Covid-19 takes some oomph out of restraint agreements

By Lisa-Anne King

19 Apr 2021

The Covid-19 pandemic has had a devastating effect on the global economy. Business rescues, insolvencies, liquidations and restructures are rife, as are retrenchments and unemployment. It is in this context that we will consider the enforceability of a restraint of trade agreement during the Covid-19 pandemic.

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In general terms, a restraint of trade agreement (referred to as a "restraint") is an agreement between an employer and an employee (or a company and a shareholder) which precludes the employee or shareholder from rendering services to a competitor for a specified period and within a specified area.

As a general proposition, restraints are enforceable under South African law and have been enforced by our courts on many occasions. It is not a requirement that payment be received by the restrainee for the restraint to be enforceable. When considering whether or not to enforce restraints, amongst the factors which our courts consider are:

- Does the employer have a protectable proprietary interest which requires protection? Common examples of a protectable proprietary interest include confidential information, trade secrets and customer lists.
- Could the employee potentially prejudice the proprietary interest sought to be protected?
- Is the restraint reasonable when considering the geographical area in which it applies and the period of the restraint?
- Is the restraint contrary to public policy?

The enforceability of a restraint during the Covid-19 pandemic was recently considered by Mbongwe AJ in *Oomph Out of Home Media (Pty) Ltd v Brien and another [2021]*.

Brien, an erstwhile employee, director and shareholder of Oomph Out of Home Media Proprietary Limited (referred to as "Oomph"), resigned from Oomph's employ (whilst remaining a shareholder) during the course of February 2020.

Brien cited various reasons for his resignation. These included a breakdown of his relationship with Mr Cornelius, another director of Oomph and the fact that he had not been paid his full salary for a lengthy period (Oomph owed him in excess of R1.2 million in unpaid salary at the time of his resignation).

Following his resignation, Brien took up employment with a direct competitor of Oomph's, both in South Africa and in other African jurisdictions. In terms of his restraint, Brien was prohibited from working for a competitor and using any of Oomph's confidential information acquired in the course and scope of his employment.

Oomph contended that Brien's employment by a competitor would result in him disclosing Oomph's confidential information and trade secrets to the competitor and would result in Oomph's customers, business associates and employees being enticed away from Oomph. This, so Oomph contended, would result in the competitor having an unlawful competitive edge over Oomph.

It was not in dispute that Brien's new employer was a direct competitor of Oomph. It was also found that Brien had contacted certain of Oomph's customers and business associates with a view to enticing them across to his new employer.

Brien countered by arguing that his restraint was unreasonable and invalid in that it would prevent him from earning a living.

Although the Court did not favour Brien's argument that the restraint was invalid, it did consider the restraint's reasonableness. The Court had regard to the circumstances which arose during the period from the date on which the restraint was concluded to the date of termination of the employment relationship. In so doing, the Court opined that the occurrence of the Covid-19 pandemic could not be overlooked. The Court also considered it relevant that Oomph had been unable to pay Brien his full salary and owed him in excess of R1.2 million at the time of his resignation.

The Court rejected Oomph's argument that Brien could seek alternative employment in a different field (he had certain qualifications in the field of communications) as Brien has last been employed in this former capacity in 2012. For Brien to be forced to start afresh in a different field when many businesses were being forced to close and individuals were doing everything possible to survive and cope with the effects of the Covid-19 pandemic, was plainly unreasonable and contrary to public policy and constitutional values.

In these circumstances, the Court decided that it would not enforce Brien's restraint.

Conclusion

Whilst employers should be aware of this judgment, it does not follow that restraints are not enforceable during the current global pandemic. Whether or not a restraint will be enforceable will hinge on the circumstances of each case.

Whilst I do not necessarily agree with this judgment, as in my view it confuses the principles applicable to restraints, the fact that Brien was owed a significant amount (one of the primary reasons for his resignation), the timing of his resignation (shortly before the National lockdown) and the subsequent global economic crisis, were factors that weighed heavily on the Court in determining that the restraint was unreasonable and contrary to public policy and constitutional values and

therefore unenforceable.

It is advisable for employers seeking to enforce restraints to obtain advice from an employment law expert both in preparing restraints and in assessing their enforceability. The circumstances which prevail at any particular juncture will always be relevant and will need to be carefully considered.

ABOUT THE AUTHOR

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