THE ENFORECEABILITY OF TRAINING BONDS, NON-COMPETE AND SOLICITATION CLAUSES IN EMPLOYMENT CONTRACTS

Introduction

Restrictive clauses are usual clauses in contracts of employment. And with the increase in the level of awareness and sophistication of the Nigerian labour market leaping to catch up with international best practices, more than ever, issues of the enforcement of these clauses are litigated. The doctrine of restraint of trade presents itself as a double-edged sword that can swing both sides. While it seeks on one hand, to prevent abuse regarding certain trade practices, it also tends to present on the other, one may say, the skewed opportunity for violation of individuals' rights to certain trade freedoms. This article explores the species of restrictive clauses and its enforceability in Nigeria.

What is a contract in restraint of trade?

A contract in restraint of trade is one in which a party covenants to restrict his future liberty to exercise his trade, business, or profession in such a manner and with such persons as he chooses. The restraint requires that the employee should not disclose trade secrets, solicit other employees or customers, or enter competition with the employer upon termination of the employment relationship.[1] The restrictions in most cases are in two phases. One subsists during the pendency of the employment, the second takes effect immediately the contract of employment is determined.[2]

With the desire to protect against the disclosure of information considered to be confidential by employee in his future conduct, employers have always insisted on the inclusion of

[1] Furmston, (ed.), Cheshire and Fifoot Law of Contract 13th ed. (London: Butterworths, 1996) at 35.
[2] 3 D. D. Bennett & A. L. P. Hartman, Employment Law for Business (Irwin, McGraw Hill Companies, 2002) p.5.

restrictive covenants in contracts of employment.[3] By this, the employee has an obligation not to disclose or use for his benefit information[4], which is special and peculiar to the employer. It is a settled principle of law that parties are bound to the terms of a contract they freely entered. They are not allowed to disown their obligation and liabilities[5] as the court will give full effect to the terms as contained in the contract agreement.[6] What then is so distinguishing about contracts in restraint of trade that is always frowned at and, prima facie void, except if a special circumstance is established to justify their validity and bindingness?

In many jurisdictions, non-compete or restraint in trade clauses are encouraged to protect trade secrets and business innovations and ideas. It is common place to find a post-termination clause in contracts of employments particularly for some specific and sensitive cadres in an organization. International best practices recognize reasonable restraint in trade clauses[7]. What is reasonable is subject to factors which vary from country to country. Before signing up to a contract of employment that contains a restrictive clause or when the courts are called upon to decide the validity of a post termination clauses in employment contracts, the employee or the courts as the case may be, will consider certain issues such as, the reasonability of the clause; the legitimate business interest sought to be protected; reasonability in duration; attached consideration; is it just a deterrent factor; are there remedies available to the aggrieved party; the laws in force; and the surrounding circumstances of each case.

Are restrictive agreements and practices statutorily regulated in Nigeria?

Restrictive agreements and practices are regulated in Nigeria. The Federal Competition and Consumer Protection Act, 2018 ("FCCPA") prohibits restrictive or unfair business practices which prevent, restrict, or distort competition or constitute an abuse of a dominant position or market power in Nigeria. The prohibited "acts[8] include:

- Directly or indirectly fixing the purchase or selling price of goods.
- Dividing markets by allocating customers, suppliers, territories or specific types of goods or services.
- Limiting or controlling the production or distribution of any goods, or services, markets, technical development or investments.
- Collusive tendering.

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[3] See Dix and Crump, Contracts of Employment 6th ed.(London: Butterworths, 1980) 121.
[4] Whether during or after the employment.
[5] In George Ashibuogwu v. A.G of Bendel State and Anor (1988) 1 NWLR (Pt.69) 138 at 158, the Supreme Court per Agbaje, J.S.C reiterated that; "the parties to a contract would prima facie be liable for their obligations under the contract"..
[6] Except if they are illegal contracts, in which case they may be declared void and of no effect. For instance, contracts to commit a crime, a tort or a fraud, contract prejudicial to the status of marriage, contracts prejudicial to public safety, contracts prejudicial to the administration of justice, contracts to promote corruption in public life and contracts to defraud the state of revenue etc. are void and unenforceable.
[7] Section 254C (1) (f) of the Constitution allows the National Industrial Court to apply international best practices in the determination of matters before it. See the case of Aloysius v Diamond Bank Plc (2015) 58 NLLR (Pt. 199) 92, 134.
[8] Section 59 of the FCCPA, 2018

- Making the conclusion of an agreement subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of the agreement.

The list of prohibited acts is not exhaustive and the Federal Competition and Consumer Protection Commission (FCCPC) which is the relevant regulatory authority charged by the FCCPA to regulate mergers, consumer protection and competition, can also declare an agreement or practice to be restrictive, depending on the individual circumstances.

What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Non-competition, non-solicitation of employees and customers, training bonds are the more common forms of restrictive covenants in Nigeria. By virtue of the provisions of Section 68(1)(e) of the Federal Competition and Consumer Protection Act 2018 (the "FCCPA"), post-employment restrictive covenants of up to two years are legal under the Nigerian law.

The interpretation and effect of a restrictive covenant in a contract of employment was examined in the case of Studio Press Plc v Kadoor & Anor[9], per Oyewunmi, J of the National Industrial Court, Lagos judicial division when Clause 25 of the contract of employment of parties contract was considered by the Court. Clause 25 of the contract provides thus:

> "For a period of two years immediately following the termination for whatever reason of this agreement, the employee agrees not to work in the same or similar capacity in any company whose business is the same or similar to that of the employer in Nigeria except with the prior written permission of the employer to do so, which permission will not be unreasonably withheld though it will normally be withheld if the employee intends to work in the same or similar business to that carried out by the company".

The Court held that clause 25 of the contract of employment was a restraint of trade which is reasonable in the circumstances of the case, and as such enforceable.

What are Training Bonds? How can they be enforced under Nigerian Law?

As a measure against losses that could arise due to employees terminating their contracts after receiving trainings, employers often require employees to issue undertakings to remain in their service for a specified period after the acquisition of new skills or certificates, which costs was borne by the employer. This, from the perspective of the employer, guarantees that the employer will recoup the investment made in such employee.

Such undertaking is popularly called a "training bond" which is an agreement between an employer and its employee(s) that requires the employee to remain in the service of the employer for a specified length of time, in consideration of the employer paying for an acquired skill set or training of the employee. Usually, training bonds contain a clause that offers the employee an option to repay the bond value (the sum expended in training the

[9] NICN/LA/144/2015

employee) where such employee desires to leave the services of the employer, prior to the time specified in the bond or undertaking.

In taking into consideration the issue of enforceability of training bonds, the employer needs to examine **Section 34(1)(c) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)** which provides as follows:

> "Every individual is entitled to respect for the dignity of his person, and accordingly, no person shall be required to perform forced or compulsory labour".

Pursuant to the constitutional provision, **Section 73 of the Labour Act, Cap. L1 LFN 2004**[10] prescribes the punishment for forced labour as follows:

> "Any person who requires any other person, or permits any other person to be required, to perform forced labour contrary to section 34 (1) (c) of the Constitution of the Federal Republic of Nigeria 1999, shall be guilty of an offence and on conviction shall be liable to a fine not exceeding N1,000 or to imprisonment for a term not exceeding two years, or to both,"

The inference drawn from the foregoing provisions of the law is that "forced labour" is prohibited in Nigeria. Thus, taking that into consideration, as well as the position on restraint of trade, Nigerian courts have previously held that restrictive covenants are generally not enforceable[11]. In other words, in determining whether a training bond is a restrictive covenant and/or amounts to forced labour, the courts will consider the circumstances of each case.

On the issue of enforceability of training bonds in Nigeria, the case of **Overland Airways Limited V. Captain Raymond Jam**[12] is very instructive. Overland Airways Limited ("Overland"), an airline operating in Nigeria, sponsored one of its pilots, Captain Raymond Jam ("Raymond"), to undergo trainings in the United States of America. Raymond executed two training bonds and committed himself to remain in Overland's employment for 36 months and 12 months, respectively. Upon completion of the trainings, Raymond acquired new licences and certifications. While the bonds were still subsisting, Raymond resigned from the employment of Overland. Dissatisfied with this development, Overland instituted an action against Raymond at the National Industrial Court seeking to enforce the terms of the training bonds against him. In his defence, Raymond contended that the training bonds were void and unenforceable under Nigerian law, as they constituted unreasonable restraint of trade; unfair labour practice and were contrary to public policy. He also argued that the training bonds contradict the practice in the aviation industry wherein pilots were bonded only for the period within which their licences are valid. Overland countered this claim and argued that the training bonds were not contracts in restraint of trade; they were freely

[10] It should however be noted that the Labour Act is limited in scope as it applies to employees who perform manual labour and clerical works (workers) and not employees who perform executive or professional works (non-workers). These latter classes of employees are subject to the terms in their contract of employment. See Section 91 of the Labour Act, 2004.
[11] See Koumoulis v. A.G Leventis Motors Limited (1973) All N.L.R 789.
[12] (2015) 62 NLLR (Pt. 219) 525

entered into by the parties; and were necessary for the protection of its business interests. It submitted that training bonds are enforceable not only in Nigeria, but also in other jurisdictions.

In reaching its decision, the court considered the custom of training bonds in line with international best practices, particularly the practice in the aviation industry in India. It held, inter alia, that although training bonds are prima facie not enforceable as they are restraints to trade, it will however enforce such bonds where it can be shown that it has been freely entered, subject to the overriding condition of fairness and reasonableness with respect to the duration and sum to be repaid by the employee in the event of his breach.

Also, to determine what is fair and reasonable, the court would consider the following:

a. whether the specified period for which the employee must remain in the service of the employer is reasonable.
b. the estimated training cost must not be unduly exaggerated as to render the employee incapable of repaying it; and
c. whether the employer has offered the employee something extra (and not just the employment) as consideration for the employee's covenant to remain in the service of the employer for the specified period.

Thus, there is no hard and fast rule to this, as what apply to each case will depend on the terms of the bond and the circumstance of each case. The decision of the National Industrial Court in the case of Overland v. Raymond (Supra) which has been re-affirmed in the more recent judgment of the National Industrial Court on 15 November 2018 in NICN/AK/49/2015 - Dr. Victor F. Balogun & 2 Ors. v. Federal University of Technology Akure & Anor, emphasises that training bonds may be enforceable if the terms are fair and reasonable.

What is a Non-Compete Agreement? Its purpose and Requirements.

A non-compete agreement is a clause in a contract that specifies that an employee must not enter competition with an employer after the employment period is over. These agreements also prohibit the employee from revealing proprietary information or secrets to any other party during or after employment.

The position of Nigerian law on Non-Compete clause and its enforceability was pronounced in the case of Afropim Engineering Construction Nigeria Limited v. Jacques Bigouret[13]. The Appellant, who was the Plaintiff at the lower Court, sued the Respondents amongst other reliefs for:

"An Order of injunction restraining the 1st Defendant from entering into an employment or offering his services to any company or organization doing similar business as that of the plaintiff both whilst the 1st Defendant remains in the Plaintiffs employment and also within six months after the termination of the employment Agreement between the Plaintiff and the 1st Defendant."

[13] (2015) 52 N.L.L.R PT (173) 1CA

The lower Court dismissed the case of the Plaintiff and the Court of Appeal in affirming the decision of the trial judge held thus:

> "Any contractual Agreement or Employment Agreement which does not conform with Section 17(3) (a) (e) of the 1999 Constitution is void because of its non-conformity. In the instant case, Article 12 of the Plaintiff's Employment Agreement which states that "the Employee agrees that he will not enter into an employment or offer his service to any similar company or organizations in Nigeria whatever the circumstances may be, this within six months after the termination of the agreement" goes counter to the provisions of our Section 17 (3) (a) and (e) of the 1999 Constitution and it is void to the extent of the inconsistency or non-conformity.
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> I think that was quite pretentious, as a close study of the said provision shows that Article 12 never outlawed the 1st Respondent entering into an employment or offering his services to any similar company or organization, while still working for the Appellant but barred him from doing so "within six months after the termination of this Agreement" It appears to me that, the Appellant, in the effort to exploit him tried to colonise and completely expropriate the 1st Respondent, and make him useless to himself, if he stayed back in Nigeria, even when out of service to the Appellant. The Appellant had hurriedly incorporated that clause, without vetting it, to see that it had effect, only after the Appellant would have dumped the 1st Respondent, not while still in service to it! That is what the last sentence in Article 12 connotes "…this within six months after the termination of this agreement.
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> Of course, the learned trial Chief judge had held Article 12 a nullity, for being an affront to Section 17 (3) (a) and (e) of the 1999 Constitution." "I hold that the learned trial Chief Judge was right, as it is against the spirit of the Constitution, basic law, to castrate an able bodied man and render him unemployed and useless to himself and family, for a period of six months (or any period at all) after being sent out of job, just to please and satisfy the mischievous desire of a selfish, greedy monopolist, who detest competition, and loath fairness.
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> I think section 12 of the Appellant's Agreement is akin to a sentence of death, a wicked contrivance that completely negates employee's mobility in labour and bars his right to work and earn a living…."

The holistic effect of the above decision is that a non-compete clause in an employment contract is an affront to our Constitution and by virtue of the provisions of Section 1 (3) of the 1999 Constitution, non-compete clauses are to the extent of their inconsistency with the Constitution null and void.

It is to be noted that the validity and enforcement of a non-compete vary by jurisdiction and may require the former employer to keep paying the ex-employee a base salary during the non-compete period. However, employees do not have to be provided with financial compensation in return for covenants. Nigerian Courts are also more likely to uphold the covenants against the employee if the employee receives compensation in exchange for his or her consent to be bound by the covenants.

What is a Non-Solicitation Agreement?

A non-solicitation agreement is a contract that restricts an employee or former employee from soliciting from co-employees or customers after the employee's exit from employment. This is usually a clause in an employment contract. Employers use non-solicitation agreements to restrict former employees from soliciting customers or staff.

What is the difference between Non-Competition and Non-Solicitation Agreements?

A non-competition agreement and a non-solicitation agreement are often regarded as the same thing. However, in actual sense, they are distinct. A non-competition agreement is used to prevent a former employee from working for another company in the same industry, one that would be a competitor of the employee's previous employer, while a non-solicitation agreement is used to prevent the former employee from soliciting a former employer's clients or staff.

Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Section 68(1)(e) of the FCCPA provides for the maximum duration of such restrictive covenants and provides that:

> "Nothing in this Act prohibits a contract of service or a contract for the provision of services in so far as it contains provisions by which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during or after the termination of the contract and this period shall not be more than two years".

Given that the FCCPA has provided for the maximum duration of a restrictive covenant, if the restraint is challenged, in determining whether to enforce the covenant, the National Industrial Court of Nigeria (the "NICN") considers the reasonableness of the scope and the terms of the restraint and whether the employer has a proprietary interest that it seeks to protect. Where the NICN finds the length of such restrictive covenants to be excessive or the geographic scope to be too wide, it will hold such clauses to be void and unenforceable. This is because the Courts are generally reluctant to modify the terms of a contract of employment entered between parties[14].

What remedies can the employer seek for breach of post-employment restrictive covenants?

Remedies available to employers for breach of post-employment restrictive covenants include an action for damages for breach of contract and injunctive order to restrain the employee from continuing the restricted activities.

[14] BFI Group Corp. v. B.P.E (2012) 18 NWLR (Pt. 1332) pg. 209 at pgs. 238-239, paras. H-B

Conclusion

Freedom in trade and movement of labour is highly cherished because of the opportunities it presents to employers and employees alike. However, a fully complimented and balance regulatory regime is needed for business continuity. It is in realization of this that the doctrine of restraint of trade has been introduced and embraced in almost all jurisdictions including Nigeria. In as much as this has come to be, the Courts as final arbiters have ensured that there are standards and guides, and this helped in given circumstances in deciding whether such agreement is valid or not.

Worthy to note that the regulatory body, the Federal Competition and Consumer Protection Commission in the exercise of the powers conferred upon it by the FCCPA has made the Restrictive Agreement and Trade Practices Regulations (RATPR) 2022, which objective is to provide for the implementation of restrictive agreements, provide guidance on the regulatory review for agreements or decisions and clarify the process for authorization of exempted agreements and practices among undertakings. It is believed that as Nigerian laws continue to evolve in this regard, our legal jurisprudence will be enriched to serve the needed humanitarian purpose.

For further information on the foregoing (none of which should be construed to be an actual legal advice) please contact:

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