



Restraint of trade clause and the effect thereof

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A restraint of trade clause is a standard contractual clause in a service agreement entered into between the employer and employee (herein also referred to as “the parties”) for the benefit of the employer.

The purpose of a restraint of trade is to protect confidential information, company interests and trade secrets of the business operations of the employer. This is done by limiting an employee for a certain period of time to, directly or indirectly, apply, be engaged in or have any interest in an opposition company within a certain geographical area.¹

A restraint of trade is therefore in general only enforceable if the information used is confidential and protectable. Such information could be any documentation, processes, contacts, cost formulas, etc. obtained by a former employee in the course of his/her employment as a result of the employer’s spending on labour, skill and experience (not known or not to be found in the public domain), which any competitive company may immediately receive the benefit from without spending their own money and time, using their efforts or skills.²

Where a trade restriction is recorded in an agreement between a former employer and a former employee and the former employee has in fact used information that falls within

¹ Mupangavanhu Y “*The Relationship between Restraints of Trade and Garden Leave*” (2017) 20 PER/PELJ 1 3-6.

² IIR South Africa BV v Hall (aka Baghas) and other WLD 2004(4) SA 174.

the abovementioned confidential category, the former employer is entitled to apply to court for a final interdict against the former employee to prevent him/her from being employed by a direct competitor company. Such former employer is not compelled to prove the use of the information, or any mala fides of the former employee to be successful with the interdict. The mere inclusion of the trade restriction in the agreement is sufficient to be successful.

In *Basson v Chilwan and Others (Basson v Chilwan)*³, Judge Nienaber developed the “Basson test”. The test is applied to determine the reasonableness or not of the restraint of trade clause. Where not, it will not be enforceable. The following four (4) questions are applicable: 1) Is there an interest that is worthy of protection; 2) is the interest threatened by the behavior of the employee; 3) Weighing up the competitive interests of both the employer's versus that of the employee's right of being economically active; 4) Any other aspect of public interest, that may be relevant to either enforce or reject the restraint of trade as documented.

It is important to every employee to peruse and consider any service agreement thoroughly before signing it. The terms and conditions of any agreement must be mutually agreed upon, the content of any clause is open for negotiation between the parties.

In certain circumstances the employer will have more bargaining power and the employee will be forced to accept certain terms in a service agreement that is less favorable for him/her. Once the employee accepts the terms and conditions of a service agreement containing a restraint of trade clause, it is very difficult to avoid the impact and enforcement thereof. Covenants in restraint of trades are valid, however they are unenforceable when it is contrary to public policy. It is for the employee then to convince the court of its unenforceability, exposing him/her to extensive legal costs.

Failing to honor a restraint of trade clause, the employee run the risk of being interdicted and effectively being prevented from working at the competitive company and leaving him/her without work security. It can therefore have serious financial consequences.

³ (1993) 2 All SA 373 (A).

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