

Employment Law

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SOUTH AFRICA

Inconsistent application: A roadblock to enforcing restraint agreements



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Inconsistent application: A roadblock to enforcing restraint agreements

To enforce a restraint of trade agreement, it must be reasonable. The recent decision of *Altron Nexus (Pty) Ltd v Fowler and Another* (2024/112022) [2024] ZALCJHB 507 (6 December 2024) turned on the point of reasonableness of the application of a restraint of trade agreement.

The applicant, Altron Nexus (Pty) Ltd (Altron) sought a final order interdicting and restraining the first respondent (Fowler) from breaching the restraint of trade agreement they had entered into.

Altron contended that Fowler had (after resigning from Altron) taken up employment with the second respondent, MST Critical Communications (Pty) Ltd (MST), which was its competitor. The fact that MST was a competitor was conceded by Fowler during the hearing.

Fowler had entered into two restraint of trade agreements during his employment with Altron. The Labour Court found that the most recent one superseded the first restraint of trade agreement.

Altron's core argument was that the purpose of the restraint agreement was to preclude Fowler from using its client relationships and confidential information as a springboard to unfairly compete with Altron. Altron felt that with MST being a direct competitor, it would be able to poach its clients and employees. Altron argued that by virtue of Fowler's position, he was privy to confidential information concerning its client list, stock on hand, as well as plans in respect of its legacy stock and pricing thereof.

Fowler raised several arguments, such as the reasonableness of the restraint agreement, which he felt infringed on his right to trade, as it was wide enough to preclude him from working in any related industry for 12 months. He also argued that when entering into the restraint agreement, he did not have equal bargaining power to Altron and was thus not in a position to negotiate the agreement.

The cornerstone of Fowler's case concerned the interesting argument of consistency. Fowler raised two instances where Altron had not enforced restraint agreements against its erstwhile employees.

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Findings

In his judgment, Makhura, J was not convinced that Fowler had raised proper defences to the well-established legal principles concerning restraint agreements.

In particular, Makhura, J recognised that the purpose of restraint agreements goes beyond simply protecting a former employer from competition. In saying this, he noted the importance of protecting a former employer's proprietary interests, which in this case concerned the confidential information Fowler had access to that would have given MST a competitive advantage.

The focal point of this case concerned the final conclusion made by Makhura, J while scrutinising the allegation concerning the inconsistency of the application of Altron's restraint agreements.

Makhura, J afforded the parties an opportunity to file further heads of argument to address this point. He noted that in its heads, Altron (while mentioning that this point was irrelevant), argued that it had recently changed its practice of not enforcing restraint agreements.

Altron had not notified Fowler of this change of practice before his resignation and, in Makhura, J's view, it was inadequate to notify him of this **after** his resignation. Accordingly, at the time of his resignation and taking up employment with a competitor, he had not known that his restraint of trade would be enforced.

It was on this basis that Makhura, J found the application of the restraint agreement to be unreasonable and that Fowler would have reasonably expected that the restraint would not be enforced against him.

Takeaway

Employers should be cautious with changing established practices in the workplace. Where employers seek to change these practices, employees should be made aware of this. This is particularly the case with restraint of trade agreements. Alternatively, employees should be reminded of their restraint of trade agreements and other post termination contractual obligations when they resign, and they should be informed as to whether or not they will be enforced.

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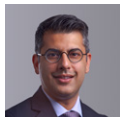
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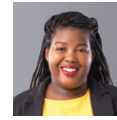
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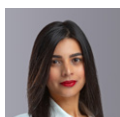
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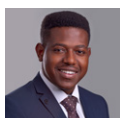
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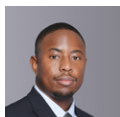
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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