

'The Good, The Bad & The Ugly' of Restraint of Trade

A subject that is mired in misunderstandings, wishful thinking and bad market intelligence is the issue of a Restraint of Trade.

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

Restraints are used to provide the employer with reasonable and legitimate protection against the exploitation of its proprietary interests.

While the inclusion of a restraint agreement, from a commercial perspective is understandable, the agreement also has to be reasonable. So while the courts regularly uphold restraints, they should be proven to be justifiably necessary in order to protect the interests of the company.

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

- Restraints are not legally enforceable
 - Restraints are certainly viable and regularly enforced both in South Africa and overseas

- A restraint is not valid if you are not financially compensated for it
 - Not all restraints come with financial compensation
 - Payment is not necessary to enforce a restraint

- Your restraint is lifted if you pay back the money
 - Not necessarily so. It depends on the individual circumstances and the final decision lies in the hands of the contract provider.

Don't confuse Retention Bonuses with Restraints of Trade.

- Restraints are only valid for a few months
 - The average restraint in South Africa is between 3 and 12 months post departure. In rare cases issued for up to three years.

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. Or, 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. As the saying goes *'The only constant in life is 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 can't change just their minds. Similarly, employers have the right to build in unforeseen circumstances to protect themselves. But 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 impact 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. But you can't replace talent if the current incumbents can't 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 their departure. Unhappiness breeds contempt, disengagement and poor morale. And yet many companies endure this to secure necessary skills.

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

This article is not intended to serve as legal advice or a definitive or exhaustive analysis of the subject matter.

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