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Do restraint of trade agreements survive a transfer of a business as a going concern?

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ISSUE

Are restraint of trade agreements transferred in terms of a section 197 transfer of business as a going concern?

SUMMARY

A restraint of trade agreement or undertaking is only transferred in terms of section 197 of the Labour Relations Act if it constitutes a term of a transferring contract of employment.

COURT'S DECISION

In the case of *Laser Junction (Pty) Ltd v Fick* (2017) JDR 1631 (KZD), the High Court had to consider whether a restraint of trade agreement was a contract of employment transferrable in terms of section 197 of the Labour Relations Act 66 of 1995 ("LRA"). Fick, the employee, was employed by Laser CNC (Pty) Ltd in 2010, at which time he signed a "Memorandum of Agreement of Secrecy and Restraint". In 2012, Laser Junction purchased Laser CNC as a going concern. Laser CNC's business and the contract of its employees transferred to Laser Junction by reason of the purchase. In 2017, the employee resigned from Laser Junction's employment and joined a competitor, Pinion and Adams (Pty) Ltd. Laser Junction approached the court, seeking to interdict the employee from taking up employment with Pinion and Adams, on the basis that, when Laser Junction bought the business from Laser CNC, the restraint of trade agreement between Laser CNC and the employee also transferred to the applicant as well.

The court held that only contracts of employment are transferrable under section 197 of the LRA. The court was then tasked with assessing whether the restraint of agreement was "a contract of employment" as contemplated by section 197. On this, the court interpreted a 'contract of employment' with reference to section 4 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA"). Section 4 of the BCEA provides that contracts of employment may contain basic conditions of employment as provided in the BCEA or a sectoral determination, and any law or term in a contract that is more favourable to the employee. The court held that a restraint of trade agreement that is less favourable to the employee than the BCEA, cannot therefore be a term in a contract of employment. The court noted that whether a restraint of trade agreement is less favourable is determined on a case by case basis. The court thus went on to assess whether the restraint of trade agreement in this case was less favourable. The court held that the real and only purpose of the restraint of trade agreement was to discourage the employee from leaving the employment of the employer and when he did, to constrain his new employment to his employer's advantage. The court concluded that the restraint of trade agreement was not merely less favourable, but manifestly unfavourable to the employee. Accordingly, it did not meet the definition of a contract of employment, and could thus not be transferred to Laser Junction by operation of law.

IMPORTANCE OF THIS CASE

The High Court's judgment must be read with caution, as it failed to consider the Constitutional Court's interpretation of section 197(2)*(b)* of the LRA in *Horn v LA Health Medical Scheme* 2015 (7) BCLR 780 (CC), which provides for the transferring of **all** rights and obligations. The

Constitutional Court's interpretation of section 197(2)*(b)* of the LRA allows for restraint of trade agreements to be transferred to a new employer, as it falls within the wide meaning of 'all rights and obligations' referred to in the provision. It is likely that when this issue again comes before the High Court, the Constitutional Court decision will be considered closely.

Inserting specific provisions in restraint of trade agreements which ensure that the agreements transfer to the employer's successors in title may be an effective way to remove any doubt in a similar case.

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