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New employers may be able to enforce restraints of trade

By Rishal Bipraj

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Restraints of trade relate to restrictions applied to employees to maintain confidential business secrets of the employer. They are enforceable by the employer through employment contracts.

The benefit of a restraint vests in such employer or owner of the business, who may enforce it if an employee seeks to use those secrets and compete directly against the employer in the same or similar line of business. However, does the employer's right automatically pass to a new employer if the business is sold?

Various court cases hold that the right to enforce the restraint may pass to a new owner when the goodwill of a business is sold, unless, however, the restraint takes the form of a purely personal obligation to the old employer.

Goodwill may be generally defined as the favourable reputation and clientele of an established and well run business. What is comprised in the sale of the goodwill of a business, and whether it includes the right to enforce a restraint, is a question of fact. If such right does form part of the goodwill, the right to enforce the restraint will be transferred to the new owner in the sale by a cession of the contractual rights of the business. Consequently, the new owner becomes the party entitled to enforce the restraint.

An added element is that section 197 of the Labour Relations Act provides that when a business is transferred as a going concern, the effect is that employees of that business become automatically employed by the new owner of the business, without the need for new contracts of employment between the employees and the new owner.

In Securicor (SA) (Pty) Ltd v Lotter, Securicor acquired a security company and certain employees were transferred to Securicor in terms of section 197. Their original contracts of employment contained a restraint against working for competitors for a period of two years after the termination of their contracts. About two years after the sale of the business, the employees resigned from Securicor and joined a direct competitor. The court found that the employee's original contracts had not terminated and that Securicor could enforce the restraint.

Section 197 simply substituted the old employer with the new employer in respect of all contracts of employment and vested the new employer with all the requisite rights and obligations. Therefore, as the right to enforce the restraint formed part of the goodwill, such right had been transferred to Securicor.

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