Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.56, 2016

Non-compete Clauses in Contracts of Employment in Nigeria: A Critical Evaluation of the Decision in Aprofim Engineering Ltd v Bigouret Anor (2015)

Abubakri Yekini[1]* Tanimola Anjorin[2]
1.Assistant Lecturer, Lagos State University, Lagos, Nigeria
2.LLM Candidate, University of Lagos, Akoka, Lagos, Nigeria

Abstract
Restrictive clauses are usual clauses in contract of employment. With the increase in the level of awareness and sophistication of the Nigerian Labour market, issues of the enforcement of non-compete clauses are now being litigated as against what is obtainable before now. The state of the law appears to have settled with respect to the validity or otherwise of contracts in restraint of trade (or non competition clauses) under the common law. The Court of Appeal has seemed to have enervated this perceived settled area of law. This paper therefore, seeks to critically appraise the nullification of non-compete clauses via the instrument of Chapter II of the 1999 Constitution (as amended) as laid down in *Aprofim Engineering Ltd v Bigouret*[3] and to give a balanced perspective of non-compete clauses in contracts of employment.
Keywords: Contracts, restrictive covenants, non-compete clauses

I Introduction

It's always best to write out the terms and conditions of every employment contract so that parties can be ad idem on the rules governing their relationship. The courts are not to rewrite the contract of parties and parties are usually bound by the terms of the contracts willingly signed. Courts, over the ages, have been enjoined to enforce the intention of the parties as demonstrated from the agreement between them[4]. It is imperative that an employee should demand from his employer, the terms of a contract of employment which spells out in details, the relationship of parties during and after the employment, if any[5].

One of the usual terms in contract of employment is what is referred to as restrictive clause (also called non-competition, non-solicitation clause). This clause is understood under the common law as contract in restraint of trade. It usually prohibits an employee from engaging in business, whether on his own or in the employ of another, that is in the same line of activities with the business of his employer.

These clauses were initially viewed to be contrary to public policy and did not get the support of the courts. However, various justifications were offered to support the validity and enforcement of non-compete clauses in contract of employment and has been so recognised and enforced in most jurisdictions till this present time.

II Judicial approaches to non-compete clauses

Covenant not-to-compete or simply put, non competition clause has been traced to have originated from England. It is a clause used in master-apprenticeship relationship to ensure that an apprentice serves his master after the latter's investment on him. The clause forbids a departing apprentice from setting up a rival business either on his own or in conjunction with others.

The common law unequivocally frowns at such clauses as they were viewed to be objectionable and contrary to public policy. The earliest reported English case on the subject is ***the Dyer's Case***[6]. In this case, a London practitioner entered into a non-compete agreement with his apprentice to forgo the latter's debt if he did not engage in his trade in the same city for a period of six months after the cessation of his apprenticeship. The

[1] Abubakri Yekini is an Assistant Lecturer in the Department of Jurisprudence and International Law, Lagos State University and currently a PhD Researcher at School of Law, University of Aberdeen, United Kingdom.
[2] Tanimola Anjorin holds a degree in History and International Studies from the Lagos State University. He later obtained a law degree from the same University and was thereafter called to the Nigerian Bar. He is a member of the Nigerian Bar and an Associate Member of the Chartered Institute of Arbitrators (UK) Nigeria Branch. He currently runs a Master's programme with specific interest in Law of Taxation, Labour Law, and Energy Law.
[3] (2015) 52 N.L.L.R PT (173) 1 CA.
[4] Cooperative Development Bank Plc V Arc.. Mfon Ekanem [2009] 16 NWLR (PT. 1168) 585; Shell Petroleum Development Company of Nigeria Limitedv Monday Amadi (CA) [2010] 13 NWLR (PT. 1210) 83.
[5] See section 7, Labour Act, 2004.
[6] The Dyer's Case, Y.B. Mich. 2 Hen. 5, fol. 5, pl. 26 (1414). For a detailed analysis of the evolution of non-compete agreement see: Office of Economic Policy, U.S. Department of the Treasury Report, Non-compete Contracts: Economic Effects and Policy Implications, March 2016; Gary Minda, The Common Law, Labor Law and Antitrust, 11 Berkeley Journal of Employment & Labor law, 461 (1989).

judge refused to enforce the covenant and even threatened to jail the Master if he had showed up in court. The court nullified the clause as being contrary to public policy.

This position was adopted for about three centuries by the English courts as they continue to reject any attempt to restrict labour mobility. A paradigm shift was witnessed in ***Mitchel v. Reynolds***[1] when the court began to reconsider the absolute rejection of restrictive covenants. In this case, Lord Macclesfield introduced certain considerations that should guide the courts in determining whether a covenant in restraint of trade should be allowed or not. These considerations formed the bedrock for what would later become the English law position on covenants in restraint of trade. His Lordship distinguished between voluntary, involuntary general and particular restrictive covenants.

In his analysis, Lord Macclesfield posited that involuntary restrictive covenant remains void while voluntary covenants should be allowed provided they are not general but particular. Particularity was viewed in terms of the specific interest of the employer/former business owner to be protected, the reasonableness, scope, time and place of the covenant[2].

The industrial revolution with its attendant technological inventions and deployment in businesses eventually led to new ways of doing business, market competition and the need to protect unfair advantages as a result of worker's mobility. The court then began to formalise the principle guiding post employment covenants in restraint of trade. It was thought to be unconscionable and the court of equity will readily enforce such clauses against the employee[3]. Hence, the rule tends to favour the principle of freedom of contract-which ties parties to their contract. As the US Treasury Report puts it, 'a central value of the liberal economic philosophy permitted men of sound mind to enter arrangements as they saw fit'[4]. However, such covenants will be rejected where they are unreasonable, too wide, and where there is no interest to be protected by it.

This position of English law remains valid till today[5] in most common law jurisdictions. The court will always look at each case on its merit; weigh the competing interest of protecting the business of the employer, the right of the employee to earn a living and that of the public not to be denied of the industry of prospective citizens. Though, very limited reported cases are available in the Nigerian law reports, they still suggest that the Nigerian courts have adopted and applied this English law position severally. In ***Vee Gee (Nigeria) Limited v Contact (Overseas) Limited***,[6] the Court of Appeal holds the view that 'the courts will enforce the injunction negative covenants in restraint of trade where such covenants are not wider than reasonably necessary for the protection of the covenantee and are not injurious to public interest'.

In ***Overland Airways Limited v Captain Raymond Jam***[7], the National Industrial Court enforced a training bond against the defendant. The defendant was a former employee of the plaintiff who sponsored him for a training programme in aviation. The defendant was bonded to serve the Plaintiff for a minimum of 4 years after his training. Having acquired the requite training and qualifications, the defendant repudiated the bond and attempted to leave the service of his employer. The Court per B.B Kanyip ruled in favour of the Plaintiff company and upheld the restrictive covenant against the defendant. The court considered the state of the law in other jurisdictions and came to the conclusion that the restriction is reasonable and enforceable[8].

The Supreme Court per UDOMA, J.S.C. in ***Koumolis v Leventis Motors Ltd***[9] has also had the opportunity to extensively dealt with the validity or otherwise of contract in restraint of trade.

The Covenant, the particulars whereof are set out above, is certainly in restraint of trade and

---

[1] 24 ER 347 (Queen's Bench 1711). The fact of the case is this: Reynolds, a baker, agreed to rent his bakery for five years. In return, Mitchel pledged Reynolds a bond worth 50 pounds on the condition that Reynolds would not resume his trade within St. Andrew Holborn Parish for 5 years. The latter failed to keep the agreement and Mitchel sued. Chief Justice Parker ruled in favor of the agreement. He reasoned that while general restraints on trade were unlawful, as they benefited neither party, some partial restraints were reasonable.

[2] For a detailed judicial review of how the English courts have applied these criteria in this period, see : Amasa M. Eaton, On Contracts in Restraint of Trade, Harvard Law Review, Vol. 4, No. 3 (Oct. 15, 1890), pp. 128-137.

[3] Robert W. Gomulkiewicz ,'Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation', University of California, Davis Law Review [Vol. 49:251 2015], p.260.

[4] U.S. Department of the Treasury Report, Supra, p.30.

[5] See: Nordanfelt v. Maxim Nordanfelt Guns and Ammunition Co. (1891) A.C. 535 H.L., Esso Petroleum Co. Ltd v. Harper's Garage (Stourport)Ltd. (1968) A.C. 269.

[6] [1992] 9 NWLR (Pt. 266) 503.

[7] Unreported suit no: NICN/LA/597/2012.

[8] Judgement delivered 11th April 2015. See www.acas-law.com/phone/newsletters.html (accessed 26/6/16). It is instructive to not that there is a world of difference between contracts in restraint of trade and training bonds. While the objective of the former is to protect an employer's confidential information acquired by an employee from being used against the employer, the latter seeks to compel a current employee whose training has been sponsored by the employer to work for an agreed duration so that the employer could derive its benefit from the investment on the employee. However, both have similar character as they seek to prevent an employee from moving to a new employment.

[9] [1973] NSCC 557.

> is therefore governed by certain legal principles. Generally, all covenants in restraint of trade are prima facie unenforceable in common law. They are enforceable only if they are reasonable with references to the interests of the parties concerned and of the public...
> We think we are right in stating that in relation to master and servant it is a well established principle of law that a covenant in restraint is viewed by the courts with the utmost jealousy. It is therefore for the employer who seeks to enforce it against the servant to show that it is designed for the protection of some exceptional proprietary interest of the employer. If the covenant affords adequate protection to the covenantee, the requirement that it must be reasonable in the interest of the parties is satisfied as the court will not enquire into the adequacy of the consideration for the covenant. And depending on how the covenant is framed, an employer can lawfully prohibit the employee from setting up on his own, or accepting a position with one of the employer's competitors, so as to be likely to destroy the employer's trade connection by a misuse of his acquaintance with the employer's customers or clients.

This exposition by the Supreme Court has clearly underlined the policies behind the recognition of non-competition agreements in deserving cases.

In the United States, non-competition agreements have been subject of increasing litigation especially with the emergence of the technologically driven market. In a research carried out by Wall Street Journal in 2013, 'more employers are requiring their new workers to sign "non-compete" agreement which they say are needed to prevent insiders from taking trade secrets, business relationship or customer data to competing firms when they leave'[1]. This has led to increase in litigation in the law courts as the emerging market is knowledge and technology driven and any serious employer is looking out for the brains everywhere.

Notable among the recent law suits over non-compete agreements in the US is the litigation concerning the movement of Dr Kai-Fu Lee from Microsoft to Google. Dr Lee was a top executive in Microsoft and an expert in search and speech recognition system. He was said to have been responsible for the Microsoft internet search programme and has all the trade secret of Microsoft programmes. Few years later having signed a non-compete agreement; he moved to Google, a keen competitor of Microsoft and the latter sought to challenge his employment at Google. The matter was eventually settled out of court[2].

Majority of the US States recognize and enforce non-compete agreement. Their positions are not too different from what is obtainable under the English law[3]. The State of California stands out as an abolitionist. By default, non-compete agreements are void. These clauses were outlawed by the Civil Code of California[4]. As the Court held in ***Edwards v. Arthur Andersen LLP***[5] ,the State of California in 1872 adopted a 'settled public policy in favour of open competition, and rejected the common law "rule of reasonableness" , when the Legislature enacted the Civil Code'. The statutory exceptions allowed are non-competition agreements in the sale or dissolution of corporations[6], partnerships[7], and limited liability companies[8].

Therefore, in the US, only the State of California has a settled legislative policy in favour of open competition and of course, labour mobility[9].

In the European Union, non-compete agreements are also enforceable provided they serve to protect legitimate business interest and are reasonable. In most jurisdictions, such agreements are required to be in writing (voluntary) and the restriction must be for reasonable specific period of time and geographical location. The maximum period allowed in most State range between 12 to 24 months[10].

III Aprofim Engineering Nig. Ltd v Bigouret & Anor (2015)

The Appellant, a Limited Liability Company, was the Plaintiff at the Lower Court, where it sued the Defendants/Respondents amongst other reliefs for

> *An Order of injunction restraining the 1st Defendant from entering into an employment, or offering his services to any company or organization doing similar business as that of the plaintiff both whilst the 1st Defendant remains in the Plaintiffs employment and also within six months after the termination of the*

[1] http://www.wsj.com/articles/SB10001424127887323446404579011501388418552 (accessed 26/06/16).
[2] http://www.crn.com/news/applications-os/175008003/microsoft-google-settle-kai-fu-lee-case.htm
[3] See Robert W. Gomulkiewicz, supra.
[4] http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=16001-17000&file=16600-16607 (accessed 26/06/16).
[5] (2008) 44 C4th 937.
[6] S.16601.
[7] S.16602.
[8] S.16602.5.
[9] See: D'sa v. Playhut, Inc. (2000) 85 Cal.App.4th 927, 933; Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 Cal.App.4th 853, 859; Morlife, Inc. v. Perry (1997) 56 Cal.App.4th 1514, 1520. (these cases are available online at http://law.justia.com/).
[10] Julie Bouchard et. al., (2013), A practical guide to the enforcement of non-competes in the EU, K & L Gates LLP.

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.56, 2016

employment Agreement between the Plaintiff and the 1st Defendant.

The Lower Court dismissed the case of the Plaintiff and the Court of Appeal in affirming the decision of the trial judge held thus:

> "Any contractual Agreement or Employment Agreement which does not conform with Section 17(3) (a) (e) of the 1999 Constitution is void because of its non-conformity. In the instant case, Article 12 of the Plaintiff's Employment Agreement which states that "the Employee agrees that he will not enter into an employment or offer his service to any similar company or organizations in Nigeria whatever the circumstances may be, this within six months after the termination of the agreement" goes counter to the provisions of our Section 17 (3) (a) and (e) of the 1999 Constitution and it is void to the extent of the inconsistency or non-conformity.
>
> I think that was quite pretentious, as a close study of the said provision shows that Article 12 never outlawed the 1st Respondent entering into an employment or offering his services to any similar company or organization, while still working for the Appellant but barred him from doing so "within six months after the termination of this Agreement"
>
> It appears to me that, the Appellant, in the effort to exploit him tried to colonise and completely expropriate the 1st Respondent, and make him useless to himself, if he stayed back in Nigeria, even when out of service to the Appellant. The Appellant had hurriedly incorporated that clause, without vetting it, to see that it had effect, only after the Appellant would have dumped the 1st Respondent, not while still in service to it! That is what the last sentence in Article 12 connotes "…this within six months after the termination of this agreement.
>
> Of course, the learned trial Chief judge had held Article 12 a nullity, for being an affront to Section 17 (3) (a) and (e) of the 1999 Constitution."
>
> "I hold that the learned trial Chief Judge was right, as it is against the spirit of the Constitution, basic law, to castrate an able bodied man and render him unemployed and useless to himself and family, for a period of six months (or any period at all) after being sent out of job, just to please and satisfy the mischievous desire of a selfish, greedy monopolist, who detest competition, and loath fairness.
>
> I think section 12 of the Appellant's Agreement is akin to a sentence of death, a wicked contrivance that completely negates employee's mobility in labor, and bars his right to work and earn a living…."

The holistic effect of the above decision is that a non-compete clause in an employment agreement is an affront to our constitution and by virtue of the provisions of Section 1 (3) of the 1999 Constitution, non-compete clauses are to the extent of their inconsistency with the Constitution null and void.

In very simple terms, the implication of the decision of the Court of Appeal in the case under review is that notwithstanding the agreement of parties to an employment contract, such agreements must unarguably conform with the Constitution. In the words of Ogundare J.S.C in **Menakaya V Menakaya**[1] he stated thus, 's*uffice to say that parties cannot by conduct or consent alter the constitution or a statute.'*

The trial court and the Court of Appeal in the case under review resolved that a non-compete clause is an affront to Section 17 of the Constitution. Can we really say that a contract of employment containing a restrictive covenant seeks to alter Section 17 of the Constitution as held by the trial court and the Court of Appeal in the case under review? Another fundamental question is whether Section 17 of the Constitution which has been severally held to be non-justiciable against the government can be made justiciable against private persons and organizations. In the absence of any vitiating element in contract or clear limitations by any law in force, can the court rely on Fundamental Rights Objectives and Directive Principles of State to render a restrictive clause null and void?

In analysing the correctness or otherwise of this decision of the Court of Appeal with due respect, the decision has to be juxtaposed with the superior authorities on Chapter 2 of the Constitution (as amended), the existing precedents on the subject matter of the decision, international best practices and the commercial implications of the same.

a. Chapter II of the constitution as the basis for the decision

The Court of Appeal in the case under review relied heavily on the provisions of **Section 17 (3) (a) and (e) of the 1999 Constitution** to void the non-compete clause in the employment contract. **Section 17 (a) and (e) of the 1999 Constitution (as amended)** provides thus:

> "The State shall direct its policy towards ensuring that –

[1] (2009) 9-10 SC P.1.

(a) All citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment;
(e) There is equal pay for equal work without discrimination on account of sex, or any other ground whatsoever;"

It is trite that the provisions of chapter II of the Nigeria constitution (as amended) in not justiciable in any court of law in the country. In interpreting this section, the apex Court has consistently maintained that state policy or legislation is required before it can uphold the provisions of Chapter II of the constitution. This has been restated by the courts and reliance is also placed on Section 6(6) (c) of the Constitution. The Supreme Court in **Ugwu v. Ararume**[1] defined the word "justiciable" thus:

An enactment is justiciable if only it can be properly pursued before court of law or tribunal for a decision. But where a court or tribunal cannot enforce such enactment then it becomes non-justiciable that is non-enforceable. This means that the executive does not have to comply with the enactment unless and until the legislature enacts specific laws for its enforcement. In Nigerian constitutional law, there are typical examples of such enactments particularly those contained in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999, placed under the caption, 'Fundamental Objectives and Directive Principles of State Policy'. These are not justiciable, generally, they run subsidiary to the fundamental rights contained in Chapter IV of the 1999 Constitution…"

On the basis of the above decision of the Supreme Court, the decision of the Court of Appeal under review may not stand as there is no specific legislation that has been enacted by any parliament to make Section 17 justiciable.

Again, the decision of the Supreme Court in **A.G Ondo v A.G Federation**[2] strongly suggests that interpreting chapter 2 of the Constitution, the narrow interpretation cannot be adopted. Instead, a wider interpretation must be embraced. Uwais CJN (as he then was) held thus:

"It has been argued that the fundamental objectives and the directive principles of state policy are meant for authorities that exercise legislative, executive and judicial powers only and therefore any enactment to enforce their observance can apply only to such persons in authority and should not be extended to private persons, companies or private organisations. This may well be so, if narrow interpretation is to be given to the provisions, but it must be remembered that we are here concerned not with the interpretation of a statute but the constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the constitution. See Nafiu Rabiu v. Kano State (1980) 8 - 11 SC 130; (1980) 2 NCLR 117; Aqua Ltd. v. Ondo State Sports Council (1985) 4 NWLR (Part 91) 622; Tukur v. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517 and Ishola v. Ajiboye (1994) 6 NWLR (Pt. 352) 506." (P. 53, paras. C-G)"

After advocating against narrow interpretation of Constitutional provisions, the Court was still of the opinion that the provisions of Chapter II are largely meant for government at all levels to carry out thus:

It has been argued also that the word "state" in section 15 subsection (5) means the federal government alone, because if the whole of the provisions of chapter II of the constitution on fundamental objectives and directive principles of state policy are read together, it will be seen that only the federal government is in a position to carry out the principles and objectives. With respect, I do not accept this argument, because the provisions of Section 13 thereof apply to "all organs of government, and all authorities and persons exercising legislative, executive or judicial powers."

In effect, the Court of Appeal in the case under review with respect appears to have set on the wrong path when it resorted to apply the provisions of Section 17 of the Constitution to private persons. The whole essence of the directive principles of State policy is directed to those having governmental powers to effect the directives contained in the Chapter. The eventual result will be that the provisions will eventually apply to private persons only when the government has put in place machinery for its application. Our view is supported by the introductory statement to section 17 which states thus: '"***The State shall direct its policy towards ensuring that'.*** The section is directed to the State (both Federal and municipal) and not to private persons.

b. The Court of Appeal decision, the existing precedent and international best practices

In many jurisdictions, non-compete or restraint in trade clauses are encouraged to protect trade secrets and business innovations and ideas. It is common place to find a post-termination clause in contracts of employments

[1] (2007) ALL FWLR (Pt. 377) 807 at 908 Paras. B- E (SC).
[2] (2002) 9 NWLR Pt. 772, 222.

particularly for some specific and sensitive cadres in an organization. International best practices recognize reasonable restraint in trade clauses. What is reasonable is subject to factors which vary from country to country. Before signing up to a contract of employment that contains a non-compete clause or when the courts are called upon to decide the validity of a post termination clauses in employment contracts, the employee or the courts as the case may be, will consider certain issues such as, the reasonability of the clause; the legitimate business interest sought to be protected; reasonability in duration; attached consideration; is it just a deterrent factor; are there remedies available to the aggrieved party; the laws in force; and the surrounding circumstances of each case.

In Nigeria, the decision of the Court of Appeal under review strongly suggests that non-compete clauses are unconstitutional and void *ab initio*. The implication of this decision is that all restrictive covenants and/or non-compete clauses are not maintainable because it is in violation of the provisions of the Constitution.

It is glaring that the decision of the court is reached *per incuriam* and as such it cannot be relied upon as being authoritative on this subject matter. Earlier on, we have presented the decision of the Supreme Court in ***Koumolis v Leventis Motors Ltd***[1] which approves non-compete clauses especially where such clauses are reasonable. By our doctrine of precedent, a decision of the Court of Appeal cannot stand where such is contrary to a decision of the Supreme Court[2]. Even where the decision of the Supreme Court is perceived to be wrong, a Court of Appeal is nevertheless, bound to follow it. Infact, the Supreme Court has described deliberate refusal to follow its decision by a lower court as 'gross insubordination', 'judicial rascality', and 'judicial impertinence.'[3]

In other climes, there are factors to be considered by the courts when issues arise on the breach of restrictive and/or non-compete clauses taking into consideration the peculiar facts and circumstances surrounding each case.

If we agree that every case is to be decided on its own peculiar facts and circumstances, a careful perusal of the case reveals that parties are ad idem as to the terms of the employment contract without undue influence or duress. Some may argue that in contracts of employment, the employer usually has superior bargaining power over the employee. This in itself cannot erode the sanctity of the contract which must be respected by parties and protected by the courts.

It is trite that parties are bound by their agreement except a party can establish any of the vitiating elements in contract. The employee in the case under review neither pleaded nor established any of the vitiating elements. Once parties are agreed as to their rights and liabilities under a contract, one of the parties should not be allowed to resile from it particularly where the other side has discharged his own obligation under the contract. See[4].

Courts do not grant relief to a party merely because a contract operates harshly or oppressively against him or because he bears most of the risk involved while the other party receives most of the benefits. The courts are to look at the intention of the parties and give effect to same. The constitutional provision relied upon by the Court is not intended by the drafters to limit the agreements in a contract or cause a revolution in this settled area of law.

Sections 17 (3) (a) and (e) of the Constitution provides that the state shall direct its policy towards ensuring that all citizens without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment and equal pay for equal work without discrimination. The proper interpretation of this section is that the government should put in place a policy framework geared at providing jobs and equal opportunity for securing such jobs. The section does not in any way limit the scope of contracts to be entered into between the employer and its employees. With due respect to the court, the decision of the court is largely based on instinct, assumptions and sentiments rather than the law, facts and evidence before the court.

It is an elementary principle of law that where parties are ad idem on the terms of a contract, the function of a court is to give effect to the terms without much ado. This is because, the court must, in the construction of the terms of a contract, give effect to the intention of the parties and not rewrite the contract.

The import of a restrictive covenant in a contract of employment was better appreciated by the National Industrial Court, Lagos Division in a recently delivered judgment. Oyewunmi J in delivering her judgment in the case of **Studio Press Plc v Kadoor & Anor**[5], upheld the agreement of parties in Clause 25 of the contract of employment.

Clause 25 reads:

> "For a period of two years immediately following the termination for whatever reason of this agreement, the employee agrees not to work in the same or similar capacity in any company whose business is the same or similar to that of the employer in Nigeria except

---

[1] [1973] NSCC 557.
[2] Kerewi v Abraham (2010) 1 NWLR (PT. 1176) 443.
[3] Dalhatu Vs. Turaki (2003) 15 NWLR (Pt. 843) 310.
[4] Mercantile Bank vs. Adalma (1990) 5 NWLR (pt 153), p.747.
[5] NICN/LA/144/2015.

with the prior written permission of the employer to do so, which permission will not be unreasonably withheld though it will normally be withheld if the employee intends to work in the same or similar business to that carried out by the company"

The follow up question is that is the trial court in ***Studio Press v Kadoor & Anor*** **(Supra)** not bound by the decision of the Court of Appeal in ***Aprofrim v Bigouret & Anor*?** I answer this in the negative. First, by whatever parameter, the provisions of Section 17 (3) (a) and (e) of the Constitution does not invalidate restrictive clauses in contracts of employment. Second, the sanctity of an agreement needs to be upheld by the courts. The Claimant firmly established that the 1st Defendant was a custodian of all Claimant's customer profile artwork and designs and many other confidential information and trade secrets which constitute the life wire of its business. A restrictive clause seeks to protect trade secrets and confidential information which the employee came in contact with within the period of his employment.

The Court of Appeal ought to have considered international best practices (as provided for in **s.254C (7) of the Constitution**), which in our humble opinion, means no more than what is generally obtainable globally, before arriving at its decision. What appears to be the international best practice in this area of law has been highlighted earlier in this paper when we presented the views from the courts of other jurisdictions. In the US, Europe, Asia and other climes, non-compete agreement are generally enforceable save where such is clearly unreasonable or serves to protect no legitimate proprietary/pecuniary interest of the employer.

It is agreed that the courts have a duty to protect those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. A better basis for refusing to uphold a restrictive clause in an agreement ought to have been the absence of consideration for the post termination obligation or unreasonableness. The courts been a court of law and equity can hold the same to be unfair and inequitable.

IV Restrictive /non-compete clauses in a contract of employment without a survival clause

Restrictive covenants are usually post termination clauses in a contract of employment while survival clause is one which seeks to confer certain rights or obligations on either party to the contract upon the termination of the contract. Ordinarily, Termination brings unperformed obligations to an end. Some will suggest that where there is no survival clause in the contract, the post termination clauses are not enforceable.

The extent of discharge of provisions is of course always dependent on the intention of the parties to the contract. The importance of the parties' intentions is reflected by the fact that substantive clauses (such as restraint of trade and confidentiality clauses) are often drafted in a manner that clarifies that they survive a termination of a contract. Accordingly, if a party undertakes to fulfil some conditions upon termination without a corresponding consideration for the same, the party should be held accountable to the observance of those provisions.

V Conclusion

Notwithstanding the upheaval sought to be created by the Court of Appeal in the decision under review, the latest judgments of the National Industrial Court as rooted in the Supreme Court decision in ***Koumolis v Leventis Motors Ltd*** remains a sound position of the law on restrictive clause in contracts of employment in Nigeria. The appellate courts can do better than the decision in the case under review when a similar issue presents itself before the court. The reliance on a constitutional provision which the apex court has consistently held to be non-justiciable is a decision largely based on sentiments rather than the law.

The Court of Appeal per Mbaba JCA while delivering the judgment held thus:

> *"…it appears to me that, the Appellant, in the effort to fully exploit him tried to colonise and completely expropriate the 1st Respondent, and make him useless to himself, if he stayed back in Nigeria, even when out of service to the Appellant…"*

The above excerpt is nothing more than sentiments and it has been laid down by the apex court over time that sentiments have no place in judicial deliberations.[1]

This paper has successfully reappraised the approaches of the courts in different jurisdictions like Nigeira, England and the United States. It is a common trend that non-compete clauses are generally favoured for policy considerations especially where the party seeking to enforce them can prove that the clauses are relevant and reasonable to protect certain concrete business interests, not unnecessarily too general and with a reasonable time and space.

The Nigerian court of Appeal in the decision under review sought to upturn the long established precedents through an unnecessary judicial pragmatism by nullifying non-compete clauses holding that such clauses are contrary to the constitutional objectives of the Nigerian State aimed at ensuring a means of livelihood for every citizens.

---

[1] Please see Ojo v. Gharoro (2006) ALL FWLR (Pt. 318) 197 at 236 (SC); Udosen v. State [2007] 4 N.W.L.R. (Pt. 1023) 125 at 137 Para. D (SC).

This paper has been able to critically assess the reasoning of the Court of Apeal decision in the case under review and concluded that the reasoning is not justifiable under the sections of the Constitution the court relied upon. The paper has demonstrated that the Courts decision is neither supported by the precedents on that sections of the Constitution nor the Supreme Court earlier decisions n non-compete clauses. It has also been argued that the decision does not support international best practices. While the reasoning behind the non-enforceability of restrictive covenants in the case under review is superficial and unnecessary judicial activism, there could be other justifiable grounds depending of the facts and circumstances of each case.

It is our considered view that there is currently no need for a review of the well settled principle of law concerning the recognition and enforceability of non-compete agreement. The wide acceptability received by this principle of recognition by man jurisdictions further lay credence to our position.