

Are agreements in restraint of trade enforceable?

By [John Saner](#), issued by [LexisNexis](#)

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There is a common misconception amongst many members of the public, and indeed the legal profession, that agreements in restraint of trade are invalid and unenforceable. As a matter of fact, and law, nothing could be further from the truth.

A restraint of trade is a provision within an employment contract stipulating that in the event of termination of employment – for whatever reason – the employee may be restricted in the geographical boundaries and the work that he can perform.

The primary intention of this provision is to protect the employer's proprietary interests – including trade secrets, confidential information and of course the company's client and customer base – from falling into the competitor's hands.

Restraint agreements are very widely used in commerce and industry in South Africa. And they are recognised in South African law, contrary to the position in the UK, as being *prima facie* valid and enforceable.

The upshot of this approach is that the applicant in a restraint enforcement application (usually the ex-employer) has, at the outset, only to prove the restraint agreement and the breach thereof. If he (or she) does so, then the onus is on the respondent (usually the ex-employee subject to the restraint, and sometimes the new employer) to show why the binding agreement should not be enforced.

That involves showing that to enforce the agreement would be unreasonable, and therefore against public policy. On application papers, this is never an easy task.

The increasing proliferation of reported and unreported restraint cases in, and extraneous of, the law reports, bears witness to the importance of restraint agreements, and their enforceability, and the unusually highly charged atmosphere of urgent restraint application proceedings.

A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values.

One high-profile case, which found in favour of the employer in the Supreme Court of Appeal, is *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA). Reddy, who was employed by Siemens, resigned to take up a position with Ericsson. He had agreed, upon joining Siemens, not to be employed by a competitor for a period of one year after termination of his employment and undertook not to disclose trade secrets and confidential information belonging to Siemens.

In interdicting Reddy from taking up employment with Ericsson, the court found that the restraint was aimed at preventing a person with knowledge of confidential technologies as a result of his employment from utilising them to the detriment of the employer:

"It is confidential technologies which are to be protected, it is not necessary for the applicant to prove that information is not academic in the hands of [Ericsson]. By its very nature such information in the hands of a competitor may be detrimental to the applicant's business."

Having an understanding of every aspect of this important, practical and difficult aspect of law from the history and

development of agreements in restraint of trade to a knowledge of the most up-to-date decisions in the Supreme Court of Appeal, will assist attorneys, labour law practitioners, counsel, judges – in fact all legal professionals – whether for the employer or employee – in providing valuable counsel.

ABOUT THE AUTHOR

John Saner SC (MA (cum laude) LLB (Wits) has been a member of the Cape Bar for thirty years. He took silk in 2014 and continues to practice and litigate in the medical negligence field as a member of the Cape Bar, from his base in Tampa, Florida USA. He is the author of "Agreements in Restraint of Trade in South African Law", "Medical Malpractice in South Africa" and "Prescription Law".

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