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What the law says about restraining key employees

Labour Issues

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IN ANY business there are generally key individuals who may harm the company if they left to a competitor.

To reduce this risk, the parties may enter into a restraint of trade agreement in terms of which the employee undertakes not to compete with the employer for a certain period of time after termination of employment.

Employers must ensure that the restraint of trade agreements they impose upon employees are reasonable. If they are not reasonable, they will not be enforced by a court of law.

In deciding whether or not a restraint is reasonable and so enforceable, the court will consider whether:

- The employer has an interest that deserves protection;
- That interest is threatened by the employee who has resigned;
- Such interest outweighs the employee's interest not to be economically inactive; and whether
- There is an aspect of public policy that requires the restraint to be maintained or rejected

Protectable interests include "customer connections" and "trade secrets as well as confidential information".

Real risk

Although an employee may have regular dealings with customers during the course of his/her employment, the test applied to determine whether an employee has obtained "customer connections" is whether the connection is such that the employee will probably be able to persuade the customer to follow him to the new business.

There must be a real risk that once employed by the competitor, the former employee may undermine his former employer's protectable interest.

Trade secrets

Trade secrets refer to information which is:

- Useful and capable of application in the industry;
- Known only to a restricted number of people or close circle;
- Of economic value to the company seeking to protect it; and
- Not in the public domain.

The court will assess whether the employee was exposed to confidential information and trade secrets during his employment. This may include business plans, pricing structures or technical know-how.

If it is established that the former employer has an interest worthy of protection, the court will consider certain factors to determine where the balance lies in protecting the proprietary interest of the former employer and keeping the former employee economically inactive. These factors include:

- The likelihood of the employee securing employment in another industry. It is possible, for example, that a person with general sales, IT or operational skills may be able to use his expertise in a different industry and avoid breaching his restraint of trade undertakings.
- Whether the restraint period is unreasonably long: There is no prescribed minimum or maximum period that an employer may impose a restraint upon an employee.

Case law has, however, provided insight as to what would be accepted as a reasonable period.

It is generally accepted that a period of six to 12 months is reasonable, however, the circumstances of each case would need to be assessed to determine the reasonableness of the period of the restraint.

- Whether the area of the restraint is reasonable: A restraint of trade agreement will define the geographical area within which the restraint will be applied. It would be unreasonable to restrain an employee from working within the whole of South Africa if, for example, the customer connections were only based in Durban.

Restraint of trade agreements remain a useful tool to protect against the risk of competitors gaining an unfair advantage.

If your business employs certain key individuals who are in a position to establish customer connections and are exposed to trade secrets, it may be worth requiring them to sign a restraint of trade agreement, provided the agreement is reasonable and capable of being enforced.

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