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NON-COMPETE CLAUSE IN A SALES CONTRACT

It is common practice for purchasers to include, as part of an agreement for the sale of a business, a clause that prevents the seller from operating a similar business within a specified radius or within a specified time frame from the business that was sold. This is commonly referred to as a non-compete clause. However, the purchaser should tread lightly when inserting such a clause, as it might not necessarily be enforceable.

The legal position is that no contract which is "against public interest" will be enforceable. Courts will have a wide discretion to evaluate whether a contract is indeed against public interest. In a standard non-compete or restraint of trade clause the factors that will be under consideration are as follow:

i. Is the area referred to too big/wide?

ii. Is the scope of practice/activities excluded too wide?

iii. Is the period referred to unreasonably long?

The seller of a business, in principle, has a right to freedom of occupation – as contained in section 22 of the Constitution of the Republic of South Africa. This constitutional right may be limited through a non-compete/restraint of trade clause, but only if the clause is "not against the public interest". In *Reddy v Siemens* the court found that it is essential to strike a balance between the rights of all the parties in the agreement that has an interest in the restraint of trade, including policy considerations arising out of the public's general legal notions. On the one hand, it is public policy that a valid agreement should always be enforced as both parties agreed thereto. On the other hand, section 22 of the Constitution guarantees every person the right to freedom of occupation.

The seller will carry the burden of proving that certain aspects of the non-compete is against public interest if there is a valid agreement in place. In order to consider whether or not to enforce a restraint of trade clause, the court must strike a proper balance between the rights of the purchaser and the seller. The court must consider when the period of restraint will be so long, the scope of activities so limited or the area of restraint so wide that it skews the contract unfairly in favour of the purchaser, to the prejudice of the seller. This will always depend on the facts of each case and will differ depending on the industry to which the business belongs. A useful guideline was nonetheless provided in *Automotive Tooling Systems v Wilkins* (2006), where the court found that a person cannot be prevented from earning a living from his “general stock of skill or know how”.

Both the purchaser and seller should be aware of their rights and obligations when agreeing to a non-compete clause. The parties will be well advised to discuss the clause intently before agreeing thereto, in order to ensure that it is enforceable whilst still encompassing the appropriate limitations required to allow the purchaser’s business to operate smoothly. Obtaining proper legal advice when drafting such a clause will ensure that major problems are avoided in the future.

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