

EMPLOYMENT ALERT

LET OUR STRIKE GUIDELINES BE THE STARTING POINT FOR YOUR STRIKE STRATEGY

At Cliffe Dekker Hofmeyr we pride ourselves in providing our clients with practical solution driven information in line with the current challenges faced by our clients.

Due to the increase in strikes and strike violence in South Africa, our employment practice developed useful strike guidelines for our clients' benefit. These guidelines will provide clients with practical information about strikes, lock-outs and picketing and answer some of the more complex questions around these topics. The guidelines are definitely the starting point when considering a strike strategy and when preparing for industrial action. Our strike guidelines can be accessed on our website.

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RESTRAINTS OF TRADE - LEGAL PROTECTION OR A WEAPON TO WIELD: DO THEY TRANSFER IN TERMS OF SECTION 197?

In the recent judgment of *Laser Junction (Pty) Ltd v Fick* (6970/2017) [2017] ZAKZDHC 36 (28 September 2017), the Labour Court dealt with, among other issues, this important question: Is a restraint of trade agreement transferrable in terms of s197 of the Labour Relations Act, No 66 of 1995?

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The employee was employed by Laser CNC (Pty) Ltd. In January 2011, at the end of his probation period, the employee signed a Memorandum of Agreement of Secrecy and Restraint. Three months later, the parties entered into a contract of employment.

In December 2012, Laser Junction (Pty) Ltd purchased Laser CNC as a going concern. Laser CNC transferred its business, employees and their contracts of employment to Laser Junction.

Due to the financial difficulties of Laser Junction, the employee resigned in February 2017 and one of Laser Junction's direct competitors hired him. This sparked Laser Junction to approach the Labour Court for an order interdicting the employee from taking up employment with its competitor, relying on the restraint agreement between the employee and Laser CNC.

The gist of Laser Junction's case: when it bought the business from Laser CNC the restraint agreement transferred to it in terms of s197 of the LRA.

The employee, on the other hand, argued that the restraint fell away when Laser Junction signed a new employment contract with him in 2013. There was a dispute about whether a new contract was actually concluded.

With regard to whether there was a valid restraint, the court held that restraint fell away when Laser Junction concluded a new agreement with the employee in 2013, alternatively that the restraint fell away when the employee was promoted to procurement as the restraint only related to the employee in his capacity as an internal sales clerk.

As to whether the restraint agreements transferred under s197 of the LRA, the court held that "section 197 of the LRA provides for the transfer of a contract of employment to a new employer. It is designed to ensure that the transfer of a business does not prejudice the employees." It held that "only contracts of employment are transferrable under s197 of the LRA".

The court then turned to the nature of an employment contract, explaining that the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) states 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."

Importantly, the court held that a restraint of trade that is less favourable than the BCEA cannot be a term in an employment contract and if less favourable would be excluded from a contract of employment as defined and not transferrable under s197.

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The court characterised the restraint harshly, stating that the real and only purpose of the restraint agreement was to wield it as a weapon to discourage the employee from leaving and when he did, to constrain his new employment to its advantage. The court held that the restraint agreement was less favourable than the BCEA, did not meet the definition of a contract of employment and could not be transferred, in terms of s197, to Laser Junction.

The lessons that can be learnt from this case: Firstly, if a restraint of trade is of particular importance to a company, it should ensure that such agreement is more favourable to the employee than the BCEA. A restraint of trade clause will be more favourable to an employee where the employee is paid for the period of the restraint. Secondly, because s197 of the LRA only provides for the transfer of contracts of employment, it is a better alternative for restraints of trade to be incorporated in the principle contract of employment rather than being a stand-alone agreement.

Aadil Patel and Courtney Jones



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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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