Understanding Restraint of Trade agreements

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A Restraint of Trade is a contract, agreed between an employer and employee, which places restrictions on the employee's future activities or employment should he or she decide to leave the business.

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It is a subject mired in misunderstandings, wishful thinking and bad market intelligence.

When one enters corporate territory, one can appreciate that the company is going to want to protect its hard-earned IP, trade secrets, methodologies etc. In fact, it is quite flattering that one is important enough to it that it would want to keep one on board. However, with this responsibility, comes with pros and cons.

Restraints are used to provide the employer with reasonable and legitimate protection against the exploitation of its proprietary interests, most commonly its confidential information, trade connections and goodwill.

While the inclusion of a restraint agreement, from a commercial perspective is understandable, the agreement also has to be reasonable. An employer cannot prevent an employee from earning a living. So while restraints are regularly upheld by the courts, they should be proven to be justifiably necessary in order to protect the interests of the company, plus, the interests which the company seeks to protect, should be clearly identifiable.

Four common misconceptions

Four of the most common misconceptions around restraints of trade are:

1. Restraints are not legally enforceable

    a. Restraints are certainly viable and regularly enforced both in South Africa and overseas

2. A restraint is not valid if you are not financially compensated for it

    a. Not all restraints come with financial compensation

    b. Payment is not necessary to enforce a restraint

3. Your restraint is lifted if you pay back the money

    1. Not necessarily so, it depends on the individual circumstances and the final decision lies in the hands of the contract provider.

       Do not confuse Retention Bonuses with Restraints of Trade. The purpose of a retention bonus is simply to encourage key members of staff to stay - and these are not always linked to restraint clauses. If you only have a retention bonus, paying back the money may release the employee from any further restrictions, but you need to read the terms and conditions carefully - the document might be a combination of retention and restraint.

4. Restraints are only valid for a few months

    a. Contracts vary. The average restraint in South Africa is 3 to 6 months post departure, but more restraints are being written for a year. In some cases, these are issued for up to three years, but this is rare.

Contentious points

Aside from the generally accepted circumstances of restraints, there remain a few contentious points.

- **Undue pressure** - when an employee is pressurised into signing a restraint. For example, when a much anticipated job offer is contingent on the acceptance of a restraint. Alternatively, when a promotion will only be forthcoming once a restraint is signed. People have choices, but when is undue pressure beyond the realm of reasonable?

- **Change** - businesses restructure, new management is appointed, companies merge, businesses close. What happens to the rights of the employee when the circumstances under which the restraint was signed, change?

  From a legal perspective, contracts have to be honoured and people cannot just change their minds. Similarly, employers have the right to build in unforeseen circumstances to protect themselves. However, if a change in circumstances has a negative impact on the employee - surely there must be room for reasonable renegotiation of the original contract?

- **Stubborn policy enforcement** - when does the rigid enforcement of a restraint policy negatively affect a business - when it hinders internal company development.

Not all employees remain forever critical to the business wellbeing. Skillset requirements change, new technologies are introduced, succession planning is needed to revitalise the management team etc. and sometimes, people just reach their intellectual limit.

Keeping on top of the skills requirements for a business by replenishing the talent pipeline is a no-brainer. However, when a 'no exception' corporate policy refuses to lift the restraints of those impacted, we wade into murky territory. You cannot replace talent if the current incumbents cannot leave and why should they leave if they're going to be restrained?

Once an employee is unhappy in a company or role, there are few benefits to restricting his or her departure. Unhappiness breeds contempt, disengagement and poor morale, yet many companies endure this to secure necessary skills.

Restraints have their value, especially in the skills-challenged areas. Nevertheless, the implementation and acceptance should be given much thought.

ABOUT THE AUTHOR

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