

20 JANUARY 2020

# EMPLOYMENT ALERT

## IN THIS ISSUE >

### Employee unchained

Today it is common place to find a restraint of trade in almost every contract of employment you see. It is a mechanism that is being utilised more frequently as the world of commerce becomes ever more competitive.

FOR MORE INSIGHT INTO OUR  
EXPERTISE AND SERVICES

[CLICK HERE](#) 



CLIFFE DEKKER HOFMEYR

## Employee unchained

---

It is trite that in our law we have a constitutional right to freedom of trade, occupation and profession and that for a restraint of trade to steer clear of infringing this right it will need to be reasonable.

---

Today it is common place to find a restraint of trade in almost every contract of employment you see. It is a mechanism that is being utilised more frequently as the world of commerce becomes ever more competitive.

A restraint of trade generally prevents a party, after termination of employment, from freely working and earning a living in his/her trade or from freely engaging in the same business venture as the former employer. The restraint is generally limited in duration and to a geographical area.

It is trite that in our law we have a constitutional right to freedom of trade, occupation and profession and that for a restraint of trade to steer clear of infringing this right it will need to be reasonable.

Generally, it can be said that when one determines whether a restraint of trade is reasonable, they will have regard to the following: the nature of the activity sought to be restrained, the purpose of the restraint, whether there is a protectable interest, the duration and area of the restraint as well as the bargaining positions of the parties.

However, in a recent case a further hurdle was placed before an employer seeking to restrain an erstwhile employee. In *Megafreight Services (Pty) Ltd Bezuidenhout and Another*, a 2019 judgment in the Labour Court, it was held that the *exceptio non adimpleti contractus*

could be raised successfully by a former employee wishing to defend herself from being restrained. This means that when an employer tries to enforce the restraint of trade against the former employee, the employee can simply defend him/herself by showing that the employer has not performed in terms of its own obligations under the contract of employment.

A restraint of trade does not exist in isolation and it is usually contained in a contract of employment or an agreement to which there are reciprocal obligations.

The *exceptio non adimpleti contractus* is a defence that can be raised in the case of a reciprocal contract. The essence is that the party raising the *exceptio* (exception) can withhold their own performance, for example their undertaking to not join a competitor, and defend the claim of the employer which seeks to restrain them from taking up employment with the competitor until the employer has fulfilled all of its obligations under the contract of employment.

In the *Megafreight Services* case, the employer who sought to restrain the erstwhile employee, had failed to pay to the employee commission in terms of the contract of employment between the employee and the employer. The court found that given the above the employer did not have a clear right to the relief and therefore dismissed the application.

## Employee unchained...continued

---

Any employer seeking to enforce a restraint should be mindful of their obligations under the contract in which the restraint is couched and ensure that there are no reciprocal obligations that will derail any attempt at a successful restraint.

---

The court stated that: *"As long as something remains which has to be performed by the applicant (the employer), the respondent (the employee) may raise the exceptio non adimpleti contractus as a defence to any attempt by the applicant to enforce the restraint"*.

Therefore, any employer seeking to enforce a restraint should be mindful of their obligations under the contract in which the restraint is couched and ensure that there are no reciprocal obligations that will derail any attempt at a successful restraint.

---

*Hugo Pienaar and Jaden Cramer*

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

EMPLOYMENT

## CASE LAW UPDATE 2019

**CLICK HERE**  
to access CDH's  
Employment Law  
booklet to assist  
you in navigating  
the employment  
relationship during  
the current economic  
uncertainty.



**BAND 2**  
Employment

Cliffe Dekker Hofmeyr



EMEA

**2009-2019**

Recommended us in

**TIER 2**  
Employment

DealMakers

**2018**

**1<sup>ST</sup> BY M&A DEAL FLOW FOR  
THE 10<sup>TH</sup> YEAR IN A ROW.**

**2018** 1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by M&A Deal Value.  
2<sup>nd</sup> by General Corporate Finance  
Deal Flow.  
1<sup>st</sup> by BEE M&A Deal Value.  
2<sup>nd</sup> by BEE M&A Deal Flow.  
Lead legal advisers on the Private  
Equity Deal of the Year.

CHAMBERS GLOBAL 2014 - 2019 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2019 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2019 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2019 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 4: Employment.



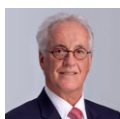


## OUR TEAM

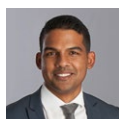
For more information about our Employment practice and services, please contact:



**Aadil Patel**  
National Practice Head  
Director  
T +27 (0)11 562 1107  
E aadil.patel@cdhlegal.com



**Hugo Pienaar**  
Director  
T +27 (0)11 562 1350  
E hugo.pienaar@cdhlegal.com



**Steven Adams**  
Senior Associate  
T +27 (0)21 481 6341  
E steven.adams@cdhlegal.com



**Gillian Lumb**  
Regional Practice Head  
Director  
T +27 (0)21 481 6315  
E gillian.lumb@cdhlegal.com



**Thabang Rapuleng**  
Director  
T +27 (0)11 562 1759  
E thabang.rapuleng@cdhlegal.com



**Anli Bezuidenhout**  
Senior Associate  
T +27 (0)21 481 6351  
E anli.bezuidenhout@cdhlegal.com



**Jose Jorge**  
Director  
T +27 (0)21 481 6319  
E jose.jorge@cdhlegal.com



**Michael Yeates**  
Director  
T +27 (0)11 562 1184  
E michael.yeates@cdhlegal.com



**Sean Jamieson**  
Senior Associate  
T +27 (0)11 562 1296  
E sean.jamieson@cdhlegal.com



**Fiona Leppan**  
Director  
T +27 (0)11 562 1152  
E fiona.leppan@cdhlegal.com



**Avinash Govindjee**  
Consultant  
M +27 (0)83 326 5007  
E avinash.govindjee@cdhlegal.com



**Bheki Nhlapho**  
Senior Associate  
T +27 (0)11 562 1568  
E bheki.nhlapho@cdhlegal.com



**Jaden Cramer**  
Associate  
T +27 (0)11 562 1260  
E jaden.cramer@cdhlegal.com



**Tamsanqa Mila**  
Associate  
T +27 (0)11 562 1108  
E tamsanqa.mila@cdhlegal.com

### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 8581/JAN

