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Economic downturn sparks more restraint cases

By Nicholas Preston and Prinoleen Naidoo

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During these tough economic times, employers cannot afford to have their star employees approached by fellow competitors, hoping to achieve star appointments themselves and in some cases, the hope that these appointments will also bring with it some much-needed market share in the form of customer connections and additional business.

In return, employees are subject to the same tough economic conditions that currently prevail and such attractive promises of handsome packages easily persuade these employees to take up employment with competitors, in breach of their restraint of trade undertakings.

The consequence of the current state of affairs has been an inevitable rise in the enforcement of restraint of trade agreements, which are being pursued more frequently and more actively than ever before. On the same score, restraint of trade applications are also being opposed more frequently and actively than ever before, with prospective employees seeking to protect their ability to take up employment with their new employers and thereby, benefit from the handsome packages that they are offered in return.

Restraint case law

In doing so, employees will put forward an array of defences, one of which includes that their employer forced them to sign the restraint of trade or that they had no option but to do so. This issue came before the Labour Court in the decision of Hi Tech Recruitment and Others v Nel and Another.

Nel's employment with Hi Tech was conditional upon her signing a contract of employment, which contained a restraint of trade clause. Nel later resigned and took up employment with a direct competitor of Hi Tech and the company sought to enforce her restraint of trade. Nel raised the defence that she had signed her contract of employment (which contained the restraint of trade provision), under duress.

She amplified her defence by stating that she was only 28 years' old when she signed the contract and was overwhelmed by the employment contract. She contended further, that she had no choice but to sign the employment contract failing which she would have been left unemployed.

The Court rejected Nel's argument and held that if an employee did not understand the contract or required more time to read it, she should have requested this. The employee was gainfully employed at the time that she signed the offer of employment and had a choice whether to sign it or not. It went on to state that requiring an employee to agree to a restraint as part of the contract of employment cannot, by itself, constitute duress as contemplated in the law of contract.

What was also noteworthy was that despite the fact that Nel had given undertakings not to breach the restraint of trade provisions and whilst employed by the competitor, this did not bar Hi Tech from approaching the Court to enforce her restraint. The Court reiterated its reasoning from earlier decisions, namely that an employer should not have to content itself with, "crossing its fingers and hoping that the respondent party will honour its undertakings."

Accordingly, and even in the face of such undertakings or claims of duress, restraints of trade can still be enforced and your business protected during present times, subject to the other requirements for enforceability being present.

ABOUT THE AUTHOR

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