

# Kontak die LWO / Contact the LWO

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Nuusbrief van die LWO Werkgeversorganisasie

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## Restraint of trade - enforceability?

By Mariëtte Redelinghuys

Restraint of trade clauses in employment contracts cause many arguments in the legal fraternity and amongst employers and employees, as there are no hard and fast rules to settle these disputes. Restraint of trade agreements are not regulated by Labour Law and factors such as different industries, assets and trade secrets will determine the content of such agreements.



When an employee enters into an employment agreement, the last thing on his mind is the ending of an employment relationship. One of an employers' priorities is to protect his/her intellectual property, trade secrets, reputation and good will.

**Does a restraint of trade clause or agreement provide sufficient protection for the employer's business and is it enforceable?**

To answer this question we need to look at the precedents set by the courts and *Reddy v Siemens Telecommunications (Pty) Ltd (251/06) [2006] ZASCA 135; [2006] SCA 164 (RSA) (30 November 2006)* is a good example and we still use this Appeal Court judgement today.

In this matter Mr Reddy signed a restraint of trade agreement which prohibited him from working for Siemens's competitors. In the agreement Mr Reddy also agreed not to disclose trade secrets and confidential information belonging to Siemens. Siemens applied to the High Court for an interdict to prevent Mr Reddy from going to work for Ericson, a major competitor at the time. The Court held that it was sufficient cause to grant such an interdict if Siemens showed that Mr Reddy had the knowledge and that he could use it to the detriment of Siemens.

**Therefore one can conclude that the purpose of a restraint of trade agreement would be to prevent a person from using information he learned at his previous employer to the detriment of such an employer when he moves on to a new job.**

Mr Reddy however said that what he learned at Siemens would be of no use to Ericson, he would not be working with any Siemens customers and that the restraint was therefore of no force and effect. The Court held that a restraint of trade is indeed enforceable unless it is shown to be unreasonable. The person that alleges that the restraint of trade is unreasonable should prove it.

### Wie is die LWO?

Die LWO is gedurende 1990 as werkgeversorganisasie tot stand gebring, ten einde werkgevers binne die Suid-Afrikaanse besigheidsgemeenskap te bedien met regsdiens, asook verwante dienste op die gebied van Arbeidsreg. Die LWO is 'n nie-winsgewende ledeorganisasie en word bestuur deur 'n Raad wat uit lede bestaan. Die LWO beskik oor die nodige infrastruktuur waardeur lede effektief op 'n nasionale basis bedien kan word.

### Die doel van die LWO

Die LWO het ten doel om die werkgeversorganisasie van voorkeur te wees vir werkgevers op 'n nasionale basis, gegrond op die professionele en effektiewe wyse waarop lede van die LWO met regsdiens, asook verwante dienste op die gebied van die Arbeidsreg, bedien word.

### Who is the LWO?

The LWO was established during 1990 as an employers organisation in order for employers to be provided with legal services within the field of the Labour Law. The LWO is a non-profitable members organisation and is managed by a board consisting of members. The LWO has the necessary infrastructure through which members can be served effectively on a national basis.

### The purpose/goal of the LWO

The LWO aims to be the employers organisation of choice for employers on a national basis, based on a professional and effective manner in which members of the LWO can be served with legal services as well as services related to the Labour Law.

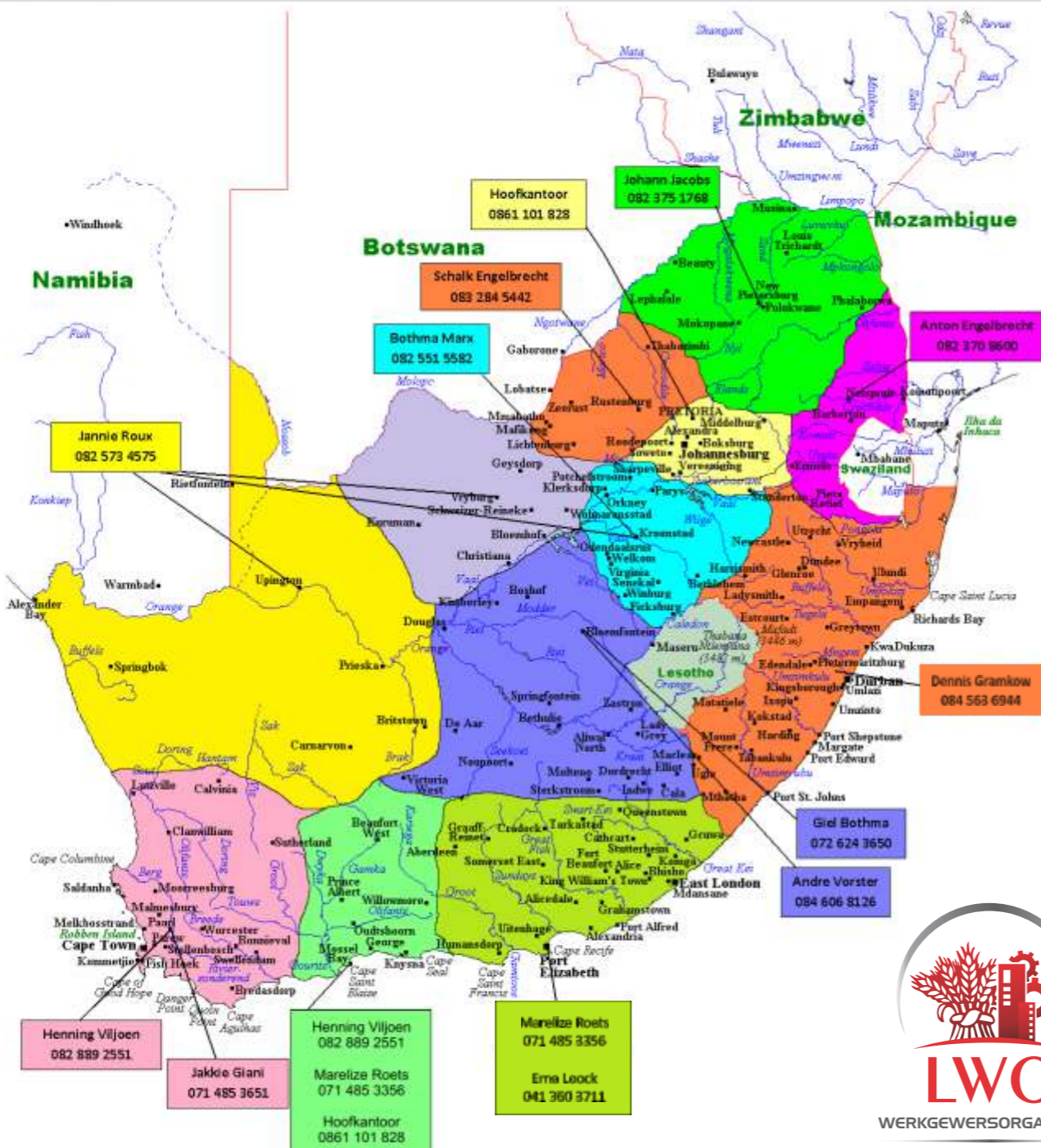
When determining the reasonableness, the following factors need to be considered:

- Public interest - parties should comply with their contractual obligations;
- In the interest of society, all persons should be permitted to engage in trade and commerce or be employed, in order to earn a living;
- Is there an interest that deserves protection and if such an interest exists, is such an interest threatened by another party?

In Reddy's case, his restraint had limited restriction. He was allowed to work and make use of his own skills, and he was just not allowed to work for a competitor. The agreement restrained his choice of employer. The Court found that the restraint was not unreasonable, as Reddy's loyalty would lie with the new employer and, due to the knowledge and technical know how he has, he may very well have an opportunity to use it, which poses a real risk to Siemens.

A restraint of trade is in principle enforceable through our courts. The enforcer of a restraint of trade must however be aware of the factors that are considered by our courts. It is of the utmost importance for employers to seek professional advice with regards to the content of restraint of trades, because the incorrect content or terms and conditions may very well be the reason the courts will not grant the relief sought.

Contact the LWO for more information at 0861 101 828.



# Die voordele van 'n werksprofiel

Deur Morné Venter

'n Werksprofiel ("job profile") is in kort 'n beskrywing van die pos. Dit sluit in wat die pos behels, die vereistes, verantwoordelikhede, take, pligte, ensovoorts, asook wie geskik sal wees vir die pos.

'n Werksprofiel is baie voordelig vir die werkgewer, veral met betrekking tot die volgende:

- 1 'n Werksprofiel kan u help met diskriminasie eise, veral in gevalle wanneer 'n persoon aansoek doen vir 'n werk. Indien 'n kandidaat byvoorbeeld beweer u het haar nie aangestel nie omdat sy 'n vrou is, kan u dan deur middel van die werksprofiel bewys dat geslag nie betrekking het tot die pos nie en dat sy eenvoudig nie aan die vereistes voldoen het nie.
- 2 'n Werksprofiel kan u help om te besluit tussen twee kandidate wat albei voldoen aan die minimum vereistes, soos opgesom in die advertensie, deur te kyk na die ander faktore soos omskryf in die volledige werksprofiel.
- 3 'n Werksprofiel kan u help met swak

prestasie eise. Dit is baie maklik om te bewys dat 'n werknemer nie aan die vereistes en verantwoordelikhede van die verlangde rol voldoen nie, indien dit goed gedokumenteer is in die werksprofiel.



- 4 'n Werksprofiel verskaf struktuur in die werksplek en word dikwels gebruik om posisies in 'n besigheid te gradeer, wat weer deurtrek na salarisskale. Dit is belangrik om die beginsel van gelyke betaling vir werk van gelyke waarde toe te pas. Dit gee u ook 'n idee wat om 'n nuwe werknemer te betaal.
- 5 'n Werksprofiel neem 'n werknemer met gestremdheid in ag deur te

voldoen aan die Wet op Billike Werksgeleentheid. So 'n werknemer se gestremdheid moet in ag geneem word in die opstel van sy/haar werksprofiel.

- 6 Deur 'n werksprofiel as basis vir 'n werwingsadvertensie te gebruik, verseker u dat die regte kandidaat aansoek doen vir die pos.
- 7 'n Werksprofiel vorm die grondslag vir opleiding en ontwikkeling. U kan dit gebruik om potensiaal vir groei in terme van die ontwikkeling van vaardighede te bepaal.
- 8 'n Werksprofiel is noodsaaklik in geval van herstrukturering of personeelvermindering. Indien u herstrukturering of personeelvermindering wil oorweeg of toepas, vergelyk die werksprofiel met die nuwe posisies om te bepaal wie die beste kandidate sal wees met betrekking tot die nuwe struktuur.

**Kontak die LWO vir advies of bystand by 0861 101 828.**

# Skills development levy

By Elmari Lemmer

## What is the aim of the skills development levy?

The Levy Grant scheme, legislated through the Skills Development Levies Act, serves to fund the skills development initiative in the country. The intention is to encourage a more planned and structured approach to learning and to increase employment prospects for job seekers.

**Participation in the scheme will benefit the employer in terms of incentives, as well as a better skilled and more productive workforce.**

## Who must pay the levy?

All employers who are registered with SARS for PAYE (pay as you earn) and have an annual payroll in excess of R500 000.00 must register with SARS to pay the skills development levy. The levy is calculated as 1% of your wage bill and is payable monthly.

## Registration

An employer must obtain a registration form (SDL101) from any SARS office, if he/she did not receive it via e-mail. SARS will impose both interest and penalties for late or non-payment of levies.

**Contact the LWO for more information at 0861 101 828.**



# Dienskontrakte

Deur Jan Swanepoel

'n Dienskontrak is 'n wetlike verpligting wat die werkgewer beskerm. Dit is die basis van die verhouding tussen die werkgewer en werknemer en vervat die volledige terme en voorwaardes soos op ooreengekom. Ons adviseer werkgewers om pro-aktief op te tree in die bestuur van moontlike toekomstige dispute.

**Dit is uiters belangrik om te verseker dat dienskontrakte voldoen aan die Wet op Basiese Diensvoorwaardes, asook die werkgewer se operasionele vereistes.** Verduidelik die kontrak aan die werknemer en verseker dat hy/sy die inhoud daarvan verstaan. Maak dit ook 'n vereiste dat die werknemer eers die kontrak teken voordat hy/sy amptelik vir diens aanmeld. Sodoende skakel u potensiële konflik uit indien die persoon na aanvang van diens weier om die kontrak te teken weens enige redes.

'n Werknemer kan nie ontslaan word indien hy/sy weier om die kontrak te teken nie. Die kontrak is egter steeds geldig en die maatskappy se reëls en regulasies, asook wetlike aspekte, is ook van toepassing op daardie werknemer.

**Kontak die LWO vir meer inligting by 0861 101 828.**

# Discipline in the workplace - what are your rules?

By Elmari Lemmer

The relationship between the employer and the employee is based on mutual benefits and respect. Clear rules and guidelines ensure that friction and misunderstandings are kept to a minimum, which in turn promotes not only productivity but also a positive working environment. Rules are implemented in the workplace through the employment contract and policies. As the employment contract cannot be amended without proper consultation with the employee, the majority of rules in the workplace is implemented through policies.

**A policy informs employees of the rule/s in respect of a certain topic. The employer puts these rules in place in order to ensure the smooth and efficient running of his/her business operations.**

**Policies are not underwritten by labour legislation, but define the employer's own rules, which must be reasonable, for the workplace.**

We strongly advise employers to implement the following policies in the workplace:

## Code of conduct

A code of conduct states the employer's own rules specific to his/her business and industry. These rules should refer to, for example, general rules in the workplace, hygiene, salary advances, safety regulations, use of company property, clothing, etc.

## Smoking policy

A smoking policy regulates smoking in the work place in terms of whether smoking is allowed and if so, the designated areas and times allocated for smoking.

## Sick leave policy

The aim of a sick leave policy is to regulate the amount of sick leave

employees are legally entitled to, as well as the reasonable requirements set by the employer for sick leave to be approved as such.

## Cell phone policy

A cell phone policy regulates the use of cell phones in the workplace to ensure a safe and productive environment. This policy can limit private as well as company cell phone use.

Other policies include a sexual harassment policy, an internet and e-mail policy, a hygiene policy, etc. It is vital to ensure that employees are informed of these policies, as well as any changes made to the policies, preferably in writing.



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**Policies are a pro-active way to minimise the employer's risk when it comes to Commission for Conciliation, Mediation and Arbitration (CCMA) matters. A Commissioner at the CCMA will always enquire:**

- Was there a rule in the workplace?
- Is there proof that the employee was aware of this rule?
- Did the employee act according to the rule?
- Was there progressive warnings (according to the offence)?

# Poligraaftoetse in die werksplek

Deur Crystal McLaughlin

Die gebruik van poligraaftoetse (leuenverklikkertoetse) in die werksplek bly omstrede. Tydens die proses word 'n persoon se fisiese reaksie, soos bloeddruk en sweet, gemeet terwyl verskeie vrae beantwoord word. 'n Persoon se reaksie op die vrae is gewoonlik 'n aanduiding of hy/sy oneerlik geantwoord het al dan nie. Hoe akkuraat die uitslae is, bly debatteerbaar.

Poligraaftoetse word nie gereguleer deur wetgewing nie. Toetsuitslae word wel erken deur forums wat arbeidsdispute hanteer, soos bv. howe, die KVBA en ander privaat arbitrasie tribunale as 'n bykomende ondersoekmiddel in gevalle van oneerlikheid in die werksplek.

Die volgende moet in ag geneem word:

- Die toetse moet deur 'n gekwalifiseerde poligrafis gedoen word, wat erkende prosedures volg;
- Die werknemer moet fisiek en geestelik geskik wees vir die aflê van hierdie toetse;
- Beide partye mag 'n ander persoon



teenwoordig hê tydens die aflê van die toetse solank die persoon nie inmeng met die toetse nie;

- Die toetse moet redelikerwys toegepas kan word op alle werknemers;
- Redes vir die toetse moet volledig aan die werknemer verduidelik word;
- Die proses moet verduidelik word en die werknemer moet ingelig word dat die toetse vrywillig is, sonder enige diskriminasie of dreigemente.

- Die werknemer moet skriftelik toestem tot die toetse;
- Indien 'n werknemer weier om die toetse af te lê, kan die werkgewer nie daarop aandring nie. Dit is elkeen se grondwetlike reg om te weier.
- Die uitslae moet deur 'n gekwalifiseerde poligrafis uitgelê en verduidelik word om as bewyse te kan dien;
- Poligraaftoetse word slegs in ag geneem as ondersteunende bewyse of getuienis;

Ongeag die getuienis teen 'n werknemer, moet 'n dissiplinêre verhoor altyd gehou word voor ontslag. As die regte prosedure nie gevolg is nie, kan die werknemer die aangeleentheid verwys na die KVBA. Dit is dan moontlik 'n geval van onbillike ontslag op grond van prosedurele onbillikheid.

**Kontak die LWO by 0861 101 828 indien u enige navrae in hierdie verband het.**