

Short notes on:

EFFECT OF THE RESTRAINT OF TRADE IN YOUR EMPLOYMENT CONTRACT

Introduction

The provision for restraint of trade clauses may seem simple and employees may be tempted to agree to it when newly employed. However, the effect of the clause is far reaching and employees must be aware that they are presumed to be familiar with the effect of the clause. Generally restraint of trade clauses restrict the employee from performing a certain type of work for a specified period and within a specified geographical location after the termination of the employment contract. The impact when this clause is enforced can seem is prejudicial or potentially damaging to an employee's future prospects or potential for business.

Does the restraint of trade negatively impact freedom of trade?

Restraint of trade as a mechanism to prevent employees from competing with the employers competitors are not legislated. This means that unless it is contained as an agreed term of the employment contract an employer has no right by way of legislation to seek that an employee be restrained from working or doing business with its direct competitor after termination of the employment agreement.

For an employer to effectively rely on provisions restraining its employees the provision must be carefully drafted and set out clearly the parameters of the restraint. A court will consider the wording and implications of a restraint of trade clause very carefully in what is essentially a balancing act of competing interests. The competing interests are of the employee on the one hand not to be unfairly prejudiced in trade and the employer on the other not to be subject to unfair trade.

How do we determine if a restraint of trade clause is reasonable?

In *Magna Allos and research (SA) (Pty) Ltd v Ellis*¹ the court stated that restraint of trade agreements are enforceable unless they are unreasonable weighed against established principles. Generally, a restraint of trade will be unreasonable if it does not protect some proprietary interest

¹ 1984 (4) SA 874 (A)

of the party seeking to enforce the agreement. However, a restraint of trade cannot exist to eliminate competition.

The decision of the court therefore sets out that a party who sought to be restrained now has an onus to show on a balance of probabilities that such restraint is unreasonable.

The investigation as to the reasonableness of a restraint of trade is a value judgement and two policy considerations are taken into account. These are namely, public interest which require that a party to a contract must comply with its accepted contractual obligations and, that a citizen should be free to follow a trade of his choice.

It follows then that a restraint would not be regarded as reasonable and enforceable in the absence of an interest deserving of protection. A restraint of trade clause that exists merely to prevent competition is consequently, unreasonable.

In *Basson v Chilwan and others*² the court established that the enforceability of a restraint of trade hinged on the nature of the activity that is prevented, the duration of the restraint, the area of operation, and factors peculiar to the parties and their respective bargaining powers and interests.

Are restraint of trade clauses in line with the Constitution?

The courts have considered whether these clauses, only housed in agreements, are reasonable and in line with the constitution³. The courts have looked at the common law approach of balancing and reconciling competing interests against the limitations of section 36(1) – the limitations clause- of the Constitution. The Supreme Court of Appeal has determined that the common law approach of balancing interests, having considered that restraints of trade were concluded pursuant to a law of general application, does not differ substantially from a justification analysis that would be done under the precepts of section 36 of the Constitution.

Conclusion

The reasonableness and enforceability of a restraint of trade will depend on the facts relevant to each case. Generally employers will only be able to enforce a restraint of trade if it has a legitimate interest worthy of protection and the restraint is reasonable relative to its geographical area of operation and length it endures.

² 1993 SA 742 (A)

³ See *Reddy v Siemans Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)

Before signing a restraint of trade agreement seek advice from an expert at SchoemanLaw.

