Case Study

Close but no cigar

A useful reminder of the importance of restraint of trade clauses in employment agreements

Oh, so you think you can prevent your employees from joining a competitor without having a restraint of trade agreement. Think again!

Recently, in the case of ***Absa Insurance and Financial Advisors (Pty) Ltd v Johan Jonker and another*** **C741/17 and C742/17 (LC)**, an employer attempted to interdict and restrain, on an urgent basis, two of its former employees from taking up employment with a competitor. However, the employer had a rather daunting and challenging hurdle to overcome in that one of the two employees in question had not signed a restraint of trade agreement and her employment agreement did not contain any restraint of trade clauses.

Rather creatively, it could be said, the employer tactfully placed its eggs into one basket: that of unlawful completion, in an effort to succeed with its claims.

The principle of unlawful competition stems from our common law and cannot, therefore, be found in legislation. This principle is deeply-engrained in our law.

The Labour Court reaffirmed that our law recognises two forms of unlawful competition: (i) unfair use of a competitor's fruits and labour and (ii) the misuse of confidential information in order to advance one's business interests and activities at the expense of a competitor.

In reaching his conclusion, Steenkamp J made a key distinction between the limitation on the use and application of confidential information in the former employees' possession, on the one hand, and their ability to take up employment with a competitor of their erstwhile employer, on the other hand.

In dealing with the use of confidential information, the Court held that such a limitation does not prevent a client, from his own motivation and without encouragement from the employee, having his business conducted by the employee after the termination of his employment with the employer. Further, such an outcome will be permissible and not disturbed by a Court as long as the employee in question did not purposely engineer or design such an outcome via the sly, underhanded or covert use of confidential information.

In dealing with the employees' ability to take up employment with a competitor, the Court first held that an interdict preventing them from doing so would render the employees economically inactive and unproductive for a certain period. The employer cannot prevent the clients of the business from making their own election as to which service provider they would like to do business with. The employer and the employees are free to compete against one another in an open market.

In a last ditch effort to convince the Court of its case, the employer attempted to rely on an *"implied restraint"* (being an unwritten but valid and enforceable restraint). However, in this regard, the Court quoted previous case law authority confirming that our courts will not lightly read into an unclear or ambiguous provision in an agreement a restrictive covenant in restraint of trade.

In conclusion, the Court held that the employer had failed to make out a proper case interdicting and restraining the two employees and, accordingly, dismissed the employer's case with costs.

This case serves as a useful reminder to employers to ensure that they have impenetrable restraint of trade agreements in place with those supposedly "loyal" and important employees who could cause serious damage to their business if they were to join a competitor.

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