REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT, JOHANNESBURG

JUDGMENT

Reportable

Case No: J262/2010

In the matter between:

CAROL WALLEJEE **First Applicant**

MTSHWENI JOHANNA **Second Applicant**

And

FCSA ORGANISATION SERVICE (PTY) LTD **First Respondent**

TALWIN CONSULTING CC

T/A FRANKLIN COVEY SA **Second Respondent**

Heard: **29 August 2015**

Delivered: **05 March 2015**

Summary: **Joinder application. Applying for joinder after judgment. Waiver of right to join the interested party. Interested party has right to be heard. Application of section 197 of the LRA to joinder after judgment. Joinder not**

automatic in terms of the provisions of section 197 of the LRA. Party to be joined has right to be heard.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an application to join the second respondent, Talwin Consulting CC ("Talwin") as a party to an order issued by this Court against the first respondent, FCSA, on 21 May 2012. The applicant also seeks to substitute and replace the first respondent with Talwin in the same order.

[2] The applicant instituted these proceedings subsequent to a default judgment which was made in her favour by this Court. In terms of that order the Court found her dismissal to have been both procedurally and substantively unfair and ordered that she be reinstated.

[3] The second respondent has applied for condonation for the late filing of its statement of defence. In my view considering that the delay was only for 5 days and the explanation proffered is reasonable, there is no reason not to grant condonation. The joinder application is opposed by Talwin based on the following grounds:

> '4.1 Joinder may not be sought after judgment has been delivered.
>
> 4.2 The applicant waived her right to join Talwin as a party to this matter as she was at all times aware of the facts which form the basis of this application but elected to proceed with the matter without joining Talwin.
>
> 4.3 There is no transfer of business from the FCSA to Talwin, let alone a transfer as a going concern.'

Background facts

[4] Talwin is a training and development company which conducts the business of assisting companies with a variety of learning and training programmes aimed at effectiveness and productivity.

[5] The case of Talwin is that in September 2011, it entered into a franchise agreement with Franklin Covey, an American Company which provides productivity tools and assessment services. It was through this agreement that Talwin acquired a license to use Franklin Covey's programmes as part of its portfolio in South Africa, Swaziland and Lesotho.

[6] The acquisition of the licence was preceded by a payment of an initial fee to Franklin Covey. Furthermore, Talwin continues to pay on-going royalty fees for such licence. Talwin, however, does not receive any consideration or revenue from Franklin Covey. It also does not receive clients from Franklin Covey or FCSA as a result of the acquisition of the licence.

[7] It is common cause that the applicant was prior to her dismissal employed by FCSA as a partner and facilitator. She was retrenched by FACSA on 31 October 2009.

[8] The applicant was unhappy with her dismissal and it was for that reason that she referred a dispute concerning an alleged unfair dismissal to the CCMA for conciliation. The matter was then filed with this Court for adjudication after conciliation failed.

[9] The first respondent having failed to file a statement of opposition the applicant applied for a default judgment. The application was successful in that the Court found her dismissal to have been unfair.

[10] Thereafter the applicant was unsuccessful in seeking to enforce the order against FACSA and it was for that reason, that she resorted to enforce it against Talwin. In this respect the applicant contended that Talwin was liable because FACSA

had transferred its business to it as a going concern and in terms of section 197 of the Labour Relations Act (the LRA).[1]

[11] In seeking to have the default judgment enforced against Talwin the applicant filed the present application which as indicated earlier is opposed.

[12] On 13 February 2014, the applicant brought an application seeking to have the matter referred for oral evidence as a result of various disputes of facts pertaining to amongst others whether there was transfer of business from FCSA to Talwin in terms of section 197 of the LRA. That application was dismissed by Tlhotlhalemaje AJ on 20 March 2014. The order dismissing the application reads as follows:

> "i. The application to refer the matter to oral evidence is dismissed.
>
> ii. The Registrar of the Court is directed to set the matter down for the hearing of the main application [the joinder application].
>
> iii. Costs are to be in the costs."

[13] As indicated earlier in this judgment the applicant obtained an order in her favour against FCSA. She now seeks an order declaring that; that judgment to be executable against Talwin alternatively to have Talwin joined as a party to the proceedings that had already concluded. The substitution argument is based on the contention that there was a transfer of business as a going concern and that the provisions of section 197 of the LRA are applicable.

Legal Principle

[14] 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

[1] Act 66 of 1995.

the subject matter of the proceedings. The test was explained in *Gordon v Department of Health: Kwazulu-Natal*[2] 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".

[15] Before dealing with the merits of whether transfer as a going concern has taken place, I will deal firstly with the preliminary point raised by Talwin, which is that the judgment in question cannot be enforced against it because it was not cited as a party in the proceedings which led to the granting of the order. It is argued in this regard that Talwin was not afforded the opportunity to be heard in relation to its potential liability to the applicant.

[16] In failing to timeously joining Talwin, the applicant, according to Talwin waived its right to join it once the order of the court was made. In this respect Talwin relies on the judgment of *Ngema and Others v Screenex Wire Weaving Manufacturers (Pty) Limited and others*,[3] where the Court in dealing with facts very similar to the present held that:

> "It is not correct as the applicants submitted that joinder may take place after judgment has been handed down."

[17] The Court further held that:

> "In this case, the second respondent must, save if there is an express exclusion of its rights in terms of the LRA, enjoy the same rights to be heard . . . There is no express exclusion in the LRA that an interested party, such as second

[2] 2008 (6) SA 522 (SCA); 2009 (1) BCLR 44 (SCA) at para 9.
[3] (2012) 33 *ILJ* 681 (LC).

> respondent, should not be afforded an opportunity to be heard in a matter where it has a direct and substantial interest. In this case, the dispute was no longer about whether the appellants had been unfairly dismissed. That issue had been disposed of by this Court in the judgment of Zondo JP who dismissed an appeal against the judgment and order of Hendricks AJ to the effect that the dismissal of the appellants was both procedurally and substantially unfair. That did not mean that the second respondent did not have right to be heard with regard to the question of the appropriate remedy."

[18] Another important point made by the LAC, in that case, is that the second respondent, (being the party which the applicant sought to join after the order was made) was at the least, entitled to be heard on the specific question of the relief. The court also found that the second respondent ought to have been joined as it had a direct or substantial interest in the determination particular in relation to the appropriate relief.

[19] In the present matter although the applicant is seeking to have the court come to her assistance, she does not however take it into her confidence. She deals very peripherally with the issue as to when did she become aware that the transfer has taken place. The version of Talwin, which I accept as being more probable based on the facts put forward by it, is that the applicant became aware during the middle of November 2011 through the email which was from the second applicant addressed to Mr Roets, the relevant part for the purpose of this judgment reads as follows:

> "Dear John
>
> Herewith the new address for FCSA, as requested, I am also attaching a letter notification of change of ownership that they had send to me. "

[20] There has been an excessive delay in seeking to join Talwin considering the time between the applicant instituting the proceedings against FACSA to the time when the current proceedings were instituted. Despite being aware of the alleged

transfer of the business, the applicant did nothing to ensure that Talwin was joined in the proceedings.

[21] In light of the above I am inclined to agree with Talwin that the applicant has waived her right to join it in those proceedings. Accordingly, the preliminary point raised by Talwin stands to succeed and thus the applicant's application to join or substitute Talwin stands to fail on this basis alone.

[22] In my view, the applicant's claim would still be unsustainable even if the preliminary point was not dispositive of the matter. The application would still be unsustainable when the facts relating to allegation that there has been a transfer of business as a going concern are objectively considered.

[23] In seeking to join Talwin and have the order made against FACSA enforced also against it, the applicant relies on the provisions of section 197 of the LRA. The purpose of section 197 of the LRA, is stated *in Ngema v Screenex Wire Waving Manufacturing (PTY) LTD and Others*[4] by Davis in the following terms:

> "[7] As the decisions make it clear, the very purpose of s 197 is to ensure an automatic transfer of employment contracts from the old to the new employer, in which the transfer of the business as a going concern takes place and existing workers are protected against a loss of employment when the business is so transferred.
>
> [8] It must follow, pursuant to this provision, that the employees who were dismissed before a transfer of the business took place may enforce their claims against the new employer.

Section 197 of the LRA reads as follows:

> '197 Transfer of contract of employment-
>
> (1) In this section and in section 197A-

[4] (2013) 34 *ILJ* 1470 (LAC).

(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.

(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 an 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 in 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."

[24] The question of whether the transfer of business as a going concern between FACSA and Talwin took place in terms of section 197 of the LRA is a matter to be determined objectively from the facts as appears on the papers before this court. It was in this respect that the court in *Schutte v Powerplus Performance*

(Pty) Ltd,[5] 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 same approach was adopted in *Aviation Union of South African v SA Airways (Pty) Ltd.* [6] where the court held that 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.

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*,[7] as follows:

'(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

[5] [1999] 2 BLLR (LC).
[6] [2012] 2 BCLR 117 (CC).
[7] [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, *National Education Health and Allied Workers Union v University of Cape Town Others* (2003) 24 *ILJ* 95 (CC).

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.'

[25] The case of the applicant in contending that there was a transfer of business as a going concern from FACSA to Talwin, is summarised in its heads of argument in the following:

'6.1 on the papers, it is common cause that FCSA is no longer the license holder for the provision of Franklin Covey services in South Africa and that Talwin is now the license holder for such;

6.2 despite Talwin's of this fact, on the papers, it is clear that the Franklin Covey license is exclusively issued to a single entity in any region and that, in respect of Southern and Eastern Africa Region [particularly, in South Africa], the license has been exclusively issued to Talwin;

6.3 it is common cause that, after the termination of the license agreement between FCSA and Franklin Covey and subsequent awarding of that license to Talwin, some of the employees of the former FCSA, commenced employment for Talwin;

6.4 it is common cause that subsequent to the awarding of the Franklin Covey license to Talwin, Talwin commenced servicing some of the former clients of FCSA;

6.5 it is common cause that the nature of the Franklin Covey services now provided by Talwin remain exactly the same as those previously provided by FCSA;

6.6 finally, it is common cause that, without having obtained the Franklin Covey license, Talwin could not provide Franklin Covey services and solutions to any client.'

[26] The issue of whether Talwin should be joined in this matter depends on whether the facts support the proposition that FACSA's business was transferred as a going concern to Talwin. In the first instance there is a dispute of fact as to the transfer of business between the two entities. Applying the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[8] case, I am of the view that the probability supports strongly the contention of Talwin that there was never a transfer of business as a going concern to it.

[27] In my view, even the basic facts based on the applicant's own papers, do not support the proposition that business was transferred from FACSA to Talwin. The relationship between the parties and Franklin Covey, the American Company was that of franchiser and franchisee. The parties concluded their agreement in as far as the productivity training was concerned respectively with Franklin Covey. The business of both FACSA and Talwin was based on the licence issued to them. It is common cause that when the period of the trade licence which was held by FACSA came to an end, Talwin successfully tendered for the license. The version of Talwin, which as I have indicated earlier has to be accepted or on the basis of the principle in *Plascon Evans* is that it independently applied for the licence and was successful in securing the licence..

[28] As concerning the fact that some of the employees of FSCSA were employed by Talwin, the facts indicate that they were employed in the ordinary course and not as part of a transfer.

[29] It is clear from the above that the only conclusion to reach is that there was no transfer of business from FACSA to Talwin. It cannot therefore be said that

[8] 1984 (3) SA 620 (A) at 634H-I where Corbett JA stated that '…where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

Talwin had any interest in the outcome of the applicant's claim. As a result the applicant's claim stands to fail.

[30] The second respondent has argued that costs should follow the result. In my view, instituting these proceedings the applicant acted in an unreasonable and thus forcing the Talwin to incur unnecessary costs. In the circumstances, I see no reason why costs should not follow the result.

Order

[31] In the premises, the applicant's application is dismissed with costs.

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E, Molahlehi

Judge of the Labour Court, Johannesburg

Appearances

For the Applicant:	Mr B. Masuku of Taback Attorneys
For the Respondent:	Advocate K. Iles.
Instructed by:	Bowman Gilfillan