
Restraint of trade: the vexed question – is it reasonable?

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THE reasonableness of a restraint of trade agreement is a matter for the court to determine, and the fact that parties to the restraint of trade may have accepted or described it as reasonable is of no consequence.

The Supreme Court of Appeal identified four questions that should be asked when considering the reasonableness of a restraint:

Does the one party have an interest that deserves protection after termination of the agreement?

If so, is that interest threatened by the other party?

In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

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?

Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry undertaken at the time of enforcement covers a wide range of factors, including the nature, extent and duration of the restraint and factors specific to the parties and their bargaining powers and interests.

In 2007, the Supreme Court of Appeal said that to bring the reasonableness test in line with the Constitution, a fifth question had to be asked:

Does the restraint go further than necessary to protect the interest?

In South African law, an agreement of restraint of trade is valid on the face of it and therefore enforceable. It will only be invalid and unenforceable if it is contrary to public policy on account of it unreasonably restricting a person's right to trade or to work.

Employers beware: there is no conceivable basis to require an employee to sign an agreement so broad in scope and application and be compelled to be restrained from working on a vague a basis. Given the nature of the restraint clause and the need for courts to balance the contractual provisions against the right to be a productive worker, a restraint clause should be drafted to reflect this balance.

For more information on the above, contact Anneke Whelan, Partner in the Litigation department, via e-mail at awhelan@wylie.co.za