

Short notes on:

RESTRAINS OF TRADE: CONFIDENTIALITY AND THE PROTECTABLE INTEREST - KEY INGREDIENTS TO EFFECTIVE ENFORCEMENT

Introduction

Restraints of trade have become an almost automatic inclusion in many agreements. The driver behind this is the protection of commercially sensitive and confidential information. Furthermore, to prevent any unlawful competition or an unfair advantage being leveraged in the market. With that being said, a recent labour appeal court case has made us question the effectiveness.

The case: North Safety Products v Naidoo and Another (D943/19) [2019] ZALCD 7 (10 September 2019)

The Employer sought to enforce a restraint and confidentiality for 12 months within the geographical area of Richards Bay. The Employer's business concerns the design, manufacture and marketing of personal protection and safety equipment products for use in the workplace.

The court states that in deciding restraint of trade disputes, the following questions require investigation:

- Whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained.
- Further, if there is a protectable interest, to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive.
- Lastly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the employee outweighs the interest of the employer – the restraint is unreasonable and unenforceable.

The Employer claimed that as a result of the connection the Employee had with its customers, specifically a unique knowledge of customer needs and their specific requirements, these customers might be induced to follow him to his new employer. In *Rawlins and Another v Caravantruck (Pty)*

Ltd 1993 (1) SA 537 (A), the court held that the idea that the ‘customer contact’ doctrine depends on:

“the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket”.

The Employer stated that the crux of the advantage the employee has now taken knowledge of specific requirements of the customers with which he dealt during his employment, and specifically regarding products which they deemed important to their basket of products.

The court found that on the facts of the matter, the information falls short of constituting confidential information and further that the Employer failed to show that it has a protectable interest which the Employee is capable of exploiting.

Conclusion

When drafting restraints of trade clauses, it is crucial to consider what is ultimately being protected and what constitutes confidential information. This, in addition to considering the fairness and reasonableness. Contact SchoemanLaw today for all your data protection, labour and commercial needs.