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Can you restrain without a restraint?

By Motheo Mfikoe

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The Labour Court in South Africa recently considered whether an employer could restrain its former employees from commencing employment with its competitors, without having an agreed restraint of trade. The cases of *Absa Insurance and Financial Advisors v Jonker and Another*; and *Absa Insurance and Financial Advisors v Jonker and Another* (Case numbers C741/14, C742/17) were originally two separate cases against the married respondents, who were former financial advisors for Absa Insurance and Financial Advisors (AIFA), but they were consolidated due to the similarities in the facts of the cases.

The application was heard on an urgent basis as Mrs Jonker, who had resigned from AIFA, was due to take up employment with a competitor within three days of the application being made. At this time, Mr Jonker, who had taken early retirement from AIFA, had already started working for the competitor.

The Jonkers had entered into employment agreements with AIFA in their respective financial advisory roles. Their employment agreements contained confidentiality and protection of client information and company interest provisions, placing obligations on the Jonkers to not disclose any confidential AIFA information. However, the agreements did not expressly contain restraint of trade provisions.

The Jonkers' client base was centred around a small town called Robertson. Mr Jonker serviced 470 clients whereas Mrs Roberson serviced 792 clients. Upon the Jonkers' respective resignation and retirement, AIFA instructed them to return their company equipment, including their laptops and other software, in accordance with their employment agreements. During this time, AIFA enlisted its "sky agents" to contact the clients who had been serviced by the Jonkers whilst still in AIFA's employ. When the sky agents contacted these clients, it was discovered that five of them had been in contact with Mr Jonker and had decided to stay with him as their financial advisor. Mr Jonker admitted to speaking with his old clients after they called him due to their unhappiness with AIFA's call centre. Meanwhile, Mrs Jonker admitted to sending an email to her old clients informing them that she was leaving, however, she did not indicate to these clients where she was going.

As the agreements did not contain any restraint of trade provisions, this raised the question as to whether an employer can rely on the confidentiality (and protection of proprietary interests) provisions to prevent former employees from poaching and enticing its clients and/or ensuring that confidential information is not used to gain a competitive advantage. AIFA argued that a restraint of trade is not the only way for an employer to protect itself. There are two forms of unlawful competition, namely the unfair use of a competitor's fruit and labour and the misuse of confidential information to advance one's business interests and activities at the expense of a competitor.

The Labour Court, in applying the facts, stated that AIFA did not establish a clear right to the extraordinary remedy and that an interdict was drastic. There was no proof that the Jonkers actively disclosed AIFA's confidential information and proprietary interests. The fact that the Jonkers took up employment with a competitor, even while in possession of client confidential information, did not amount to unlawful competition. AIFA cannot prevent clients from making their own election to continue with the Jonkers and as a result the application was dismissed.

In light of this, it is important for businesses that rely heavily on the sanctity of trade secrets, trade connections and confidential information to protect their proprietary interests adequately. If there is a real risk that an employee could use such information to advance either their own interests or those of another, an employer should include both a restraint of trade and confidentiality provisions in their employment agreements to avoid a similar outcome.

ABOUT THE AUTHOR

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