

The enforceability of restraint of trade agreements against employees

WE often receive instructions from anxious clients to either enforce restraint of trade agreements or to evade them.

What is surprising, however, are some common misunderstandings regarding these agreements and the relevant legal principles.

The starting point, of course, is that there needs to be an agreement. There is no right, in the absence of an agreement, to restrain an employee from joining a competitor or from taking clients with them.

Restraint agreements usually have one or both of the following elements: a non-compete clause prohibiting an employee from joining a competitor, and a non-solicitation clause preventing an employee from "stealing" clients.

To be enforceable, the provisions of a restraint agreement must not

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unreasonably restrict the employee's right to freedom of trade or work and must not offend public policy.

Specific Interest

The geographical area and period over which the restraint applies must be linked to a specific interest of the employer that is deserving of protection. A common interest worth protecting is an employer's trade connections.

As rapport with clients increases, so too does the ability of an employ-

ee to persuade them to take their business elsewhere.

To prevent solicitation, those customers must be customers of the employer, and not those that the employee brought along when they joined the company.

For example, an insurance broker who joins a brokerage with a portfolio of existing clients would generally be entitled to have those clients follow them after resigning.

That is unless there was an express agreement between the brokerage and the broker to the contrary, or the brokerage "purchased" those clients from the broker upon arrival.

Exception

The other exception is if, as a result of his or her employment with the brokerage, the broker obtained

a significant influence over a client that did not exist before.

Here the employer will have a protectable interest.

If an employer's business and market operates within a particular municipality or province, a restraint agreement cannot be enforced throughout South Africa.

Similarly, a restraint cannot exist for several years when the employer's protectable interest is only under threat for a few months.

Pricings

For example, if an employee is a buyer for a large retailer and has knowledge of the short-term marketing strategy, product pricings and supplier contract terms, this knowledge may only be a risk for a defined period.

It is this period during which the restraint may be able to be enforced.

Ultimately the law of restraint of trade is comprised of general principles and legal values.

Each case is to be judged on its own facts and there is always an element of risk involved in enforcing these agreements.

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