ENFORCEABILITY OF RESTRAINT OF TRADE AGREEMENT UNDER NIGERIAN LABOR JURISPRUDENCE: *IROKOTV.COM LTD. V. UGWU* IN PERSPECTIVE

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Abstract

When an employment contract is created, a term can be inserted wherein the employee is restrained, during and after the cessation of the contract, from engaging in any business that is competitive to that of the employer for a specified period or within a geographic location. Such an agreement is known as a restraint of trade/employment. The questions are, what is the essence of such an agreement and when will it be enforceable under Nigerian law? What is the impact of such an agreement on capital and the mobility of labor on Nigeria's economy? What must employers who may be desirous of adopting the practice know? This article adopts the doctrinal methodology in appraising the validity and enforceability of restraint of trade agreement under Nigerian labor law by focusing on the decision of the NICN in IrokoTV.com Ltd. v. Ugwu. It analyses the validity of the practice under common law and pigeonholes when the same would be enforced by Nigerian courts. The paper highlights what employers who want to adopt restraint of trade clauses in employment contracts, must know and do. It discusses the defenses available to an employee who is unreasonably yoked by a restraint clause. It examines the impact of the judgment on the jurisprudence of restraint of trade in Nigeria; it argues that the judgment is a welcome development having balanced contending interests involved in the restraint of trade practice. It recommends that trade unions should sensitize their members on the position of law as laid down in the decision. Also, if the decision is appealed, the Court of Appeal (which is the final court on labor matters in Nigeria) should uphold the decision due to its rightness and plausibleness.

Keywords: Employment contract, National Industrial Court of Nigeria, Nigeria, Public policy, Restraint of trade

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1. INTRODUCTION

Parties who have the requisite contractual capacity, are legally permitted to enter into contract including a contract of employment.[1] Once such a contract is formed, the law will recognize it if the terms and conditions are not contrary to the express or implied stipulation of the law.[2] Generally, the law will neither recognize nor enforce any contract that is illegal or contravenes the law as this is contrary to public policy.[3] The fact that such a contract places an undue burden on either or both parties, will not qualify as a ground for its non-enforcement by the court.[4] Thus, Section 7 of the Labour Act[5] prescribes certain mandatory terms and conditions which must be contained in an employment contract (or written statement using the language of the Act), which an employer must give to the employee not later than three months after being employed.[6] Additional to these statutory terms, parties can add others so long as the added terms and conditions are not offensive to the law. One of such terms is the one requiring an employee, during the course of employment or so soon thereafter, within a specified time frame or/and geographic location, not to engage in a business that is the same or similar to that of the employer or accept employment from another employer who is a competitor.[7] This type of employment clause/agreement is what is referred to as a covenant in restraint of trade/employment.[8] Such covenants/agreements have become commonplace in Nigeria in light of the increasing competition in the market and the need to gain a competitive edge and stay afloat with business wise.[9] The employee, on the other hand, desires to exploit his/her skill, expertise, knowledge, and talent maximally for the benefit of society as a whole and the law must recognize this desire; create a balance and protect all these interests towards attaining harmonious employment relations.[10]

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[1] Itse E Sagay, *Nigerian Law of Contract,* 2nd ed. (Ibadan, Spectrum Books Ltd. 2000) 8.
[2] Barnabas C Okoro, *Law of Employment in Nigeria,* (Lagos, Concept Publications Limited 2011) 29.
[3] Olugbemi A Fatula, *Law of Contract* (Ile-Ife, Afribic Publications 2012) 89-90.
[4] *Olaniyan v Aroyechun* [1991] 5 NWLR (Pt. 194) 625; *Enigwe v Akaigwe* [1992] 2 NWLR (Pt. 225) 505.
[5] Labour Act Cap. L1 Laws of the Federation, 2004.
[6] Oladosun Ogunniyi, *Nigerian Labour and Employment Law in Perspective,* (2nd ed., Lagos, Folio Publishers Ltd., 2004) 9.
[7] Emeka Chinau, *Employment Law* (Akure, Bemicov Publishers (Nig.) Ltd. 2004) 1-20.
[8] *Andreas I Koumoulis v A. G. Leventis Motors Ltd.* [1973] 1 All NLR (Pt. 2) 144.
[9] Emmanuel J Uko "The Validity of the Doctrine of Restraint of Trade under Nigerian Labour Law" 4(2) *International Journal of Advance Legal Studies and Governance* (2013) 34-46.
[10] Abubakar Yekeni and Tanimola Anjorin, "Non-Compete Clauses in Contracts of Employment in Nigeria: A Critical Evaluation of the Decision in Afropim Engineering Ltd. v. Bigouret & Anor" (2016) 56 *Journal of Law, Policy and Globalisation* 101-108.

The existence of a restraint of trade/employment clause places various interests (i.e. the interest of the employer, the employee, and the society at large) at a variant that needs to be balanced for harmonious employment relations.[11] Several reasons, ranging from economic, social, and legal, account for employers resorting to such employment practices, and its effect on labor mobility and the economy at large cannot be overemphasized.[12] This is so, particularly in a country like Nigeria where it is generally acknowledged that there is an unprecedentedly high level of unemployment.[13]

The issues are: what is the essence of such an agreement and when will it be enforceable under Nigerian law? What is the impact of such an agreement on capital and the mobility of labor on Nigeria's economy? What do employers who may be desirous of adopting restraint of trade in employment contracts need to know? What interest does an employer need to have to warrant the court to inhibit the exploitation of an employee's or former employee's skill and talent; Does the practice of restraint of trade runs afoul of the demands of public policy and how can the various contending interests in a contract of employment with a restraint of trade clause/agreement be balanced? When will a restraint of trade/employment clause amount to an unfair labor practice under Nigerian labor law? This article proffer answers to these issues by reviewing the recent decision of the NICN in *IrokoTV.Com Ltd. v. Michael Ugwu*[14] where the Court had the opportunity to pronounce the validity and enforceability of restraint of trade agreement under Nigerian law. The paper, argues that the decision has deciphered the *raison d' etre* of restraint of trade agreement and what the employer needs to bear in mind in deploying the same in an employment contract. It proffers how a balance could be created between the three competing interests in implementing restraint of trade agreements and when the same would amount to an unfair labor practice under Nigerian labor law. The paper further highlights the impact of the judgment on the jurisprudence of restraint of trade in Nigeria and argues that the decision is a welcomed development and in the event that same is appealed, it should be affirmed by the Court of Appeal which is the apex court on labor matters in Nigeria.

[11] Oladosun Ogunniyi, (n 4) *Op. cit.* 257.
[12] Emmanuel J Uko (no 9) *Op. cit.* P. 39.
[13] David T Eyongndi, and Chi-Johnny Okongwu, "The Legal Framework for Combating Child Labour in Nigeria" (2018) 2(1) *UNIPORT Law Review* 221-234.
[14] Unreported Suit No. NICN/LA/169/2015 Judgement delivered on the 12th day of November, 2020 per Coram J.D. Peters J.

The paper is divided into six sections. Section one is the general introduction. Section two discusses the rationale and types of restraint of trade/employment agreements that parties could execute. Section three examines the validity and enforceability of restraint of trade/employment agreement at common law and how this has influenced decisions of Nigerian courts by virtue of Nigeria's common law heritage. Section four is a review of the NICN decision in *IrokoTV.Com Ltd. v Michael Ugwu*.[15] Section five highlights matters arising from the decision. Section six contains the conclusion and recommendations.

2. THE RATIONALE AND TYPES OF RESTRAINT OF TRADE AGREEMENTS

Before the rationale and types of restraint of trade/employment are examined, it is apposite to answer the question: what is restraint of trade/employment? According to Oji and Amucheazi[16] restraint of trade is a practice whereby an employer and his employee enter into a covenant for the purpose of restricting the right of the employee to engage in particular or specific types of business activities within a given area or locality and or within a stipulated period of time. Emiola[17] defines it as a practice whereby an employer and his employee enter into a covenant for the purpose of restricting the right of the employee to engage in particular or specific types of business activities within a given area or locality and/or within a stipulated period of time. From the foregoing, restraint of trade is a restrictive covenant that forbids an employee from engaging in the same or similar business activity as that of an employer within a specific geographical location or within a specified period of time. The restraint pertains to either locality or time.[18] It is worth noting that restraint of trade does not only operate between an employer and his employee but is a matter of contract thus: could be between two or more employers once executed *qua* parties. For instance, employers and A and B may agree that they shall not employ the former employees of either of each of them within a specific period of time upon cessation of their employment. This agreement, subject to certain conditions as would be discussed subsequently, is valid and therefore binding despite the fact that there is no employer-employee relationship between them. Restraint of trade is a precursor to modern competition law.

[15] *Ibid.*
[16] Elizabeth A Oji, and Offornze D Amucheazi, *Employment and Labour Law in Nigeria,* (Lagos, Mbeyi and Associates Nig. Ltd. 2015) 86.
[17] Akintunde Emiola, *Nigerian Labour Law* 4h ed. (Ogbomosho, Emiola Publishers Ltd., 2008) 61.
[18] Olumide Babalola, *Casebook on Labour and Employment Law* (Lagos, Noetico Repertum Inc., 2014) 314-315.

The main reason employers or business owners resort to restraint of trade/employment, is to protect their business interest from competitors.[19] No prudent employer or business owner would wish its venture to suffer a minor or major setback nor allow its trade secret to becoming public knowledge. The financial loss and even the possibility of folding up the business due to such an occurrence cannot be overemphasized. Restraint of trade, aside from primarily protecting the interest of the employer, in a long run, protects the economy in general as the effect of the negative consequences of leak or theft of an employer's business interest (trade secret) on the economy could be enormous.[20] An employer or anyone, even at common law, has a right to protect a legitimate interest. Where business concerns fold up due to sharp practices, it is capable of leading to loss of employment meaning decrees in taxes and an increase in crime rate as there would be several persons rendered unemployed wanting to make ends meet even through resorting to crime. It is therefore, in the overall interest of the economy, that reasonable and lawfully executed restraint of trade/employment agreements are honored or enforced.

As per the types of restraint of trade/employment agreements that can be executed, there are two. First, it could take the form of a restraint placed on the employee while in the employ of the employer. The second form it could take is for it to be placed and becomes operative after the departure of the employee from the employ of the employer post-employment. The first restraint, by its nature, is customarily justified as it seeks to protect the legitimate interest of the employer while in business and the law, would necessarily lend its aid.[21] It is worth noting that the validity of restraint during the currency of the employer-employee relationship, is not a matter of course, i.e. is not conclusively applicable just because it is made during th continuation or substance of the employment.[22] For it to be lawful and enforceable, it must, as a matter of compulsion, fulfill the basic elements of the general law of contract pertaining to the validity of a contract.[23] However, the second form, as a general rule, is *prima facie* illegal and therefore

[19] *Petrofina Great Britain v Martin* (1966) Ch. 146; *Tanksale v. Rubee Medical Centre Ltd.* [2013] 12 NWLR (Pt. 1369) 345.
[20] Andrew C Bells, *Employment Law* (London, Sweet and Maxwell, 2006) 175.
[21] *J. K. Randle & Anor. v. Nottidge* (1956) 1 F. N. C. 96; *Hivac Ltd. v Park Royal Scientific Instruments Ltd.* (1946) Ch. 169; *John Holt & Co. Ltd. v Chalmers* (1918) 3 N.L.R. 77.
[22] Akintunde Emiola, (n 17) *Op. cit.* 61-62.
[23] *Esso Petroleum Company v Harper's Garage (Stourport) Ltd.* (1967) 1 All E.R. 699; *Union Trading Company Ltd. v. Hauri* (1940) 6 WACA 148.

unenforceable. This is because, its justification that it purportedly seeks to protect the legitimate interest of the employer is prone to disputation as it can adversely affect the mobility of labor and the general interest of the public making it therefore, contrary to public policy.[24] For restraint after employment to be enforced, it has to be justified on reasonable grounds.[25] The onus to show that the restraint is reasonable and therefore valid and enforceable, rests squarely on the party (usually the employer) who is desirous of enforcing it and it will not shift to the employee.[26]

Also, the reasonableness of a restraint is determined based on the peculiarity of each case hence, what is reasonable in one case, may not be in another.[27] A post-employment restraint that ordinarily and merely seeks to protect an employer from competition from a former employee or from the employee's exercise of his/her skill simply because the same was acquired in the employ of the former employer is *ab initio* illegal, void and no effect whatsoever.[28] It is apposite to note that competition by an employee during the currency of an employment contract amounts to a breach of the implied term of fidelity and therefore amounts to a breach of contract.[29] It is therefore fair, just and reasonable for the law to protect the employer against an employee's breach of the hallowed obligation of fidelity which forms the substratum of the employment contract through restraint of trade/employment.

3. ENFORCEABILITY OF RESTRAINT OF TRADE CLAUSES AT COMMON LAW

Generally at common law, a restraint of trade/employment covenant is unenforceable since it is regarded as being contrary to the public policy of promoting trade and business and hence, void *ab initio.*[30] Where both parties to the covenant, abide by it and perform the covenant, that is the end of it but the Court will not assist either party to provide a platform for its enforcement. In *Mitchel v Reynolds*[31] Lord Smith L. C. stated that "it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it in according to his own discretion and choice. If the law has regulated or restrained his mode of doing this,

[24] Akintunde Emiola, (n 17) *Op. cit.* 62.
[25] *Union Trading Company Ltd. v Hauri* (1940) 6 WACA 148.
[26] Elizabeth A Oji, and Offornze D Amucheazi, (no 16) *Op. cit.* 87.
[27] Akintunde Emiola, (n 17) *Op. cit.* 63.
[28] *Ibid.*
[29] *Hivac Ltd. v Park Royal Scientific Instruments Ltd.* (1946) Ch. 169.
[30] *Nordenfeld v Maxim, Nordenfeld Guns and Ammunition Co.* (1894) A.C. 535.
[31] (1711) Ch. 125.

the law must be obeyed. But no power short of the general law ought to restrain his free discretion."[32]

In *Nordenfelt v Maxim, Nordenfelt Guns and Ammunition Co*[33]where a Swedish arm inventor promised on the sale of his business to an American gun maker that he "would not make guns or ammunition anywhere in the world, and would not compete with *Maxim* in any way." Lord Macnaughten in that case stated *inter alia* that such a restrain is justified only if it is reasonable; in the absence of special circumstances justifying them, they are void and unenforceable as they are contrary to public policy.[34]

The above common law position subsisted until in *Herbert Morris Ltd. Saxelby*[35] the Court came to a position that under certain circumstances, contracts in restraint of trade would be enforceable. Such circumstances include: where such contract is necessary to protect an employer's legitimate competitive interest; where the enforcement of the such contract is neither unreasonably burdensome to the employee nor harmful to the public interest; and where the time and geographical scope of the restriction is reasonable. In *John Holt & Co. Ltd. v Chalmers*[36] where a restrain covenant disallowed the employees after leaving the employ of the employer, not to conduct business or serve anyone in a similar business within a wide range without the prior consent of the former employer, the court held that the restraint was unnecessarily wide and unreasonable hence, void and unenforceable.[37] The court found that the restriction went beyond what was necessary to protect the legitimate interest of the covenantee.[38] In determining the reasonableness or otherwise of restraint, the status of the employee in relation to the employer's business is taken into consideration.[39] Where the employee holds an important post in the employer's employ whereby he/she is in possession of

[32] Norman Selwyn, *Law of Employment* (London, Butterworths, 2000) 408.
[33] (1894) A.C. 535.
[34] *Statoil Nigeria Ltd. v Inducon (Nig.) Ltd. & Anor.* (2012) LPELR-7955; *Okonkwo v Okagbue* [1994] 9 NWLR (Pt. 368) 301. In the latter case, the Court of Appeal defined public policy as "the ideals which for the time being prevail in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy of it is generally injurious to the public interest. Public policy holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good, which may be term, as it sometimes has been, the policy of the law, or policy in relation to administration of the law."
[35] (1916) 1 A.C. 688.
[36] (1918) 3 N.L.R. 77.
[37] *Green v. Sketchley Ltd.* (1979)1 RLR 445.
[38] *Mason v Provident Clothing and Supply Co.* (1913) A.C. 724.
[39] Norman Selwyn (no 30) *Op. cit.* 413.

sensitive information like trade secrets, the court will be more willing to uphold a restraint agreement and *vice versa*. In *Plowman (G.W.) & Co. Ltd. v Ash*[40] the Court held that a restraint on a sales representative was valid on the ground that he was placed in a position to attract his employer's customers while in *M & S Drapers v Reynolds*[41] the Court held that the restraint imposed on a collector-salesman was unreasonable and therefore unenforceable.

Even in cases of restraint of trade, *pacta sun servanda* still prevails as a result, the court would be loath to strike out an agreement voluntarily entered into by the parties as it is a requirement of public policy that parties fulfill their agreements.[42] Where some of the provisions of a restraint clause are severable, the court will do all to severe and enforce that part under the doctrine of severance.[43] This doctrine requires that where a restraint clause contains two or more terms, the Court can discountenance the offensive term and enforce the other (s). Thus, where a restraint of trade agreement contains two or more terms with one not being unreasonable, the court will severe the unreasonable term and enforce the reasonable term (s).[44]

Nigeria, by her colonial history, adopted the common law position on restraint of trade/employment. Alexander J in *Leontaritis v Nigerian Textile Mills Ltd*[45] stated the law as follows:

> While it is true that a master is not entitled to protect himself at all from the mere competition of his servant, he is entitled to protect himself against the disclosure or use by the servant, especially when he is employed in a confidential position, of trade secrets, names of customers, and other information confidentially obtained… a reasonable restraint imposed for this purpose is valid, even if it has the effect of preventing to some extent the future competition of the servant.

[40] (1964) 2 All E.R. 10.
[41] (1956) 3 All E.R. 814.
[42] *Beresford v. Royal Insurance Co. Ltd.* (1938) A.C. 586 at 604.
[43] Abhishek Bansa, "Doctrine of Severability- How Operates?" <https://acumenjuris.com/article-single.php?id=34> accessed 20 November 2022; Dinesh Singh Chauhan, "Understanding the Blue-Pencil Rule of Severability under Contract Law" <https://www.legalserviceindia.com/legal/article-4214-understanding-the-blue-pencil-rule-of-severability-under-contract-law.html> accessed 20 November 2022**;** Minken Employment Lawyer, "Supreme Court of Canada Unwilling to Apply Doctrine of Severance to Restrictive Covenants"<https://www.minkenemploymentlawyers.com/blog/contracts/restrictive-covenants/supreme-court-of-canada-unwilling-to-apply-doctrine-of-severance-to-restrictive-covenants/> accessed 10 November 2022.
[44] *Scorer v Seymour-Johns* (1956) 3 All E.R. 814.
[45] (1967) NCLR 114 at 123.

The above view was adopted by the Supreme Court in *Andreas I. Koumoulis v A. G. Leventis Motors Ltd.*[46] where the court held that "generally, all covenant in restraint of trade are *prima facie* unenforceable in the common law. They are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public."[47] The above position had earlier been held in *Anglo-Africa Supply Co. Ltd. v John Benvie*[48] in this case, the Claimant employer executed a restraint agreement with the Defendant employee to the effect that six months after he ceases from its employ, it will not engage directly or indirectly in any business in competition with that of the former employer who was timber and general trading merchants. The employment was abruptly terminated and the Defendant started timer trade within the localities he had worked for the employer. The employer sought to enforce the agreement against him but the court held that it was unreasonably too wide as regards its geographical coverage and unreasonably comprehensive as regards the business from which the defendant was to be excluded from engaging.[49]

An important issue is, can a third party intervene in a covenant in restraint of trade? Generally, the principle of privity of contract states that only a party to a contract can derive benefit or incur liability therefrom[50] prevails to foreclose third parties from intervening in a contract. Based on the foregoing, it could be asked, if two employers have a trade-protection agreement that infringes on the right of an employee who is not a party to the agreement, can the employee intervene to set aside the agreement, or does he/she has no remedy? Certainly, the answer is negative as equity will not suffer a wrong-to-be without a remedy.[51] At least, two principles would come to the aid of such a third party. The first is that expounded by Lord Atkin in the famous case of *Donoghue v Stevenson*[52] i.e. "the neighborhood principle" which is to the effect that where a person is injured by a transaction arising from the contract of two persons, the third

[46] [1973] 1 All NLR (Pt. 2) 144.
[47] *C. F. O. A. v George Leuba* (1918) 3 N. L. R. 67.
[48] (1937) 13 N.L.R. 158.
[49] *Afropim Engineering Construction Nig. Ltd. v Jacques Bigouret* [2012] FWLR (Pt. 622) 170; *Hygeia HMO v Simbo Ukiri* Unreported Suit No. NICN/LA/454/2013; *The La Casera Co. Ltd. v Mr. Prahlad Kottappurath Gangadharan* Unreported Suit No. NICN/LA/533/2013 Judgment delivered on 17th March, 2016.
[50] *Ben Chukwuma v. SPDC* [1993] 3 NWLR (Pt. 289) 512.
[51] *Nasiru Bello v Attorney General of Oyo State &Anor.* [1986] 5 NWLR (Pt. 45) 828; David T Eyongndi, "The Supreme Court Decision in *Re Abdullahi* Re-Echoing *Ubi Jus Ibi Remedium* as a Shield and Sword" (2019) 4(1) *Miyetti Quarterly Law Review* 119-138.
[52] (1932) A.C. 562.

party is not necessarily precluded from bringing an action simply because he was not a party to the contract the performance or non-performance which has resulted in injury to him. The aforementioned principle was approved by the Supreme Court of Nigeria in *Patrick Abusomwan v Mercantile Bank of Nigeria Ltd.*[53] that the obligation of contracting parties extends to all persons who are likely to suffer injury from their action or omission and is not limited to the parties alone. The reason is such affected persons are neighbors whom the contracting parties ought to have in contemplation in all they do or forebear so that they are not exposed to in jury howsoever.

Aside from the neighborhood principle, a third party who is adversely affected by a restraint covenant will be allowed to intervene by the court based on public policy demand. On public policy consideration, where the restraint qualifies as an unjustified restraint on the mobility of labor, the same will be declared illegal hence, a third party can intervene to have the court declare it null and void. It is argued that if a restraint agreement would amount to an unjustified restraint on free competition (which is a necessary stimulus for economic growth), such restraint is equally illegal and should be voided. Monopoly is capable of negatively affecting the economy; where an employer is positioned to promote monopoly, it becomes imperative to protect the economy against such. The case of *Kores Manufacturing Co. Ltd. v Kolok Manufacturing Co. Ltd*[54] demonstrates the first arm of the public policy consideration (mobility of labor). The two companies covenanted not to employ the former employees of each other save after five years from the period of disengagement. The defendant company then employed the plaintiff's chief research chemist within five years of leaving the plaintiff's employ. The plaintiff sought to enforce the agreement between them. The court held that the agreement was not only too wide but constituted an unjustified restraint on the mobility of labor and therefore, not enforceable between the parties nor against their employees. In fact, an affected employee, where there is unjustified restraint of mobility of labor, can obtain an order of court setting aside the agreement. In *Eastham v Newcastle United Football Club Ltd.*[55] a footballer was granted a declaration that the system of "retain and transfer" operated by members of the English Football League was an undue restraint on the mobility of labor as it permitted the defendant to retain

[53] [1987] 3 NWLR (Pt. 60) 196.
[54] (1958) 1 All E. R. 65.
[55] (1963) 3 All E.R. 139.

him on from moving to other clubs where his talent and skills could be deployed despite the fact that constant playing was essential to his career growth and development.

In fact, the Court of Appeal in *Aprofim Engineering Construction Nig. Ltd. v Jacques Bigouret & Anor.*[56] where the Appellant had inserted a clause in the employment contract barring the respondent from engaging in a similar contract six months after leaving its employment. The Respondent, while in the employ of the Appellant, joined others to set up a parallel company and the Appellant commenced an action seeking injunctive reliefs. Both the trial court and the Court of Appeal held that the restraint was an affront to Section 17(3) (a) and (e) of the 1999 Constitution as it seeks to render the respondent unemployed for a period of six months making him useless to himself and his family after being sent out of job just to satisfy the mischievous, desires of a selfish, greedy, monopolist, who detests competition and loathes fairness.[57] The court commenting on the nature of the article on restraint of trade in the contract, described it as a" sentence of death, a wicked contrivance that completely negates employee's mobility of labor, and bars his right to work and earn a living."[58]

4. *IROKOTV.COM LTD V MICHAEL UGWU EXAMINED*

The brief facts of this case are that: by its General Form of and Statement of Facts filed on 8th of May, 2015, the Claimant sought the following reliefs against the defendant, a declaration that the act of the defendant in organizing the business known as Africagent ltd. and Freemedigital to conduct the business of digital music distribution and rendering other entertainment promotional services constitutes a breach of the non-compete and confidentiality obligations of the defendant as set out in the employee non-disclosure agreement dated 1st December, 2011; a declaration that the act of the defendant of openly soliciting the customers of the claimant constitutes a breach of their employee non-disclosure agreement; an order restraining the defendant directly or indirectly through its agent, privies or any other authorized persons from further breach of the employee non-disclosure agreement save after the lapse of two years from the date of termination. It also sought an order restraining the defendant from further contacting the clients of the claimant who he got to know while in its employ save after

[56][2012] FWLR (Pt. 622) 1740.
[57] *Aprofim Engineering Construction Nig. Ltd. v Jacques Bigouret & Anor.* [2012] FWLR (Pt. 622) 1740 per Mbaba JCA Pp. 1762-1764.
[58] *Ibid.*

the lapse of one year as contained in the employee non-disclosure agreement. It sought an order compelling the defendant to render an account for all profits made in breach of the agreement, damages for breach of contract, and cost of the action.

The claimant had employed the defendant from October 2011 to October 2013 as a Senior Manager of its business vide an employment contract dated 1st October 2011. On the 1st of December, 2011 after working two months under the said employment contract from the UK, and thereafter relocating to Nigeria, the Claimant caused the defendant to sign an Employee Non-Disclosure Agreement dated 1st December, 2011. One of the clauses provides that the employee shall not take up a job with any of the employer's clients, vendors, and partners without the written permission of the Management of the employer; in the event that the employee's employment is terminated for any reason, he shall for a period of one year, from the date of termination, have any business dealings whatsoever with the clients of the claimants directly or through any entities or associates with any customer or client of the claimant or its subsidiaries, or any firm or company which has contacted or been contacted by the claimant, a potential customer or client of the claimant and shall maintain the strictest confidentiality in all dealings with information and trade secrets while in the employ as pertaining to the employer's customers and businesses. The defendant, while in the employ of the claimant, breached the Employee Non-Disclosure Agreement by setting up parallel businesses to that of the claimant and soliciting the claimant's clients whom he got to know while working for the claimant. These actions of the defendant, infract the employment contract which is what regulates the parties judging by the decision in *Olaniyan v University of Lagos.*[59] It contended that parties are bound to perform their obligations to a contract they willingly entered.[60] As far as the Employee Non-Disclosure Agreement is concerned, the claimant furnished which is the period and continuous disclosure to the defendant of the claimant's trade secrets, knowledge, and confidential information which had come and which was to come to the knowledge of the defendant by virtue of his employment with the claimant placing reliance on *BFI Group Corporation v Bureau of Public Enterprises*[61] and that having failed to report to work in the month of October

[59] [1986] 3 NWLR (Pt. 9) 599.
[60] *Beresford v Royal Insurance Co. Ltd.* (1938) A.C. 586, 604.
[61] [2012] 18 NWLR (Pt. 1332) 209.

2013, the defendant did not earn the salary and was therefore not entitled to it placing reliance on *Adeko v Ijebu-Ode District Council*[62]

The claimant further contended that the termination of the defendant's employment was proper as his action amounted to gross misconduct warranting summary dismissal as was done it cited the case of *Union Bank Plc. Soares*.[63]

The defendant, in response to the claimant's claim, entered an appearance and filed a Statement of Defence and Counter-Claim. He contended that he was not in breach of the Employee Non-Disclosure Agreement between them and that, the said agreement is null and void and of no effect whatsoever having been signed under duress as he had resumed work with the claimant after signing the employment contract which its terms, he was agreeable to and relocated his family from the United Kingdom to Nigeria before he was subsequently presented the Non-Disclosure Agreement to sign two months later. Having altered his position to such an extent, the claimant had no choice but to sign the agreement. The defendant further contends that no consideration was furnished for the subsequent agreement and the consideration for the employment agreement, cannot avail the Non-Disclosure Agreement as same is regarded as past consideration making the whole contract, irregular and invalid in law since it lacks a major ingredient of a valid contract placing reliance on *Taura v Chukwu.*[64] The clauses of the Non-Disclosure Agreement which are covenants in restraint of trade are illegal, null, and void and therefore of no effect whatsoever as they are unreasonably unjustifiable based on the Supreme Court decision in *Andreas I. Koumoulis v A. G. Leventis Motors Ltd.*[65] the onus is on the claimant to prove that the restraint of trade is reasonable and therefore justified before the burden would shift to him. The way and manner in which the Employee Non-Disclosure Agreement was executed, constitutes an unfair labor practice that must be sanctioned by the Court. He, therefore, urged the Court to dismiss the claims of the claimant in its entirety as the same is frivolous. The defendant counter-claimed against the claimant for the sum of ₦ 628, 404 (Six Hundred and Twenty-Eight Thousand, Four Hundred and Forty Naira) only as his unpaid salary for the month of October 2013 which was outstanding. The sum ₦ 628, 404 (Six

[62] (1962) 1 SCNLR 349.
[63] [2012] 11 NWLR (Pt. 1312)550.
[64] (2018) LPELR-45990.
[65] [1973] 1 All NLR (Pt. 2) 144.

Hundred and Twenty-Eight Thousand, Four Hundred and Forty Naira) only as salary in lieu of notice of termination of his employment as contained in the contract of employment between the parties; interest on the sums at the rate of 21% per annum until the amount is totally liquidated; the sum of ₦ 5, 000, 000: 00 (Five Million Naira) only as damages for wrongful termination of employment; and the cost of the action.

After reviewing the case of both parties and the address of their counsel, the court formulated three issues for determination. They are, whether the Employee Non-Disclosure Agreement is valid and enforceable; whether the claimant has proved his/her case to be entitled to all the reliefs sought; and whether the defendant is entitled to any of his counter-claims. On issue one which is the plank upon which all other issues rest, the court held that at common law, restraint agreements, such as the one between the parties, are generally illegal therefore, null and void as was held in *Nordenfelt v Maxim, Nordenfelt Guns and Ammunition Co*[66] however, such agreement, would be enforced if and only if it is reasonable as was held in *BDO Seidman v Hirsh Berg.*[67] A restraint agreement is said to be reasonable and therefore enforceable if, it is not greater than is required for the protection of the legitimate interest of the employer; does not impose an undue hardship on the employee; and is not injurious to the public.[68] The court further noted that the above common law position is what is obtainable in Nigeria as decided in a plethora of cases by both the Court of Appeal and affirmed by the Supreme Court particularly cases such as *Andreas I. Koumoulis v A. G. Leventis Motors Ltd.*[69] *Afropim Engineering Construction Nig. Ltd. v Jacques Bigouret*[70] where the general rule and its exceptions were stated.[71]

The court came to the conclusion that it is settled law that even at common law, a party has the right to protect a legitimate interest. It then proceeds to pose the question "what then is the interest which the claimant seeks to protect"? It came to the conclusion that from the totality of the evidence adduced by the claimant, there was no evidence of any trade secrets to which the defendant has access that warrants protection hence, there was no legitimate interest worth

[66] (1894) A.C. 535.
[67] 690 N.Y. 2nd 854 (Ct. App. 1999).
[68] *Taprogge Gesellschaft MBH v IAEC India Ltd.* (1988) AIR Bomm.
[69] [1973] 1 All NLR (Pt. 2) 144.
[70] [2012] FWLR (Pt. 622) 170.
[71] *Hygeia HMO v Simbo Ukiri* Unreported Suit No. NICN/LA/454/2013; *The La Casera Co. Ltd. v Mr. Prahlad Kottappurath Gangadharan* Unreported Suit No. NICN/LA/533/2013 Judgment delivered on 17th March, 2016.

protecting in the instant case.[72] The Court also reasoned, assuming there exists a legitimate interest to be protected, was the restraint, imposed by the claimant on the defendant, reasonable and therefore enforceable? The reasonability of such a restraint is on a tripod basis, i.e. it must be reasonable in the interest of the claimant, defendant, and the public. It answered this question of the reasonableness of the restraint in the negative. The restraint was against the interest of the defendant and the public as it prevents him from putting his skills to the benefit of the public. The Court, therefore held that "I find and hold that the said restraining clause is unreasonable, contrary to public policy and therefore an illegal and invalid contract which the Court will not and cannot enforce."[73]

Having resolved issue 1 which is the fulcrum of the suit against the claimant, all other reliefs which rest on it, were dismissed.[74] On the Counter-claim of the defendant, the court found that the claimant/respondent did not controvert the evidence of the defendant/counter-claimant on the failure to pay his October 2013 salary as the notice of termination was with immediate effect hence, since the fact not challenged are deemed admitted, the claim succeeds. On the claim for one month's salary in lieu of notice, the court found that the immediate termination of the employer failed to take cognizance of the payment of salary in lieu of notice hence, the defendant/counter-claimant was also entitled to it therefore the claim also succeeds. The claims for interest and cost of the action also succeed accordingly.[75]

This decision has reiterated as well as raised salient issues relating to the validity and enforceability of restraint of trade/employment agreements are concerned under Nigerian law. The influence of the common law on Nigerian law cannot be emphasized thus, it would seem that from the grave, the common law still rules and reigns particularly in the area of contract and more particularly, labor and employment law. The Court dealt with issues that an employer must take cognizance of when executing a restraint of trade agreement as per when and how. The preceding section deals with these issues as matters arising from the decision.

[72] *IrokoTV v Michael Ugwu* Unreported Suit No. NICN/LA/169/2015 Judgement delivered on the 12th day of November, 2020 per Coram J.D. Peters J. P. 15.
[73] *Ibid* P. 16.
[74] *IrokoTV v Michael Ugwu* Unreported Suit No. NICN/LA/169/2015 Judgement delivered on the 12th day of November, 2020 per Coram J.D. Peters J. Pp. 17-18.
[75] *IrokoTV v Michael Ugwu* Unreported Suit No. NICN/LA/169/2015 Judgement delivered on the 12th day of November, 2020 per Coram J.D. Peters J. 17-19.

5. MATTERS ARISING

The defendant had contended that the Employee Non-Disclosure Agreement is invalid, null, and void and therefore, unenforceable because it was not executed alongside the main contract but the claimant, had waited for him to accept the contract, relocated his family from the UK to Nigeria and was subsequently confronted with the Employee Non-Disclosure Agreement. At this point, he had no choice but to sign it under "duress" as he had altered his position to an extent that, to do otherwise would have been a great hardship to him.[76] The way and manner the claimant adopted in executing the Employee Non-Disclosure Agreement amount to unfair labor practice which is contrary to public policy having fettered the discretion of the defendant as far as signing same were concerned. This argument is profound and worthy of note by an employer who might wish to execute a restraint agreement with an employee.

The court, making findings on the above, reasoned thus:

> The claimant suddenly realized the need for it (i.e. the Employee Non-Disclosure Agreement) in some two months into the defendant's employment with it. That was also two months after the defendant had altered his position in relocating to Nigeria from his base in the United Kingdom along with his family. I dare say that by his conduct, the claimant intended to put the defendant in a difficult position of a *faith accompli* in which the defendant would have no choice but to dance to whatever the dictates of the claimant might be. The question is what were the options available to the defendant who relocated with his family from the United Kingdom to Nigeria on the basis of an employment agreement only to be confronted with a different scenario least expected? Such a practice amounts to changing the rules in the middle of a game. It is not a fair practice. It is not a fair labor practice. It is an unfair labor practice that this court is by the Constitution empowered to pronounce upon.

Going by the above findings, the Court has laid down the rule that, where an employer is desirous of executing a restraint of trade/employment agreement, the same must be contemporaneously executed with the main contract. This is to give the employee, an unfettered opportunity, to access his position and to either accept the two after careful consideration or reject both. Where an employer presents an employment contract and based on the terms and conditions therein, the employee accepts and alters his position in a bid to effectuate the contract, any subsequent alteration that places the employee in a position of no choice but "you

[76] *Ibid.* p. 6.

must accept" is an unfair labor practice which is against equal and fair bargaining which is the bedrock of contractual transaction. Hence, such an agreement will be declared invalid, null, and void and therefore, unenforceable.

Another issue that arises from this decision is the right to work. The Court warned that the making of a covenant in restraint of trade by an employer must take cognizance of the fact that, the same cannot be used to render an individual redundant. Where this is the case, the covenant will be against public policy as the Holy Writ enjoins all humans that "whoever will not work, should not it." Work is an intrinsic part of human life and every person must be accorded the opportunity to work. International legal instruments recognize this salient fact. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes the right to work not just economic, social, and cultural rights but also civil and political rights. Article 6(1) of the ICESCR states that the right to work includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.[77] Any restraint agreement that impedes the right to work, thereby robbing the nation of revenue generated from taxes, is against public policy and will not be enforced as was held in the cases of *Dr. Shirish Tanksale v Rubee Medical Centre Ltd.*[78] and *Nnadozie v Mbabwu.*[79] Aside from the Holy Writ providing that, "he who does not work, should not eat" the first obligation placed on man after creation and placement in the Garden of Eden, was to "work the ground and keep it in order."[80] The implication of this is that from creation, man is expected to work and work has become an intrinsic aspect of man's life and well-being, the State must therefore ensure that no human action, unjustly interferes with this inalienable expectation of man. It is therefore imperative that, in executing a restraint of trade agreement, the employer must do so, bearing in mind the inalienable right of man to work and that there is dignity in labor. Any attempt to sequestrate this right will be declared illegal, null, and void by the Courts.[81]

It is apposite to note that under the Companies and Allied Matters Act (CAMA) 2020, Directors of a company pursuant to their duty of fidelity consequent on their fiduciary relationship, are

[77] Rebecca M. M. Wallance and Kenneth Dale-Risk, *International Human Rights: Text and Material* (London, Sweet and Maxwell, 2001) 625.
[78] (2013) LPELR-21445 (CA).
[79] [2008] All FWLR (Pt. 405) 1613 at 1639.
[80] Genesis 2:15 The Holy Bible Message Translation.
[81] *Onyiuke v Okeke* (1976) 10 NSCC 146; *Onwuchekwa v Nigerian Deposit Insurance Corporation* [2002] All FWLR (Pt. 101) 1615.

perpetually restraint from using information they became aware of by virtue of their directorship. Section 306 (4) (5) of CAMA 2020 (280 (4) (5) of CAMA 2004) prohibits a director from making a secret profit or misuse of the company's information. The inability of the company to perform any functions or duties under its articles and memorandum shall not constitute a defense to any breach of the director's duty. The duty not to misuse corporate information shall not cease by the director or an officer that has resigned from the company, and he shall still be accountable and can be restrained by an injunction from misusing the information received by virtue of his previous position. This is somewhat of a statutory restraint. In fact, it will be safe to argue that this provision extends to where a director has ceased being employed in the company to set up another company or join an existing company to use the information gotten from the previous company in the new one. This was the decision of the Canadian Supreme Court in *Canadian Aero Service Ltd. v O Malley*[82] In this case, the director got corporate beneficial information by virtue of his position. He resign from his employment and form another company, and sued the information from the former company to win a bid. The former company sued for breach of his statutory duty not to misuse corporate information during and even after his employment and the Supreme Court held that he was under an obligation to not use the information. The restraint on him subsists after the end of the employment contract.[83] Once a director ceases from being in the employ of the company, any information acquired must not be used subsequently for another company save with full disclosure.[84] While this prohibition may seem harsh, its utilitarian value is not far-fetched. It seeks to prevent a situation where a director who is in possession of material information, in order to make a profit, brings his/her employment to an end, set up another company, and uses the information.[85] If this is allowed, it is capable of causing business strains which will have adverse effects on the economy.[86]

[82] (1973) 40 BLR 371.
[83] Joseph E O Abugu, *Principles of Corporate Law in Nigeria,* (Lagos: MIJ Professional Publishers Ltd., 2014) 511-512.
[84] Chris C Wigwe, *Introduction to Company Law and Practice* (Accra: Mounterest University Press, 2016) 240.
[85] Olakunle Orojo, *Company Law and Practice in Nigeria,* 5th ed. (Durban: LexisNexis, 2008) 267.
[86] D J. Bakibinga, "Directors' Duty to Avoid a Conflict of their Interests and Duty to the Company" (1990) 3(14) *The Gravitas Review of Business and Property Law,* 63-72.

6. CONCLUSION AND RECOMMENDATIONS

From the discussion above, it is trite that, parties are at liberty, within the ambit of the law, to contract and the law, will enforce such contract even though the same may occasion hardship to a party thereof. Generally, covenants in restraint of trade, particularly post-employment ones, is *prima facie* unenforceable under Nigerian law as the same is regarded to be against a public policy which entails the generally acceptable standard within a particular society which all persons, are expected to adhere to in the conduct of their affairs for the general good.[87] However, where the employer, ably demonstrates, a sufficient and cogent interest that requires protection such as trade secret and the same being reasonable, a restraint of trade clause, covering such interest, will be enforced. Where an employer is desirous of utilizing restraint of trade clause, the same must be brought to the knowledge of the employee contemporaneously with the main contract to enable the employee to decide and not when he has altered his position to his/her detriment rendering him/her unable to bargain. Where such is the case, the clause/agreement shall be rendered null and void as the same amounts to an unfair labor practice and has placed the employee in a position where he/she cannot object to such a clause/agreement without being exposed to avoidable substantial hardship.

In determining the enforceability or otherwise of a restraint of trade clause, the court has to create a balance between three contending interests to wit: the interest of the employer, the employee, and the general public. Employers resort to restraint of trade to protect their business from increasing competition, particularly in a volatile economy like that of Nigeria. The rank of the employee which may determine the kind of information/interest of the employer's business he/she is exposed to is a major determinant in determining the validity and enforceability or otherwise of a restraint of trade clause. Thus, each case will be decided based on its peculiar fact although, judicial precedent, may serve as a guide.

From the findings above, it is recommended that trade unions and other employee rights organizations, should publicize and enlighten employees about the existence and issues settled by this decision to enable them to exploit it. Also, in the event that there is an appeal against the decision to the Court of Appeal which is the final court vested with jurisdiction over labor disputes in Nigeria, the decision should be affirmed as it is a welcomed development and has

[87] Emmanuel J Uko (no 9) *Op. cit.* 34-46.

created a balance between the various competing interests in cases of restraint of trade in Nigeria.