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Restraints of trade

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RESTRAINTS OF TRADE

A restraint of trade is a provision in a contract of employment that (typically) provides that after termination of employment, the employee is restricted in the work he can perform in that he will be restrained from performing similar work in competition with his/her former employer, for a prescribed period of time and in a specific geographical area. These provisions aim to protect the employer's proprietary interests, such as client and customer connections, trade secrets and confidential information. However, to what extent can an employer restrain a former employee, especially where the employee only has the skills necessary to perform the job which he is restrained from performing? The impact of restraint of trade undertakings on former employees of a business is accordingly potentially quite prejudicial and has been argued to prevent restrained persons from exercising their constitutional rights to choose their trade, occupation or profession.

Critical to understanding how the courts will approach any application for a former employee to be restrained from competing with his former employer is to appreciate that there is no legislation or regulation which provides an employer a right to this type of protection. As such, unless the employee agrees in his contract of employment to be bound by a restraint, the employer has no entitlement to try and prevent him from working after termination of the employment relationship, even if this is for a direct competitor, and even if this in fact causes harm or damage to the former employer through loss of business. As such, the manner in which the restraint undertaking is formulated in the contract is critical, as the courts will look very closely at the terms and conditions of these undertakings to determine if they should be enforced. Ultimately, the courts perform a balancing act between the rights of the employer not to be subjected to unfair competition, and the right of the employee to choose his trade.

The leading case dealing with these issues is *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SALJ 874 (A). The court laid down the general principle that, on the face of it, restraint undertakings are not unconstitutional and every restraint agreement signed by an employee is assumed to be lawful and enforceable, and the onus lies on the employee, if he/she wishes to be released from the restraint, to show that the restraint is unreasonable and contrary to public policy. In determining whether a restraint is enforceable, a court will consider, *inter alia*, the following factors:

- the length of time for which the restraint operates;
- the geographical area to which the restraint applies;
- whether a restraint payment was paid to the employee;
- whether the employee still has the ability to earn a living;
- the proprietary interest or capital asset that the employer seeks to protect.

In the situation where an employee only possesses the skills of the job which he is restrained from performing, the consideration of the employee's ability to continue to earn a living may pose a problem for the enforceability of the restraint.

The Magna Alloys case also states that "It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world." This provides for conflicting interests between the employer and employee which must be balanced in light of the public interest.

It is well established that the proprietary interests that can be protected by a restraint agreement are of two kinds. The first consists of the relationships with customers, potential customers, suppliers and others (trade connections). The second consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor to gain a competitive advantage (trade secrets).

In *Aranda Textile Mills v Hurn & Another*, the court emphasised that proprietary interests sought to be protected must be properly described as belonging to the employer. The court pointed out that it will generally be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade. As explained in *Aranda* —

"A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workmen. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workmen, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy."

It will generally be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade. However, where the proprietary interest of the company which needs protection outweighs the employee's interest in continuing his trade, such a restraint will be reasonable and enforceable.

In the case of *Carlton Hair International v Vinciguerra and Another* the restrained individual was a 21 years old and had been employed at Carlton Hair as a junior stylist. He averred that he only accrued between 20 to 30 regular clients in the 6 months that he spent working at Carlton Hair, where a more senior stylist would have 12 to 20 regular clients a day. In this instance, the court held that the restraint of trade which restrained him until 18 November 2017 from within a radius of ten kilometres (as the crow flies) from the front door of the salon, was against public policy and unreasonable because the employee was a junior employee, qualified for only 6 months and who was only 21 years old.

Each matter will need to be determined on its own facts on a case by case basis. The general principle remains that a restraint will only be enforceable if the employer is seeking to enforce the restraint has a legitimate proprietary interest worthy of protecting, the restraint is reasonable in as far as the geographical area and duration of the restraint are concerned, and the restraint is clear in its meaning and application.



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