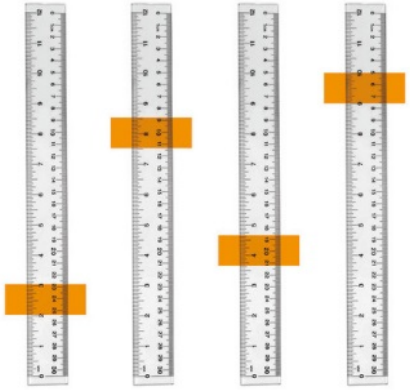
Case Study

No restraint by which he is bound



Pacta sunt servanda is not something you are likely to hear Maggie from HR blurt out when you sign your employment contract. However, that peculiar Latin phrase meaning "agreements must be kept" is the bedrock of common law contracts. It also applies to those typically wordy addendums to employment contracts, better known as restraint of trade agreements. Indeed, it is a misconception that the Courts do not uphold restraint of trade agreements. Nevertheless, there are those employees that will stop at nothing to wriggle out of their promises. In attempting to do so, two employees have been especially creative in their arguments before the Labour Court of late.

In *Stratosat Datacom (Pty) Ltd v Vermaak and 1 other (Judgment handed down on 14 June 2018)*, one such employee put forward the argument that the provisions of his restraint were only applicable at the time of his employment as a sales manager and became "*superseded*" by his subsequent appointment as a director. The employee's case was that upon his appointment as a director in January 2016, he was no longer bound by the restraint of trade which he had entered into in January 2010. He alleged that he was told that he was no longer an employee of the employer in the ordinary sense and the scope of his work and responsibility had changed drastically.

Unsurprisingly, Judge Prinsloo rejected this argument. The learned Judge reasoned that if such an interpretation is to be accepted, it would mean that the employer only wanted to protect its interests during that period in which the employee was employed as a sales manager. Such an interpretation would yield not only a nonsensical but also "*unbusinesslike result*."

In *Profibre Products (Pty) Ltd v Govindsami (Judgment handed down 5 June 2018)*, with an almost identical argument, the employee submitted that when he was promoted from the post of quality assurance manager, the restraint (and indeed his entire contract) was no longer binding. This argument was swiftly struck down by Judge van Niekerk who held that "*there is manifestly no merit in this submission*." The learned Judge went on to reason that the contract of employment signed by the employee at the commencement of employment remained intact and enforceable up until the employee's resignation. Further, there was no reason why the employee, who had reaped the benefits of the employment contract after promotion, would not continue to be bound by the obligations imposed on him.

The employee went on to produce a further novel argument that it was inconsistent of the employer not to have enforced a restraint of trade against a former colleague who had since left to join a customer. Apparently, the employer had taken the view that the employee's colleague did not hold sufficient knowledge of a confidential nature so as to compromise the employer's proprietary interests.

In this regard, Judge van Niekerk held that "*inconsistency is not in itself a basis on which a restraint might be considered unreasonable, at most, it is indicative of the absence of any proprietary interest worth of protection. Each case must necessarily be determined on its own merits.*"

Irrespective of the futility of these arguments and despite the restraints remaining applicable, the lesson to be had is that employers should ensure that they have comprehensive and up to date restraint of trade agreements in place in order to protect their interests.

Authors:

Sandro Milo
Partner,
Head of Employment Law

T: +27 87 358 9884

sandromilo@
eversheds-
sutherland.co.za

Rowan Bauer
Associate,
Employment law

T: +27 87 358 9880

rowanbauer@
eversheds-
sutherland.co.za

eversheds-sutherland.com