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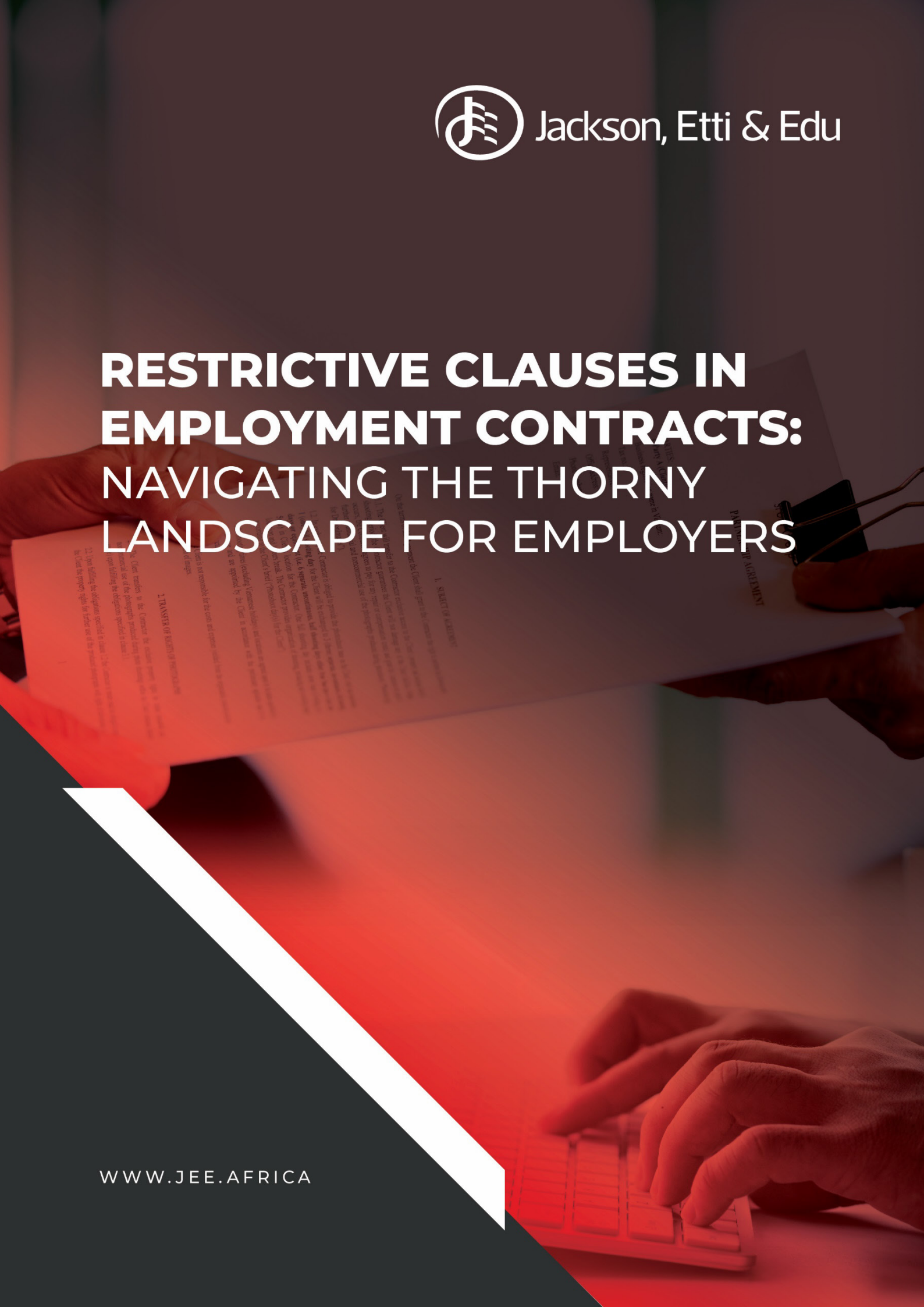
RESTRICTIVE CLAUSES IN EMPLOYMENT CONTRACTS: NAVIGATING THE THORNY LANDSCAPE FOR EMPLOYERS



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Introduction

A covenant in restraint of trade is a clause in business agreements or employment contracts which restricts or limits a party's ability to enter certain agreements. It 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.[1]

Restraint of trade is a common law doctrine relating to the enforceability of contractual restrictions on freedom to conduct business. Restrictive covenants include non-compete and non-solicitation agreements. A non-compete agreement is a promise in an employment contract, not to engage in the same type of business, for a stated time in the same market as the employer. A non-competition covenant requires an employee not to do a particular type of work, after leaving the employment.[2] On the other hand, a non-solicitation agreement is a promise in an employment contract, to refrain for a specified time, from either enticing other employees to leave the company or trying to lure customers away.[3]

Generally speaking, such a restraint is unenforceable because it would be contrary to the public policy of promoting trade and business, except where the restraint of trade is reasonable from the point of the view of the parties and the public.

The Position of The Law on Restrictive Covenants in Nigeria

Currently, the pieces of legislation that regulate restrictive contracts are the Constitution of the Federal Republic of Nigeria, 1999 as amended, and the Federal Competition and Consumer Protection Act (FCCPA), 2019. The other source of regulation on this issue is case law, as the Courts in Nigeria have, over the years, made pronouncements on the legality or otherwise of restrictive clauses in employment contracts.

Under Nigerian legal jurisprudence, the general position of law is that an employer cannot protect itself from competition by a former employee or from the employee's exercise of his skill, simply because such skill was acquired when the employee was in their employment. A restraint of trade which is included in a contract merely to prevent competition will not be enforceable by the courts. In order for a restrictive covenant to be enforceable, the employer should be able to show that the covenant was reasonable.

[1] Suit No: NICN/LA/169/2015- Iroko tv.com Limited V. Michael Ugwu available at https://nicnadr.gov.ng/judgement/details.php?id=5335
[2] Bryan A. Garner: Blacks Law Dictionary, Tenth Edition
[3] See 1 (supra)

When Will Restrictive Covenants Be Reasonable?

The position of law is that where an employee has either acquired trade secrets, or has gained influence over the employer's customers, either because they rely on the employee's skills and judgement, or because they have dealt exclusively with that employee, then the covenant in restraint of trade will be reasonable. This position was reiterated by the National Industrial Court in Studio Press (Nigeria) Plc V. Garnesh Kadoor[4] where the court held as follows:

> ***"It is the position of law as evinced in plethora of cases as stated supra that provisions in a contract which are in restraint of trade are void ab initio and unenforceable, except it is reasonable. This is also evident in the above quoted definitions. This is against the known position of the law that parties to an agreement are bound by it.***
>
> ***Restraint of trade is entirely regulated by public policy as formulated by the Courts, this would be seen in case law authorities on this subject, considered in this judgment.***
>
> ***The above position of the Courts on trade restraint, can however, be rebutted by proving that the restraint is reasonable, both as between the parties and in relation to the public interest or that the employee has either acquired trade secrets, or has gained influence over the employer's customers, either because they rely on the employee's skill and judgment, or because they have dealt exclusively with that employee. It is not sufficient that the employee may compete with the former employer, or use skill and knowledge acquired by the employee in his employer's business.***
>
> ***The main question that the claimant needs to answer is whether or not the restraint is reasonable as between the parties and in relation to public interest on the first part and secondly to show that the 1st defendant went away with its trade secret."***

Where an employee, while working for a company, is in a position and in fact the custodian of the trade secrets and confidential information vital to the employer's business, or the employee has acquired trade secrets or has gained influence over the customers of employer, then the restrictive covenant will be reasonable. This was the position of the Court of Appeal in Nissan Motors V Yoganathan.[5] In such a case, the restrictive clause would be reasonable if the employee is estopped from taking similar roles with direct competitors.

[4] Suit No: NICN/LA/144/2015 available at https://nicnadr.gov.ng/judgement/details.php?id=5604
[5] (2012) 4 NWLR (pt. 1183) 135 p. 153 @153 paras. G-H.

In the Studio Press (Nigeria) Plc V. Garnesh Kadoor6 case, the position of the court was that it will be keen to help an employer to recognize a restraint of trade clause when the former employee has acquired trade secrets or would have gained influence over the employer's customers, either because they will have trusted on the employee's skill and judgment, or because they will have dealt exclusively with that employee.

In considering whether an employer can impose a restrictive clause on its employees, the employer must consider three factors as enunciated in the decision of the High Court of Singapore in Man Financial (S) Pte Ltd v. Wong Bark Chuan David7 where the court held that the test of reasonability is three-fold, and that all the following limbs must be satisfied:

Is there a legitimate proprietary interest to be protected?

Is the restrictive covenant reasonable in reference to the interests of the parties?

Is the restrictive covenant reasonable in reference to the interests of the public?

It is the duty of the employer who seeks to enforce a restrictive covenant against its employee, to show that it is designed for the protection of some exceptional proprietary interest of the employer. In Koumolis V Leventis Motors Limited[8] the Supreme Court enforced the provisions of the restrictive covenant in an employment contract. In this case, the employee was employed as a spare parts manager who was responsible for dealing directly with the customers of his employers both within Nigeria and overseas. The employee was in possession of some of his employer's trade secrets and soon after his resignation from the employment, he was employed by a rival company who won the bid to a contract his former employer was negotiating while he was still in their employment. The court held that the restrictive covenant in the employment contract was reasonably necessary for the protection of the business interest of the employer and was therefore valid and enforceable in law.

In the Tanksale v Robee medical[9] case, the appellant, who was an employee of the Defendant, entered into a Memorandum of Understanding with his employers, wherein he agreed to close down his hospital and not to open any hospital or work with any hospital within a distance of 25 kilometres from Sango Ota, where his employer's hospital was located. The court held that the agreement in restraint of trade entered into by the parties was illegal, contrary to public policy and unconstitutional and as such, voided the agreement.

[6] Suit No: NICN/LA/144/2015 available at https://nicnadr.gov.ng/judgement/details.php?id=5604
[7] [2008] 1 SLR(R) 663
[8] (1973) 11 SC (100) ALL NLR 789
[9] (2013) 12 NWLR (pt. 1369) 548 pp. 572 G-H

The Scope of The Restrictive Covenant Must Be Limited to The Industry in Which the Employer Conducts Its Operations

The non-compete and non-solicitation clauses must be restricted to companies within the industry in which the employer carries on its operations. In Infinity Tyres V. Mr. Sanjay Kumar and others[10], the Court refused to grant the enforcement of a restrictive clause on the ground that it was very broad as it covered organizations both within and outside the company's line of business. In Tanksale v Robee Medical Centre Limited[11], the Court of Appeal was reluctant to enforce a restrictive clause in an employment contract on the ground that the agreement trade restraint imposes far reaching restraints including a restriction of constitutional rights and as such, it should be viewed with suspicion in the interest of the larger society whose norms must not be compromised by such an agreement.

Duration of Restrictive Covenants

In Nigeria, the Federal Competition and Consumer Protection Act restricts the duration of restrictive covenants such as non-compete and non-solicitation clauses, to two years. The Act gives employers and employees the right to execute a restrictive agreement provided it does not exceed two years. Section 68 (e) of the Act provides as follows:

> **"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[12]"**

The effect of this, is that a non-compete agreement will be enforceable as long as it does not exceed two years. In 7th Heaven Bistro Limited V. Mr. Amit Desphande[13] the National Industrial Court held that a non-compete clause for a duration of three years was unreasonable and void.

The Territorial Coverage of Restrictive Covenants

Where a Nigerian employer is employed to work within Nigeria, the non-compete and non-solicitation clause cannot extend to other jurisdictions outside Nigeria. In Infinity Tyres v Mr. Sanjay Kumar and others[14] (supra) the court in determining

[10] Suit No: NICN/LA/396/2015 available at https://www.nicnadr.gov.ng/judgement/details.php?id=2772.
[11] (2013) 12 NWLR (pt. 1369) 548 pp. 572 G-H
[12] Section 68, Federal Competition and Consumer Protection Act
[13] Suit No: NICN/LA/396/2015 available at https://www.nicnadr.gov.ng/judgement/details.php?id=2772
[14] Suit No: NICN/LA/170/2014 avaiable at https://nicnadr.gov.ng/judgement/details.php?id=2004

whether the geographical coverage of a non-compete clause was reasonable, held thus:

> **"The area of geographic coverage is Nigeria. This is reasonable. The duration of applicability is one year. This too is reasonable. However, the economic activity covered is "any other company in Nigeria". This is too wide and unreasonable... It is, therefore, my finding and holding that the non-compete clause in Exhibit C1 is too wide in stopping the 1st defendant from joining "any other company in Nigeria"; as such it is not reasonable and so is unenforceable."**

The restrictive contract for an employee whose employment is carried out in Nigeria must restrict its area of geographic coverage to Nigeria. The National Industrial Court reiterated this position when it held in 7th Heaven Bistro Limited v Mr. Amit Desphande[15] that a non-compete clause which extends beyond Nigeria was too restrictive and therefore unreasonable and void. Restricting employees from taking up employment with competitors outside Nigeria would be unreasonable and as such, the non-compete clause may become unenforceable.

Conclusion

Companies seeking to include restrictive covenants, such as non-compete and Non-solicitation clauses as part of the terms of their employees' contract of employment, must ensure that the duration does not extend beyond two years and that it is restricted to the industry in which such a company operates, so as not to offend the principle of reasonability.

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[15] Suit No: NICN/LA/396/2015 available at https://www.nicnadr.gov.ng/judgement/details.php?id=2772

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