

New job? Beware restraint of trade clauses hiding in your contract

By [Njabulo Mbele](#)

5 Dec 2022

The high unemployment rate has pushed job seekers into accepting any form of employment and rarely read the fine print contained in modern employment contracts. In recent times, it is common for employment contracts to contain a restraint of trade and confidentiality clauses as part of the agreement. Unwittingly, employees usually sign these agreements which remain enforceable long after the employment relationship has ended.



Image source: jason salmon – [123RF.com](#)

So, what is a restraint of trade and is it fair under the current economic and job climate?

The purpose of a restraint of trade clause is to prevent former employees from competing with their previous employer. A restraint of trade agreement is a general contract governed by common law and essentially restricts freedom of trade in a specified area, profession, and period. These clauses have been around for some time but have since become extremely popular in the current volatile skills market.

Examples of restraint of trade clauses:

- The employee undertakes not to be engaged in any other business, in competition with the employer's business, be it direct or indirect, or as a shareholder, partner, member of a Close Corporation, director of a company or in any other capacity, within 1 (one) year of termination of this agreement, in the area known Gauteng and/or surrounding areas to a maximum distance of 200km radius from the city centre/s...
- The employee agrees that he/she shall not without the employer's prior written consent, for a period of (1) one year calculated from the date on which he ceases to be employed by the employer, be engaged in, whether directly or indirectly and whether jointly or solely, or as Director, Manager...



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If you resign, are dismissed, retrenched and/or terminated for any reason whatsoever including a mutual separation, a restraint of trade clause remains enforceable after your employment has ended. These clauses, to a regular person, often look like standard contract stuff and are often overlooked when signing contracts; that is until you find alternative employment.

Human resource trend 2020 report has indicated that 72% of South Africans leave one job to go to another job where they will perform same or similar job duties and/or functions. The devastation sets in when the previous employer approaches the courts to interdict the new employment on the basis of a restraint of trade. At that point, the new employer is compelled to terminate the employment and/or end any business arrangement. These clauses have been found to successfully limit and, in some cases, completely prevent employees from partaking in any form of economic activity similar to their previous job.

The courts have considered the validity of the restraint of trade agreement in a case *Oomph Out of Home Media (Pty) Limited v Brien and another [2021]* (GJ). The court ruled that it would be unreasonable and contrary to public policy to uphold a restraint of trade during the Covid-19 pandemic:

“ March 2020 till the next foreseeable future the economic world has been hard hit by the advent of Covid-19. Many people lost their jobs an unemployment has risen to uncontrollable levels, leaving families destitute... Finding a job at this time is notoriously difficult. In the circumstances, the restraint should be rejected. ”

In my opinion, this was a fair judgment which considered the legal, political and economic circumstances of the country and the effects of a restraint of trade on ordinary South Africans.



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However, Labour Court in *Bulldog Abrasives Southern Africa (Pty) Ltd v Dan Llewellyn Davie and another [2021]* considered the approach adopted in *Oomph Out of Home Media* and held that the decision was “clearly wrong”. More

importantly, the Labour Court held that “to suggest that enforcing a restraint in a Covid-19 situation is contrary to public policy is to stretch the meaning of public policy beyond what it is supposed to be”.

The Labour Court judgment set aside the principle established in *Oomph Out of Home Media (Pty) Limited v Brien*. Restraints of trade agreements are valid and remain enforceable. The Court also found *CP De Leeuw Johannesburg (Pty) Ltd v Wheelwright [2022]* that settlement agreements do not automatically terminate the restraint of trade agreements.

Is it the right thing to do?

Morally, it is my opinion that restraint of trade agreement should be judged in according with the circumstances of each case. Currently, these agreements are used as a talent retention strategy and serve the sole purpose of limiting employees from exploring other opportunities outside their current employer.

Despite the associated costs, employees may still approach the courts on an urgent basis to contest the validity and reasonableness of such a clause, however, prevention is better than a cure. Read your contract thoroughly before signing it.

ABOUT THE AUTHOR

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