Restrictive covenants in employment contracts

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It is often said that employment is not a marriage and is therefore not meant to last a lifetime. Employers seem to be acutely aware of this when drafting employment contracts and often ensure that the contracts contain provisions which restrict the employee from engaging in certain activities that would be detrimental to the employer's business, both during and after the employment relationship. Such contractual restrictions are known as restrictive covenants.

Validity and enforceability

The validity and enforceability of restrictive covenants during the employment period (eg, prohibition against conducting a competing business on the side, working part time for a competitor during holiday leave or over the weekends and enticing away customers) is usually not debatable. However, what frequently results in litigation is whether and to what extent these restrictive covenants are enforceable 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 (eg, trade secrets such as customer lists, supplier names and marketing and production processes).

Competing interests of employer and ex-employee

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

Legality

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

necessary.

Therefore, with regard to employment, for a restrictive covenant to stand the employer must demonstrate that it has a legitimate proprietary interest which can be protected only by such restriction and that the intention is not merely to punish the employee or impose an unnecessary hardship on him or her.

Unreasonable and unenforceable

This is particularly relevant in respect of restraints which prohibit an employee from seeking employment or being employed by a competitor for a long period 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 be that the ex-employee can only find employment in the same sector. Accordingly, restraining him or her from working for a competitor would amount to denying him or her 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 restriction would likely be declared unconstitutional. Kenyan courts have held this to be the case in a number of judgments 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.

Cooling-off period

However, in some cases, and depending on the circumstances, it may be reasonable to allow for a 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 a restriction would be lawful if the employer is willing to pay the employee the equivalent of the salary that he or she would have been entitled to during the period of restraint. This is an option which Kenyan employers could consider adopting. It is highly probable that a Kenyan court would uphold such an arrangement on the grounds that the law does not generally encourage or condone unjust enrichment.

Intellectual property, confidentiality and trade secrets

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

Comment

The key to ensuring that restrictive covenants are enforceable is to limit their scope as much as possible both in time and 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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