What you need to know about restraint of trade agreements

By Madelein van der Watt

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When you have found a dream job, it can be disconcerting when your new employer presents you with a restraint of trade agreement, as part of the terms and conditions of your employment. It can feel like a show of bad faith when you are just starting a relationship with a company.

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It is also frightening to sign a piece of paper that effectively restricts your freedom in how you make a living, even if just for six months or a year. This is especially true if the restraint agreement is highly restrictive, your skills are specialised (limiting where you can work), or you are desperate for the job and feel pressured to sign.

On the other hand, many businesses have put such agreements in place because they have repeatedly lost staff to competitors after they have spent a fortune on training and developing them. Moreover, the business risks of an employee taking customer relationships and intellectual property with when he or she joins a competitor are huge.

So is it reasonable for an employer to present you with a restraint of trade agreement and should you sign it? The answers need to be considered on a case-by-case basis, but here are some general principles to consider.

Restraint of trade & labour law

The first important thing to understand is that restraint of trade agreements do not fall under labour law, but are instead regulated by the Law of Contract.

Thus, if you do sign a restraint of trade and end up in a legal dispute about the contract with your employer, you will not be able to turn to the CCMA for help.

The second point to consider is that case law in South Africa shows that restraint of trade agreements are legally enforceable, despite the common belief that they are not. Do not assume that a restraint agreement is a bluff by your employer. Signing (or later breaking) the contract should not be done lightly since the legal department might have thought it through very carefully.

When can a restraint of trade agreement be enforced

Case law in South Africa has set some precedents for restraint of trade agreements. As an example, in a dispute between an organisation and an engineer who defected to its biggest competitor, the Supreme Court of Appeal ruled in 2007 that there was an obvious risk that the employee would disclose confidential information to his new employer.

Since the engineer received a great deal of proprietary training from the organisation, the court found that the restraint of trade agreement was not unreasonable nor against public policy. The employee was interdicted from taking up his new job.

In a 2008 case between another company and a former employee, the Supreme Court of Appeal decided that the restraint was unenforceable. It reasoned that the employee had not acquired any confidential client information and had not received any training.

Since she was not leaving the business with anything she did not bring with her, the employer had no commercial interests to protect and it would be unreasonable to restrict her commercial activities.

What does this mean for you?

As the examples above indicate, the law around restraint of trade agreements can be quite complicated. However, it can be summed up as follows: restraints are meant to stop the employee "stealing" intellectual property, clients and so on from the employer, but that does not mean that the employer can steal his or her livelihood. A restraint does not mean you will never be able to continue your career in the same occupation at a different employer. It is not a way to handcuff to your employer forever.

Before you sign a restraint, look at aspects such as:

- How long will it last
- The geographical areas and business domains it covers
- The circumstances under which it will apply
- The nature of the commercial interest the employer seeks to protect
- How will it affect your ability to make a living if you leave

If you feel that you would not be able to make a living at all under its terms, try to renegotiate the terms. For example, you might be comfortable to say you will not work for a competitor in Pretoria, but that you will not agree to a countrywide restraint or you could argue for a six-month restraint rather than a year-long one.

If the employer is inflexible and the agreement seems overly restrictive, you might want to pass on the opportunity if you

have other options. It is fair for the employer to ask you not to take privileged customer or product information to a direct competitor; less so to insist that you cannot be a sales representative or engineer anywhere else.

Consult a lawyer

Before you sign a restraint of trade agreement, consult with a lawyer if there is anything that makes you feel uncomfortable. Be especially wary if the employer seems to want unreasonable clauses that go beyond protecting the business's intellectual property or its relationships with key customers. Try to protect your own interests and assets - for example, the contacts and knowledge you bring with you to the business.

In addition, if you want to break a restraint of trade agreement, before taking this drastic step, you might want to approach your employer and see if you can come to an arrangement. Otherwise, consult a lawyer to find out what your options are and what the consequences might be of breaking the contract.

There may be ways out if you were unduly pressured into signing, if the business conditions have changed since you joined (for example, it has merged with another company or your job description has changed), or if the terms are simply punitive and unreasonable.

Restraint of trade contracts are contentious and complicated. Both employer and employee need to be rational and reasonable in how they approach them. There are no hard and fast guidelines for restraints, so your lawyer is your best friend in dealing with them.

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