

Does restraint of trade transfer when a business is sold?

By Jacques van Wyk & Andre van Heerden

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Where a business is sold as a going concern, do the restraint of trade undertakings contained in employees' contracts transfer from the 'old employer' to the 'new employer'?



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Court's decision

In the recent case of *Slo-Jo Innovation (Pty) Ltd v Beedle and another [2023]* (LC), the above issue, among others, was considered. Slo-Jo Innovation (Applicant) launched an urgent application in order to enforce a restraint of trade against Ms Beedle. Beedle opposed the application on the basis that there was no employment agreement between her and the Applicant. She therefore raised a preliminary point that as the Applicant failed to establish a *prima facie* right to the relief sought, the application should be dismissed on that basis.

The facts of the case are briefly as follows. Beedle was initially employed as a sales representative at Slo-Jo Trading in 2007. Her employment contract with Sol-Jo Trading contained a restraint of trade clause.

Slo-Jo's business grew over the years that Beedle was employed by it. Beedle was instrumental in this growth. In 2018, there was an internal restructuring whereby three new companies were established, namely the Applicant, Slo-Jo Distribution and Slo-Jo International. Each company is responsible for a separate element of Slo-Jo Trading's overall business and are wholly owned subsidiaries thereof.

After the restructuring, certain employees were transferred to the new entities. Beedle was transferred to the Applicant. She was employed on the same terms and conditions she had with Slo-Jo Trading.



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Beedle subsequently resigned from the Applicant and took up employment with a direct competitor of Slo-Jo Trading and the Applicant. This led to the Applicant approaching the Labour Court on an urgent basis.

In dismissing the preliminary point raised by Beedle, the Labour Court found, among others, that Beedle's contract of employment had transferred from Slo-Jo Trading to the Applicant in terms of section 197 of the Labour Relations Act 66 of 1995 (LRA). There was no basis to contend that there was no employment agreement in place between the parties. In addition, there was no basis to the argument raised that the employment agreement was superseded by the transfer in 2018 (and the fact that another agreement was presented to Beedle, which she never signed).

Case consideration

In reaching its decision, the Labour Court had to also consider the applicability of another case: that of *Laser Junction (Pty) Ltd v Fick [2017] (KZD) (Laser Junction)*. This is because Beedle's representatives argued that as a matter of law, the restraint of trade agreement would not transfer under section 197. In *Laser Junction* it was held that only contracts of employment are transferred in terms of section 197 of the LRA and not the restraints of trade. In so finding, the Court had indicated that as a restraint of trade provision was less favourable than the minimum conditions of employment set out in the Basic Conditions of Employment Act 75 of 1997 (BCEA), it could not be a term of a contract of employment and could, therefore, not be transferred.

The Labour Court disagreed with *Laser Junction* (and, therefore, the argument raised by Beedle's representatives). First, the facts of *Laser Junction* (where employees had signed new contracts of employment after the transfer which did not contain restraint of trade provisions) was distinguishable from that of the present case (where Beedle had not signed a new contract of employment).



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Second, the Labour Court held that a "contract of employment is transferable under the provisions of section 197 of the LRA, including all the terms agreed to between the parties, not only those that are more favourable than the provisions of the BCEA". Furthermore, the effect of section 197(2)(b) of the LRA is that "if the obligation was in existence at the time of the transfer, it continued in force beyond the transfer" (*Horn and others v LA Health Medical Scheme and another [2015] (CC)*). What is important is that a restraint may still remain enforceable because the object is to protect the employer's interests (*Bonfiglioli SA (Pty) Ltd v Panaino [2015] (LAC)*).

Beedle's preliminary point was dismissed with costs. The merits of the urgent application (ie. whether on the facts there was

a basis to hold Beedle to the terms of the restraint undertakings) were not the subject matter of the decision and remained to be determined separately on another day.

Importance of this case

This case is important in providing clarity as to what kind of rights and obligations transfer along with section 197 of the LRA.

Importantly, such rights and obligations would include restraint of trade undertakings contained in contracts of employment. To the extent the 'new employer' has a proprietary interest worthy of protection it may seek to enforce the provisions of such a restraint.

Employees, in turn, should take note that should they elect to act in breach of such undertakings they may be held to account for doing so.

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