REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS27/12

In the matter between:

MLAMLI KUNYUZA AND ANOTHER **APPLICANTS**

and

ACE WHOLESALERS (PTY) LTD **FIRST RESPONDENT**

BIG SAVE (PTY) LTD **SECOND RESPONDENT**

TEMBA BIG SAVE CC **THIRD RESPONDENT**

Heard: **6 February 2015**

Delivered: **24 February 2015**

Summary: Application for joinder – applicability of Constitutional Court judgment in *Intervalve* considered in context of s 197 transfer.

JUDGMENT

STEENKAMP J:

Introduction:

[1] The applicants, Messrs Kunyuza and Maluleka -- former employees of the first respondent (Ace Wholesalers) -- wish to join the third respondent, Temba Big Save CC, to trial proceedings before this Court. That entity was not part of the failed conciliation proceedings before the CCMA before the applicants referred the dispute to this Court. The applicants say that the second and third respondents have a direct and substantial interest in the context of a transfer of the business of the employer as contemplated in s 197 of the LRA[1].

[2] The applicants also have to overcome a preliminary hurdle, and that is condonation for the late referral of their statement of claim. Their prospects of success in the joinder application and in the main referral will be a factor in the condonation application.

[3] At the hearing of this matter on 6 February 2015 I ruled that the answering affidavit is not properly before court in the absence of any application for condonation by the respondents. That constituted an irregular step and therefore Mr *Gerber*, for the second and third respondents, argued the applications for joinder and condonation on the applicants' papers.

Condonation

[4] In considering the application for condonation, I shall apply the well-known principles in *Melane v Santam Insurance Co Ltd.*[2]

Extent of the delay

[5] The delay is excessive. The employees referred an unfair dismissal dispute to the CCMA on time. Conciliation was unsuccessful. The CCMA

[1] Labour Relations Act 66 of 1995.
[2] 1962 (4) SA 531 (A) 532 C-F.

issued a certificate to that effect on 14 October 2011. The 90 days by which the employees had to deliver their statement of claim expired on 12 January 2012. They initially filed it on time, but served it on an employers' organisation and not on the first and second respondents directly. They only did so on 7 August 2014, two years and seven months late.

[6] This apparently excessive delay must be considered against the explanation therefor and the factual background to the litigation.

Explanation for the delay

[7] The matter has an unfortunate and complicated history. The employees referred a dispute to conciliation in time, alleging an automatically unfair dismissal in terms of s 187(1)(g) of the LRA in that the first and second respondents (the old and new employers, respectively) had not complied with ss 197 and 197A of that Act.

[8] Conciliation having failed, the employees initially referred a dispute to arbitration on the same day that the CCMA issued a certificate that it remained unresolved. It was set down for arbitration a month later, on 18 November 2011. On that day, the first and second respondents sought a postponement and raised a point *in limine* that the CCMA did not have jurisdiction over a claim for an alleged automatically unfair dismissal. The CCMA agreed and issued a jurisdictional ruling to that effect on 23 November 2011.

[9] On 11 January 2011 – i.e. within the prescribed time period – the employees delivered their statement of claim to the employers' organisation that represented the first and second respondents at arbitration.

[10] The employees heard nothing further. They applied for default judgment. The Court [Molahlehi J] granted it on 15 August 2012 and varied the order on 29 August. The first and second respondents applied for

rescission on 28 September 2012. It was only heard on 5 June 2013. At the hearing the respondents' attorneys raised the late filing of the statement of claim. The employees' erstwhile attorney, Andrew Goldberg, advised them to apply for condonation. They did so on 21 June 2013. It should also be noted that the third respondent, Temba Big Save, formed part of the rescission application together with the second respondent.

[11] That first condonation application served before Lagrange J on 6 November 2013. He handed down judgment on 29 July 2014. He ruled that the condonation application was premature, as the employees had served the statement of claim on the employers' organisation and not on the respondents.

[12] The employees could only get a copy of the judgment on 5 August 2014. In terms of that judgment, they had to serve the statement of claim on the second and third respondents. They did so two days later, on 7 August 2014. Of course, they also had to seek condonation. As they were based in different provinces, telephonic consultations had to be arranged and affidavits had to be exchanged between the employees and their attorneys by email. They delivered this (second) condonation application on 2 September 2014.

[13] The reason for the delay is an extraordinary one. The employees did act with alacrity, firstly by referring a dispute to the CCMA and then, when the respondents' jurisdictional point was upheld, to this Court. The mistake they made was to serve the referral on the employers' organisation and not on the respondents individually. They did so in the *bona fide* belief that the employers' organisation continued to represent the respondents. That was not unreasonable. It is a good and acceptable reason for the delay.

Prospects of success

[14] I shall address the merits of the joinder application below. Regarding the prospects of success at trial in the main dispute, the evidence before the

Court on affidavit at this stage of the proceedings is that they were dismissed on 1 September 2011, ostensibly because the first respondent (Ace Wholesalers) had ceased operations. But most of its staff and stock were taken over by either the second[3] or third[4] respondents who continued to trade from the same premises, doing the same business with the same customers.

[15] The employees thus argue that the business was transferred as a going concern in terms of s 197 of the LRA and that the new employer(s) stepped into the shoes of the old employer. If that is the case, they say, their dismissal was automatically unfair in terms of s 187(1)(f) read with s 197A of the LRA.[5]

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[3] Big Save (Pty) Ltd.
[4] Temba Big Save cc.
[5] This section reads:
"**Section 197 Transfer of contract of 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.
(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 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 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.
(3) (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.
(b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.
(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied.
(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

[16] The Constitutional Court held in *Nehawu v UCT:*[6]

"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

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(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by—

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.

(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between—

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189(1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).

(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;

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(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;

(b) conclude a written agreement that specifies—

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).

(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.

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

(10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

[6] 2003 (3) SA 1 (CC) para 56.

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 has been carried on by the new employer. What must be stressed is that the list is not exhaustive and none of them is decisive individually…"

[17] Taking account the factors outlined by the Constitutional Court and the evidence before this Court at this stage, the applicants have excellent prospects of success at trial.

Prejudice and importance of the case

[18] The applicants will evidently be prejudiced if they are non-suited. But that is the case for all employees. What sets this case apart, is that the legislature has seen fit to designate dismissals in terms of the cited sections as automatically unfair, i.e. attracting an enhanced degree of opprobrium; and the applicants did act swiftly in delivering their initial claim, albeit to the wrong (and in their mistaken belief, representative) entity.

[19] The respondents, on the other hand, will still be able to state their defence at trial. If they are successful, they could obtain a costs order. And even if they are not and compensation is ordered, the amount of compensation is capped regardless of the time it took to be heard.

Conclusion: condonation

[20] In conclusion, I believe that it is in the interests of justice, taking into account all of the factors outlined above, that condonation be granted for the late filing of the applicants' statement of claim.

<u>Joinder</u>

[21] The applicants seek to join the third respondent, Temba Big Save cc, to the proceedings because it joined the fray in the rescission application and it seems, according to the employees, that it had stepped into the shoes of the other respondents. It appears, say the applicants, that the

third respondent is indeed their "new employer" in terms of s 197(9). The third respondent, therefore, has a direct and substantial interest in the proceedings, including the relief they seek, and should be joined.

[22] The third respondent relies *inter alia* on the Constitutional Court's recent judgment in the matter of *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others,*[7] ("*Intervalve"*) for its opposition to the application to join it as a party.

[23] The Constitutional Court's judgment in *Intervalve* held that conciliation is a precondition for the adjudication of any dispute by the Labour Court and that the effect of a failure to cite all employers in a referral to conciliation is that section 191 of the LRA has not been complied with. Therefore, an alleged employer who has not been part of conciliation proceedings with dismissed employees cannot be joined to an action in the Labour Court dealing with the alleged unfairness of a dismissal after conciliation.

[24] During argument, I raised the question with counsel that footnote 53 in the Constitutional Court's judgment in *Intervalve* might indicate that the failure to cite a party in a referral to conciliation is not a bar to join such party to Labour Court proceedings when that party is the "new employer" after a section 197 takeover. I requested counsel to submit supplementary heads of argument on this issue.

[25] Mr *Gerber*, for the third respondent, argued in his supplementary submissions that footnote 53 or any other part of the judgment in *Intervalve* does not hold that it is not necessary to cite an alleged employer in a referral to conciliation before that alleged employer can be joined in unfair dismissal proceedings in this Court. He argued that the Constitutional Court held that a party cannot be joined to proceedings in this Court -- under any conditions -- unless that party was part of

[7] (CCT 72/14) [2014] ZACC 35 (12 December 2014) as yet unreported and available at http://www.saflii.org/za/cases/ZACC/2014/35.html.

conciliation proceedings with the referring party and that there are no exceptions to this rule.

The Constitutional Court's judgment in Intervalve:

[26] The Court in *Intervalve* was split 6-5. In paragraphs 26 to 40, Cameron J, writing for the majority, deals with the question of whether a referral for conciliation is a precondition to the Labour Court's jurisdiction. In paragraph 40 he holds as follows:

> '[40] Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes.'

Footnote 53 follows the above *dictum.*

Footnote 53 reads as follows:

> '53. The Labour Appeal Court was therefore right (at paras 15 – 22) to distinguish the factual circumstances in *Mokoena* and *Selala* (above n14) and to disapprove of the erroneous view, expressed in both those judgments, that the Labour Court has a discretion to condone non-compliance with the conciliation requirement. The Labour Appeal Court noted that the party joined in *Mokoena* was a transferee who had taken over the going concern of another business. Judgment against the old business was therefore effective against the transferee, who would be jointly and severally liable for any claim. The transferee therefore had an interest in the outcome of the dispute. The joined party in *Selala* also had an interest in the outcome of the case, as he was a co-employee currently employed in a position the applicant claimed should have been his. By contrast *SACCAWU* above, n14 at paragraph 10 rightly held that an applicant in the Labour Court "cannot rely on a joinder in terms of rule 22 to avoid its obligations to comply with section 191 of the LRA.'

[27] Reference to the Labour Appeal Court ("LAC") is that Court's judgment in Intervalve (*Intervalve (Pty) Ltd and Another v National Union of Metalworkers of South Africa obo Members*.[8]

The Labour Appeal Court's judgment in *Intervalve*:

[28] As is apparent from footnote 53 of the CC's judgment, it agreed with the LAC in distinguishing the facts in *Intervalve* with those in *Mokoena*[9] and *Selela*. The latter need not concern us any further. *Mokoena*, though, is important as it also deals with an alleged contravention of s 197.

[29] In paragraph 16 of the LAC judgment, Waglay JP stated (relating to *Mokoena*):

> 'The party joined was a party that the Labour Court held had taken over the respondent's business in circumstances that invoked s 197 of the LRA. In terms of this section, where a business is transferred as a going concern, it takes over the employment responsibilities of the transferor. The joinder was thus granted not on the basis of any exercise of a discretion of joining a party not taken to conciliation but because s 197(9) of the LRA places the new employer in the shoes of the old employer. In the circumstances, there was no need to refer both the new and the old employer to conciliation; any one would suffice as judgment against one was effective against the other. The party joined in *Mokoena* was in the same position as the respondent. In fact the Court in granting the joinder said:
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> > "Section 197(9) of the Act stipulates that, in such a transfer situation, the old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer. Section 197(2)(a) provides that the new

[8] (JA 24/2012) [2014] ZALAC 29 (29 March 2014), as yet unreported and available at http://www.saflii.org/za/cases/ZALAC/2014/29.html.
[9] *Mokoena v Motor Component Industry (Pty) Ltd* (2005) 26 *ILJ* 277 (LC).

> 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. If the applicants, in the present matter, succeed in proving that they were unfairly dismissed, any reinstatement order or compensation order made in their favour would be enforceable against the transferee, the third respondent. In those circumstances the third respondent is an interested party. *(Halgang Properties CC v Western Cape Workers' Associations,* [2002] 10 BLLR 919 (LAC) at 927J – 928C) and should be joined to the proceedings."'

[30] Exactly the same considerations apply in the case before me. As the Constitutional Court pointed out in *Intervalve*[10], that distinguishes it from the facts in that case. In these circumstances and in the context of s 197, the third respondent must be joined.

The various judgments in Halgang[11]*:*

[31] In this matter, the employer (Halgang) dismissed two employees due to its operational requirements. The dismissals took place nine days before the transfer of Halgang's business as a going concern to Wembley. The Labour Court held that the dismissals were both procedurally and substantively unfair and ordered Halgang to reinstate the two employees.[12]

[32] Halgang appealed to the Labour Appeal Court, which granted the appeal on the basis that Halgang's business had been transferred to Wembley as a going concern and that having regard to the provisions of section 193(2)(c) of the LRA, it was inappropriate for the Labour Court to have ordered reinstatement against Halgang. Halgang had

[10] *Supra* at fn 53.
[11] *Halgang Properties cc v Western Cape Workers' Association* [2002] 10 BLLR 919 (LAC).
[12] The Labour Court's judgment is reported as *Western Cape Workers Association v Halgang Properties CC,* (2001) 22 *ILJ* 1421 (LC).

disposed of its business and had no other business, and that it was therefore not reasonably practicable for Halgang to reinstate or re-employ the two employees.[13] Wembley was not a party to the proceedings and the LAC rejected the "springboard" argument argued by the Union that a reinstatement order against Halgang could be used as a springboard in subsequent proceedings against Wembley. As there was no waiver of joinder by Wembley, no order of reinstatement would be binding on Wembley unless Wembley had been joined to the proceedings.

[33] The matter ended up before the Constitutional Court (*Western Cape Workers Association v Halgang Properties CC,*[14] on an application for leave to appeal by the Union. The CC did not grant leave to appeal on the basis that it is no longer possible for Halgang to reinstate the two employees as Halgang's business had been transferred to Wembley. The CC held that the Union had to join Wembley as a party in the proceedings if it was seeking an order for reinstatement that would be binding on Wembley.

[34] It seems clear, therefore, that in the current circumstances the third respondent – who, it seems at this stage, has stepped into the shoes of the old employer – must be joined to the proceedings.

[35] The same conclusion is apparent from the judgment of the LAC in *Anglo Office Supplies (Pty) Ltd v Lotz*[15]:

> 'The legal position enunciated in the above authorities [the LAC and CC judgments in *Nehawu v UCT*] makes it clear that the new employer steps into the shoes of the old employer by operation of law. Unless there is agreement with the employees or their representatives to the contrary, the new employer assumes liability for all the actions done by the old employer in relation to each employee. This means that if an

[13] Id at paras 44 – 45.
[14] 2004 (3) BCLR 237 (CC).
[15] (2008) 29 *ILJ* 953 (LAC) at para 22.

> employee is dismissed before the transfer of a business or the relevant part of the business, the new employer is liable for such dismissal even though it is the old employer who actually dismissed the employee. Indeed, all the rights that the dismissed employee had against the old employer at the time of the transfer of the business, including the right to institute or pursue legal proceedings in a dismissal dispute, becomes a right that he has against the new employer. Accordingly, such an employee must, where he has instituted proceedings against the old employer, pursue those proceedings against the new employer instead of the old employer. The result would be that if the dismissal is found, after the transfer of the business, to have been unfair, any order of reinstatement would probably have to be made against the new employer.'

Conclusion

[36] Having regard to these authorities, the facts in the present case are clearly distinguishable from those in *Intervalve*. Indeed, as the Constitutional Court pointed out in that judgment[16], in the context of an alleged s 197 transfer – such as the situation in *Mokoena* – a successful applicant would have to hold the transferee accountable. That transferee – such as the third respondent before this Court – has an interest in the outcome of the dispute.

[37] In these circumstances, the third respondent has a clear and substantial interest in the proceedings by virtue of the operation of s 197 of the LRA. It must be joined to the proceedings.

Costs

[38] Although the applicants have been successful and they may have won this battle, the war is far from over. Much of what is said in this judgment is premised on the applicants' apparent prospects of success – based only on their own affidavits – in the ultimate trial and the

[16] At footnote 53.

question whether there has indeed been a transfer of the employer's business in terms of s 197 of the LRA. It seems fair to me to order that the costs of both these applications should follow the order of costs, if any, in the ultimate trial.

Order

[39] I therefore make the following order:

40.1 Condonation is granted for the late filing of the applicants' statement of claim.

40.2 The third respondent, Temba Big Save cc, is joined as a party to these proceedings.

40.3 Costs of these applications are to be costs in the trial.

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STEENKAMP J

APPEARANCES

APPLICANTS:	A L Cook
Instructed by	Crawford & associates.
SECOND AND THIRD RESPONDENTS:	Hein Gerber
Instructed by:	Nothnagel attorneys.