WERKSMANS
ATTORNEYS

EMPLOYMENT

An exercise in restraint of trade agreements, what not to do!

30 January 2023 *4 min read*

by Bradley Workman Davies, Director, Kerry Fredericks, Director and Benedict Ngobeni, Candidate Attorney

Restraint of trade agreements are characterised by the competing interests amongst them being the protection of employers' trade secrets and goodwill and the right of employees to choose their trade, occupation or profession freely. The Labour Court in *Planet Fitness Proprietary Limited v Deon Buirski* [2022] ZALCJHB 309 (8 November 2022) had occasion to consider this issue, in circumstances where Buirski took up employment with a direct and main competitor of Planet Fitness.

Background facts

Buirski was employed as Regional Sales Manager by Planet Fitness and gave restraint of trade undertakings in favour of Planet Fitness. Buirski was subsequently promoted to National Sales Manager in terms of a later appointment letter which contained provisions which Planet Fitness argued provided for further restraint undertakings in its favour.

On 18 July 2022, Buirski was suspended and he appeared before a disciplinary enquiry for allegedly approaching Virgin Active, a competitor to Planet Fitness, to seek alternative employment. Buirski was issued with a final written warning and was demoted to Regional Sales Manager. On 2 September 2022, Buirski appeared before another disciplinary enquiry for breaching his confidentiality undertakings by disclosing the private information of a member of Planet Fitness. Buirski was dismissed and he then took up employment with Virgin Active.

Labour Court

Planet Fitness brought an urgent application to the Court to enforce the terms of the restraint of trade agreement on the basis that Buirski had taken up employment with its main competitor.

In his defence, Buirski argued that Planet Fitness erroneously sought to enforce the incorrect restraint undertakings (being the first set of restraint of trade undertakings given by Buirski) and that these had been superseded by the second or later set of restraint undertakings. In any event, the later restraint undertakings were not relied upon by Planet Fitness, which only sought to enforce the first undertakings.

The case before the Court centred around the principles of restraint of trade agreements as settled by the Court in *Magna Alloys Research (SA) (Pty) Ltd v Elis* 1984 (4) SA 874 (A) and in this matter specifically, whether Planet Fitness could enforce the later restraint undertakings which Planet Fitness had failed to attach in its Court papers.

In applying the principles of restraints of trade, the Court held that where an employer asserts a protectable proprietary interest there must be a balancing of interests which are the interests in maintaining and protecting Planet Fitness's trade secrets and the former employee's interests to use his know-how and skills elsewhere. In this case, Buirski, due to his demotion and suspension, which culminated in his dismissal, had no access to Planet Fitness's critical information.

The strategic partnerships which Planet Fitness entered into, which Buirski knew of, are listed on Planet Fitness's website which is in the public domain. In these circumstances, Planet Fitness failed to make out a case that there exists trade secrets and business connections sufficient enough to justify the enforcement of the restraint undertakings.

Importantly, Planet Fitness's case was unsuccessful since it had failed to attach to its Court documents the correct restraint undertaking which it sought to enforce. The Court held that the general rule is that Planet Fitness bears the onus to invoke the contract it seeks to enforce and to prove breach, and is enjoined to annex to its Court documents a true copy of the contract which it seeks to enforce.

The later restraint undertakings were not before the Court and on the facts before it, the Court found that Planet Fitness had failed to prove the restraint it seeks to enforce. The Court concluded by stating that "*it does not avail an employer to approach the Court and hope to justify a limitation of a constitutional right on the back of an erroneous or scantily worded document that may require major reconstructive surgery*".

Importance of this case

Restraint of trade agreements are important in protecting the proprietary interests of employers and companies alike, however, as they effectively amount to a limitation of employees' rights in the Constitution, 1996, employers must always ensure that their legal contracts are properly concluded and that these contracts are kept safe to ensure that they can be accessed when needed.



Bradley Workman-Davies

Director

View Profile



Kerry Fredericks

Director

View Profile