

Restraint of Trade and its Enforceability:

A restraint of trade is an agreement between an employer and an employee and can also be found in a shareholders' agreement. There are no codified legal principles of restraint of trade, therefore, the codification arises through the conclusion of an agreement. Whilst restraints of trade are enforceable, like all other agreements, they will not be enforceable when the enforcement is contrary to public policy. Public policy dictates that agreements that are freely entered into should be honoured, however, individuals should be free to earn an income and take part in economic activities. Section 22 of the Constitution further provides that every person has the right to choose a trade, occupation or profession freely.

An employer who seeks to enforce a restraint of trade is required only to invoke the restraint of trade and prove that a breach has occurred. The onus will be on the employee (restraineed) to show that the restraint is not enforceable as it is unreasonable and against public policy. To determine whether a restraint is unreasonable, the court will balance these considerations and make a value judgment as to whether the restraint of trade is reasonable. The court will consider whether a restraint unreasonably restricts a person's freedom of trade or work and will take into account the circumstances of each case and the situation prevailing at the time of the enforcement of the restraint.

The COVID-19 pandemic has impacted both the economy and many people's employment. When a court is tasked with determining the reasonability of a restraint of trade, it must consider the situation prevailing at time of the enforcement of the restraint of trade. It therefore seems reasonable to assume that the pandemic and the surrounding economic issues will need to be considered by the court in determining the reasonability of a restraint of trade.

In *Oomph Out of Home Media (Pty) Ltd v Brien and another* [2021] JOL 49492, Mr. Brien ("Brien") was an erstwhile employee and director of Oomph Out of Home Media (Pty) Ltd ("the company"). During his employment, Brien signed a restraint of trade agreement as well as a shareholders' agreement containing a restraint of trade. In terms of the restraint of trade, Brien agreed to be restrained for a period of 18 months from the date of termination of his employment from being employed by a competitor of the company in 29 African countries and was restrained from disclosing the company's confidential information and trade secrets to a competitor.

Brien resigned and commenced employment with a competitor of the company. The company became aware of Brien's employment by its competitor in March 2020 and urgent proceedings were launched in the Gauteng Division of the High Court in May 2020, during such time South Africa was in a phased period of lock-down. The matter was subsequently heard on 28 July 2020 and judgment was delivered on 3 February 2021.

The Judgment:

The court accepted that Brien had made contact with the company's customers and found that he was in possession of the company's confidential and proprietary information, conduct that Brien did not deny. The court noted the geographically far-reaching imposition of the restraint of trade and that the company owed Brien approximately R1 200 000.00 which could indicate that Brien and the company did not have a healthy working relationship. The court placed emphasis on the prevailing situation at the time of the enforcement of the trade in order to determine whether the restraint was unreasonable. The court noted that the departure of Brien seemed to have been caused by the company's conduct and that it could not overlook the unexpected invasion of the COVID-19 pandemic. Brien has not worked in another field for nine years and for Brien to be forced out of a career of his choice and to start working in a different field at a time when many companies were closing down,

retrenchments and lay-offs being common, was unreasonable. Therefore, the court found the restraint to be unreasonable and consequently unenforceable.

Restraints of trade and the enforcement thereof is not a straightforward matter, and the court is tasked with considering numerous factors in order to make a value judgment and decide whether or not the restraint is enforceable. There are numerous debates and views surrounding restraints of trade during the pandemic, therefore one cannot assume that each matter will play out exactly the same way as the case above.