers he wanted to pursue his or her claim[11]. Furthermore, it being apparent that De Lucia seeks to join KDBT as the second respondent in the main claim, the consequences for Bester if his claim was to be unsuccessful would be dire, as he may be burdened with the costs of two legal teams which he did not bargain for. To this end, it is further concluded that it would not be in the interests of justice to grant the application.

[31] What remains to be determined is the question of costs. This Court in accordance with the provisions of section 162 of the LRA is required to have regard to the requirements of law and fairness in awarding costs. Given the circumstances of this case, it is my view that based on the legal principles dealt with elsewhere in this judgment, this application was clearly ill-conceived. Accordingly, KDBT should not have been burdened with its costs. Bester nevertheless had not opposed the application despite his intentions to do so and it would not be in the interests of fairness to award him costs, specifically since the dispute between him and De Lucia is ongoing.

Order:

[32] In the premise I make the following order:

1. The application to join the Second Respondent is dismissed.

2. The Applicant, Neville De Lucia is ordered to pay to the Second Respondent, the costs of this application.

3. There is no order as to costs made in favour of the First Respondent.

[11] In reference to *Almazest (Pty) Ltd v Alexander and Others (P03/2013) [2015] ZALCPE 33 (14 May 2015).*

4. The Registrar of the Court is directed to set-down this matter for trial for three days.

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E Tlhotlhalemaje

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	Adv. C.J Moreno
Instructed by:	Minnie & du Preez Inc.
For the First Respondent:	Adv. J Lourens
Instructed by:	Len Dekker & Associates
For the Second Respondent:	Adv. K Allen
Instructed by:	Kenny Verhage & Associates