

Can you transfer restraint of trade from one employer to another?

By [Motheo Mfikeo](#)

29 May 2018

In the High Court judgment of *Laser Junction v Karl Leeson Fick*, Laser Junction sought to enforce a restraint of trade agreement against Karl Lesson Fick (Respondent), following the Respondent's promotion and the transfer of his employment contract from his previous employer to Laser Junction in terms of section 197 of the Labour Relations Act (LRA). In casu, the High Court considered whether the restraint of trade agreement existed between the parties and, if so, whether the contract of employment was transferrable in terms of section 197 of the LRA.



© jason salmon – [123RF.com](#)

The Respondent entered into an employment agreement with Laser CNC in November 2010 as an internal sales clerk. Subsequently, the parties entered into a Memorandum of Agreement of Secrecy and Restraint on 31 January 2011, which prohibited the Respondent from using Laser Junction's confidential information "not only for the currency of the agreement, but for an indefinite period after its termination." In December 2012, Laser Junction acquired the business of Laser CNC as a going concern. As a result, Laser CNC transferred its business and employees to Laser Junction in terms of section 197 of the LRA.

In November 2015, the Respondent was promoted from his sales position to a position in procurement as a raw materials buyer. Towards the end of 2016, the Respondent realised that Laser Junction was experiencing financial difficulty as it was failing to pay its accounts and was in turn offering voluntary retrenchment to its employees. The Respondent applied for voluntary retrenchment, however, was rejected as he still had retainable skills. Nonetheless, the Respondent circulated his curriculum vitae for alternative employment and then tendered his resignation on 14 February 2017. On the same day, the Respondent entered into an employment agreement with one of Laser Junction's competitors, Pinion and Adams, as a technical sales representative with effect from 1 March 2017.

In determining whether the restraint of trade agreement existed, the court considered the enforcement of the restraint covenant entered into with the Respondent under his position as an internal sales clerk. The High Court found that the restraint of trade, if enforced, would have commenced from the date of termination of that agreement as a result of the Respondent's promotion to a raw materials buyer in November 2015. The contract entered into under the new position superseded the restraint agreement and as a result, more than 15 months had lapsed from when the Respondent was a

salesman for Laser Junction to him taking up employment with Pinion and Adams. If Laser Junction had any proprietary interests to protect, the High Court found that this would have been a sufficient cooling off period to enforce the restraint covenant. However, as this was not the case, no valid restraint agreement existed.

By the same token, the High Court took into consideration whether the restraint of trade undertaking was less favourable to the employee than the terms provided for in the Basic Conditions of Employment Act (BCEA). Section 4 of the BCEA stipulates that a contract of employment must contain basic conditions of employment as provided by the BCEA or sectoral determination and any law or term in a contract that is more favourable to the employee. Provisions that contain terms less favourable to the employee are void and cannot be transferred in terms of section 197 of the LRA. Further, section 23 of the Constitution provides that the right to choose and practice a trade can only be restrained by reasonable and justifiable means.

In *Magna Alloys and Research (SA) v Ellis 1984 (4) SALJ 874 (A)*, the court considered the following factors, amongst others, to determine whether a restraint of trade is enforceable:

- i. the duration of the restraint;
- ii. the area to which the restraint applies;
- iii. whether a restraint payment was paid to the employee;
- iv. whether the employee still has the ability to earn a living;
- v. the proprietary interest or capital asset that the employer seeks to protect.

In this case, the High Court found the restraint to be "manifestly unfavourable" to the Respondent. In applying the above factors, the restraint was found to be unreasonable and against public policy. Laser Junction could not provide sufficient evidence that it had a valid proprietary interest to protect and further the High Court found that the Respondent had no proprietary interest of Laser Junction to disclose. Laser Junction failed to prove that the Respondent had unfair access to its clients to the advantage of Pinion and Adams and to its detriment, resulting in the application being moot and the remedy ineffective. Therefore, the restraint covenant could not be transferred to Laser Junction by operation of law.

Consequently, businesses should be certain of the proprietary interests requiring protection when enforcing its restraint of trade provisions, particularly against the employee's statutory and constitutional protections, as public policy will weigh heavily on the reasonableness of the restraint. The obligations of an existing employee terminates on acceptance of an offer of promotion, as the promotion comes with new terms and conditions. Accordingly, employers should ensure accurate due diligence when transferring employees' contracts from one employer to another to prevent the incorrect enforcement of outdated or void obligations.

ABOUT THE AUTHOR

Motheo Mfikeo is an associate in the Employment & Compensation Practice of Baker McKenzie Johannesburg.

For more, visit: <https://www.bizcommunity.com>