# Are restraint of trade clauses enforceable if you've been retrenched?

South Africa's recently released third-quarter unemployment statistics revealed a 30.8% unemployment rate, which falls within the top 20 highest in the world. Statistics SA data shows that 2.2 million jobs were lost in the second quarter of the year. This increase can obviously be attributed to the impact of Covid-19 and subsequent lockdown restrictions on the economy, which has seen companies cutting back their labour force, most notably in the hotel and leisure, car rental, hospitality and retail industries.



The scramble for jobs has never been more intense, and one significant clause in many an employment contract is frequently causing a few brows to lower. PJ Veldhuizen, attorney, litigator and mediator, says that the Alternative Dispute Resolution specialists at Gillan and Veldhuizen attorney firm in Cape Town have seen an increase in disputes over restraint of trade clauses, especially for those employees who have been retrenched.

“Although one would think human compassion would prevail, we have seen some heated cases arise post-lockdown, where employers threaten to institute litigation, applying for the Court to enforce restraint of trade clauses,” says Veldhuizen.

Unemployment hits 30.8%

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Restraint of trade clauses are included in most employment contracts in order, for example, to restrict an employee from working for a competitor of the employer for a prescribed period of time (commonly two years) and, furthermore, the employee is prevented from working for a competitor within the Republic of South Africa for the stipulated period after the termination of employment.

Veldhuizen says that although the position is unclear, perhaps the courts should consider what has happened since the employment contract was entered into, and, in particular, the situation at the time restraint is to be enforced. Legal commentators are of the opinion that the courts will also consider the situation of the employee due to the Covid-19

pandemic, and should not easily enforce a restraint of trade clause that would prevent an employee from earning a living and keeping a household surviving.

PJ Veldhuizen

“Once again, this is a perfect opportunity to turn to mediation as the sensible solution,” says Veldhuizen. “Should an employer or employee meet a restraint of trade conflict, the most time-saving and cost-effective option would be to enlist an accredited commercial mediator to assist in resolving the matter swiftly and amicably. Perhaps a solution could emerge where an employee wasn’t restrained from competing but was restrained from targeting the existing clients of the employer for a period of time. There are many ways to eat a mango,” he concludes.