

RADAR SCREEN WILLIAM MAEMA

LABOUR The employer has a legitimate interest to protect business interests and the employee the right to earn a living using his training

Workers should pay attention to restrictive job contracts

It is often said that employment is not a marriage and, therefore, is not meant to last for a lifetime and employers seem to be acutely aware of this when drafting employment contracts.

This they do by ensuring that the contracts contain provisions that restrict the employee from engaging in certain activities that would be detrimental to the business of the employer both during and after the employment relationship. Such contractual restrictions are known as restrictive covenants.

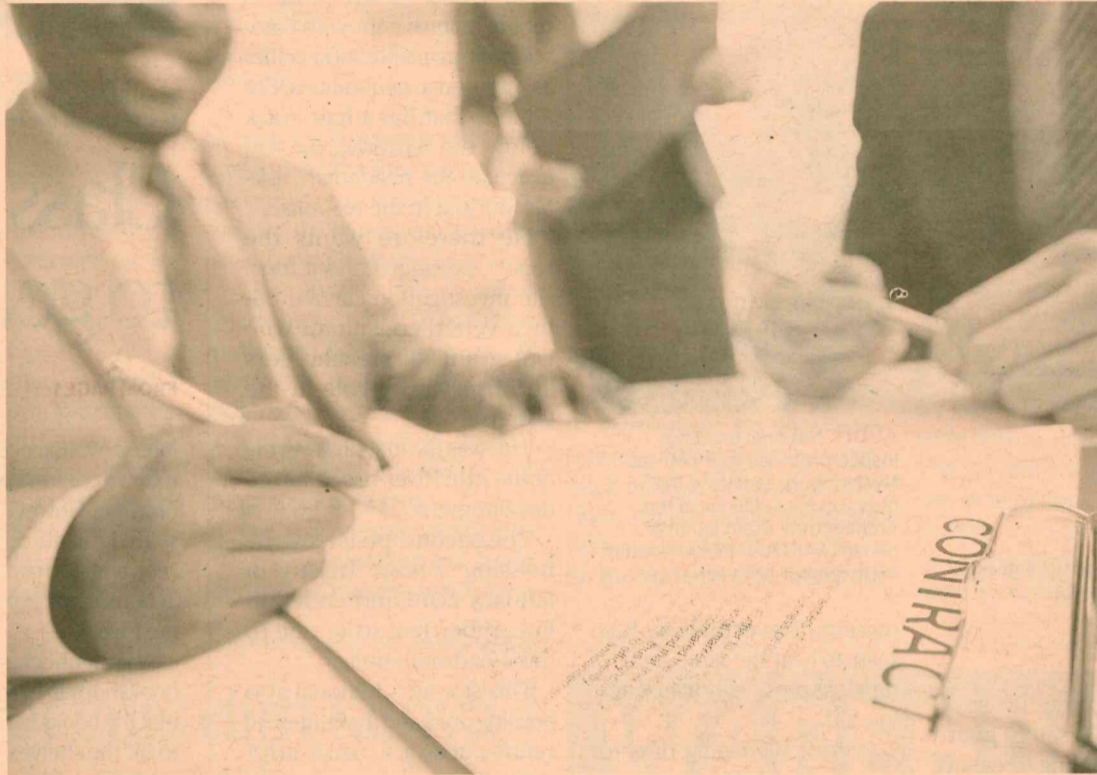
The validity and enforceability of restrictive covenants during the currency of the employment period such as prohibition against conducting a competing side business, working part time for a competitor during leave or over the weekends, enticing away customers, is usually not debatable.

What is frequently litigated upon, however, is the extent, if at all, of enforceability of such contracts after the termination of employment.

Examples of post-termination restrictions include restraint from being employed by a competitor within a specified period after the termination of employment; setting up a competing business within a certain radius of the employer's business; soliciting the employer's customers and employees; breach of the employer's intellectual property and use or disclosure of confidential proprietary information such as trade secrets (customer lists; suppliers, marketing and production processes).

The issue revolves around the competing interests of the employer and his ex-employee. On the one hand, the employer has a legitimate interest to protect his business interests against an unfair attack by his former employee. On the other, the ex-employee has a legitimate right to earn a living using his training, skill and experience that might be limited to that particular sector.

While courts generally frown upon restrictive covenants, such restrictions are actually not illegal. There is a whole statute that deals with this subject. The Contracts in Restraint of



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Trade Act expressly provides that a restrictive term in a contract is not necessarily void.

However, the High Court can declare it void if, having regard to the nature of the profession, trade or business concerned, the period and area of application, it is unreasonable and not in the interests of the parties. It may also be struck out if it is intended to accord greater protection to one party than would be reasonably necessary.

Therefore, with regard to employment, for a restrictive covenant to stand, the employer must demonstrate that he has a legitimate proprietary interest which can only be protected by such restriction and that

the intention is not merely to punish the employee or impose an unnecessary hardship upon him.

This is particularly relevant concerning restraints which prohibit the employee from seeking employment or being employed by a competitor for a long period of time after termination of employment or setting up a competing business within the same area.

Depending on the degree of skill and specialisation involved, it may well be that the ex-employee can only find employment in the same sector. This means, restraining him from working for a competitor would amount to denying him the possibility of earning a livelihood.

Since the right to work is a constitutional right by virtue of the International Labour Organisation Treaty to which Kenya is a party, such a restriction would in all likelihood be declared unconstitutional.

Kenyan courts have indeed so held in a number of cases where they have taken the view that a restriction that prevents a person from earning a livelihood is unreasonable and therefore unenforceable. In holding this view, courts have taken judicial notice of the widespread unemployment in the country.

In some cases, however, and depending on the circumstances it may be reasonable to allow for some 'cooling

off' period between the termination of employment and when the employee takes up employment with a competitor or starts a new competing business.

In some foreign jurisdictions this has been addressed by legislating that such restriction would be lawful if the employer is willing to pay the employee the equivalent of the salary he would have been entitled to during the period of restraint.

This is an option which Kenyan employers may consider to adopt. It is highly probable that a Kenyan court would uphold such arrangement on grounds that the law does not generally encourage or condone unjust enrichment.

Restrictions pertaining to breach of intellectual property, confidentiality and trade secrets are generally enforceable without limit in point of time unless otherwise limited by contract.

The proprietary material protected by such restrictions belongs to the employer and is usually of immense commercial value. There is therefore no justification for the ex-employee to benefit from it following the termination of employment.

The key to ensuring that restrictive covenants are enforceable is to limit their scope as much as possible both in time and the geographical application. The wider the scope the more likely they will be found to be contrary to public interest and therefore unenforceable.

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**INSOLVENCY ACT, 2015
NAKUMATT HOLDINGS LIMITED
(UNDER ADMINISTRATION)
Insolvency cause No.10 of 2017**

NOTICE is hereby given pursuant to Section 563 (2) (b) of the Insolvency Act 2015. Effective 22 January 2018, Mr Peter Obondo Kahi of P O Box 14077-00800 Nairobi, Kenya, has been appointed Administrator of Nakumatt Holdings Limited ("the Company").

With the appointment, the powers of the Administrator extend to all assets and undertaking of the Company. In line with the spirit of the Insolvency Act 2015 and working with the Company's stakeholders, the Administrator's primary objective for this administration is to explore ways of rescuing the Company as a going concern business and if it is not reasonably practicable to achieve this objective, to seek to achieve a better result for the Company's creditors as a whole than would be likely if the Company is wound up (without first being in administration).

In the interim and by virtue of the Administration; the powers of the directors of the Company in terms of dealing with the Company's assets have ceased. None of the directors, shareholders, employees and no other person is authorised to transact any business on behalf of the Company without express written consent from the Administrator.

The Administrator shall distribute a statement of proposal to every creditor whose claim and address are known and to any member of the Company who applies to the address below within sixty (60) days from the date thereof.

Any claims and matters relating to the Company shall be directed to the Administrator on the address below.

The Administrator act's as an agent of the Company without personal liability.

Dated this 25 th January 2018.

The Administrator's contracts are:

Nakumatt Holdings Limited (Under Administration)
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