

Short notes on:

UNDERSTANDING RESTRAINT OF TRADE AGREEMENTS

Introduction

A Restraint of Trade agreement is included in the majority of employment contracts in South Africa, yet most parties only enquire about the enforceability of clause at the conclusion of the period of employment. It is of crucial that all parties have a full understanding of the clause and its potentially far-reaching implications.

This presents a challenge to employees, particularly those with specialized knowledge and experience in small industries or those who have settled in a certain city with the intention to start or grow a family.

What is a restraint of trade agreement

A Restraint of Trade agreement (hereinafter referred to as "ROTA") was defined by Buckley J in the matter of *Petrofina (Great Britain) Ltd v Martin 1965 (2) All ER 176* as "a contract in which one party (the employee) agrees with another party (the employer) to limit or restrict his future freedom to trade with another external party, who was not a party to the employer/employee contract".

The ROTA is used to protect a business's protectable interest which is its confidential information which gives it a competitive edge. It was found in the *L'Oreal South Africa (Pty) Ltd v Shaun Kilpatrick and Another*¹ case that employer will have a protectable interest if the employee has an intricate knowledge of the day to day operations and management of the employer's business as well as strategies that have been implemented or that have been developed and are due to be implemented.

A ROTA is enforced by an application for an interim or final interdict. Requirements which an applicant for a final interdict have to satisfy, as set out in *Setlegelo v Setlelogelo*² are the following:

A clear right on the part of the applicant

A clear right would be based on the employment contract and the restraint of trade agreement signed by both the Employer and the Employee. The legal principle of *pacta sunt servanda* ("agreements

¹ (J1990/2014) [2014] ZALCJHB 365

² 1914 AD 211 at 227.

must be kept") will apply which will grant the applicant a clear right on which he can rely on for his application.

An injury actually committed or reasonably apprehended

The Supreme Court of Appeal confirmed this principle in *Reddy v Siemens Telecommunication (Pty) Ltd*³ where the Court stated that a mere opportunity to divulge privileged information is ground enough to satisfy this requirement.

No other satisfactory remedy available to the applicant

An employer could argue that should its protectable interest be divulged to a competitive, the loss it suffers as a result of such divulgence should be impossible to quantify which would mean that a damages claim would not be a satisfactory remedy.

The Court in *Magna Alloys and Research (SA) Pty Ltd v Ellis*⁴ stated that a restraint of trade agreement is enforceable if it is reasonable and not against public policy. Thus, a party may allege that the agreement is against public policy based on the unreasonableness of the restrictions put into place to protect the protectable interest. The party alleging that a restraint is unreasonable bears the onus of proving this in court.

In determining the reasonableness of an employer's restraint, a court will consider the protectable proprietary interest of the business compared to the how broad the restraint is in terms of the geographical area and the duration of time of the restraint as well as the capacity in which the employee will be restrained from working in.

In order to determine whether a restraint of trade is reasonable the Court in *Basson v Chilwan and Others*⁵ set out a test consisting of four questions:

1. Does the one party have an interest that deserves protection after termination of the agreement?
2. If so, is that interest threatened by the other party?

³ 2007 (2) SA 486 (SCA).

⁴ 1984 (4) SA 874 (A).

⁵ 1993 (3) SA 742 (A).

3. In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
4. Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

These questions were asked in the case of *Vodacom (Pty) Ltd v Motsa and Another*⁶ Vodacom was able to enforce a senior employee's contract, which included a six-month notice period and a restraint of trade for a further six months after the notice period based.

In making its decision, the court noted that the employee was a senior employee, and had intimate knowledge of Vodacom's short and longer-term strategic plans, and that this information would be of benefit to a direct competitor. The court confirmed that the restraint was reasonable, and that the employee had to spend six months on gardening leave, and could not work for the competitor for a further six months.

Conclusion

When formulating a restraint of trade agreement, one should identify the contract party's protectable interest and the amount of protection needed and then word the provision to confer adequate protection and no more in order to ensure reasonableness.

It is also prudent to ensure that the provision of the restraint is severable regarding the period for which it will apply, the area in which it will apply and the capacities in which the person is restrained in order for the court to partially enforce the restraint of trade agreement. While the courts have accepted, in principle, that an order of partial enforcement of a covenant in restraint may be granted where the restraint in the contract is too wide in its scope of operation. The court will not, in the name of partial enforcement, perform major surgery and transform the contract into something completely different to that agreed upon.

Whether you require a restraint of trade agreement drafted to ensure that it reasonable and enforceable or you need litigation specialist to launch an application to urgently enforce your restraint

⁶ (J 74/16) [2016] ZALCJHB 53

of trade agreement, contact a professional at SchoemanLaw Inc. to receive expert service and tailored entrepreneurial solutions.

