

# ARE RESTRAINTS OF TRADE LEGAL?

Category: Commercial Law

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Simply put, a restraint of trade is a legal contract between an employer and employee that prevents the employee from engaging in a similar business within a specified geographical area and/or within a certain time, once the employment contract has terminated.

Many new employees heedlessly sign a restraint of trade, falsely under the impression that they are unenforceable. This mistaken belief may be as a result of the right that every person has a right to choose a trade, occupation or profession freely.

In the case, *Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)*, the court held that restraints of trade are only illegal and unenforceable if they are in conflict with public policy and the public interest.

As restraints of trade have been established to be lawful in certain circumstances, the first important thing to note is that a restraint of trade is regulated by the Law of Contract and not Labour Law. This means that any legal dispute arising from a restraint of trade agreement between an employer and employee cannot be referred to the CCMA to be adjudicated on.

The reason employers include restraint of trade agreements within an employment contract is due to the fact that employers often lose staff to competitors after they have invested a lot of time and company resources into developing the employee. This creates the further risk of that employee taking customers, intellectual property and other trade secrets with them to the new employer.

The reasonableness of a restraint of trade can only be determined on a case-by-case basis.

In the case, *Basson v Chilwan & Others 1993 (3) SA 742 (A)*, there were four principles demonstrated that courts use to determine the reasonable of restraints:

1. Does the one party have an interest that deserves protection after termination of the agreement?
2. If so, is that interest threatened by the other party?
3. In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
4. Is there an aspect of public policy having nothing to do with the relationship between the

parties that requires that the restraint be maintained or rejected?

With regard to the above, a restraint is generally not enforceable when it is evident that an employee has not acquired any confidential client information and had not received any training. Likewise, a restraint of trade against an admin clerk for a period of two years, within the geographical location a province will also most likely be deemed unenforceable.

Restraints of trade are more appropriate for employees who are in high powered positions or have control over sensitive information. It may seem as acting in bad faith by the employer including a restraint of trade agreement within an employment contract for less senior roles.

It is always important to note that you can always attempt to renegotiate the terms of a restraint of trade if you feel it will limit your ability to make a living.