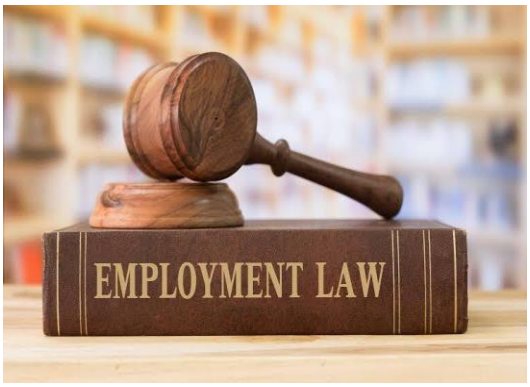
**A Newsletter on Labour Law and Emerging Trends - May 2021 Edition**

Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

## ENFORCING TRAINING BONDS: WHAT EMPLOYERS SHOULD KNOW




Sometime in 2019, Continuous Solutions Limited (CSL/company/employer) employed Dumebi Coker (Dumebi) as an IT Consultant. Attached to Dumebi's contract of employment was an Employment Training Bond Agreement (ETBA) executed by both parties. By the terms of the ETBA, Dumebi bonded himself to remain in the employment of the company for a period of four (4) years, and in event he decides to leave the company before the expiration of the contractual duration, he would be liable to forfeit his one year gross salary to the company. Having worked for a period of two (2) years, Dumebi got a juicy offer from Korak Solutions Limited (Korak), paying three-fold of his current salary, and decided to leave the company. He subsequently tendered his resignation letter, and upon receipt of same, the company reminded him of his bond and the consequences of failing to honour it. The company however subsequently decided to approve Dumebi's resignation on the condition that he executes an undertaking not to engage in, or work for any organization in the same line of business as the company or its direct competitors for a period of eighteen (18) months.

Following Dumebi's resignation, the company seized his international passport, and made the execution of the undertaking a condition precedent to retrieving his international passport, knowing that Dumebi's wife was undergoing surgical procedures for cancer treatment in India, and he was wont to visit her often. Seeing the emergency of his wife's medical situation, and the need to stand by her at that trying time, Dumebi signed the undertaking, so as to retrieve his international passport from the company.

Due to financial pressures from his joblessness and his wife's medical emergency, Dumebi joined Korak one month after leaving CSL. The company has now sued Dumebi for breaching the ETBA, as well as the undertaking. The company lost, as Dumebi put up a strong defence against the action, showing that the ETBA and undertaking were both unfair and unreasonable.

The above hypothetical scenario played out in the cases of *A-Z Solutions and Allied Services Limited v. Mr. Ibrahim Diab*, (Suit No: NICN/LA/571/2019), and *ATB Techsoft Solutions Limited V. Eniola Grace Ake*, (Suit No: NICN/LA/100/2020), judgments of National Industrial Court of Nigeria (NICN) per Hon. Justice I.G. Nweneka, delivered on January 25, 2021, and March 16, 2021 respectively.

**Facts and Findings**

1. *ATB Techsoft Solutions Limited v. Eniola Grace Ake*

Eniola Grace Ake (Eniola) was employed by the ATB Techsoft Solutions Limited (ATB), and subsequently executed an Employment Bond Agreement (EBA), wherein she undertook to pay her one year gross salary to the company if she disengages from ATB before the expiration of three (3) years from the date of the EBA.

Eniola worked for ATB for over a year, and resigned. During the pendency of the employment, Eniola was never trained, nor did ATB expend any sum of money on her training. ATB sued for enforcement of the EBA and payment of the sum of ₦1,419,840.00 (one million, four hundred and nineteen thousand, eight hundred and forty naira), being the amount purportedly due under the EBA. It was argued on behalf of Eniola that the EBA was unreasonable as the company failed to justify same, having not sent her on any training. Eniola had actually trained herself by enrolling for free courses online and sending the certificates to ATB's Human Resources Department to show that she had invested her time on self-development to grow on the job.

After hearing the parties, the court gave judgment in Eniola's favour and held that the company, having failed to invest in training her, cannot enforce the EBA as there was nothing to justify the restriction to bind her to the company for three (3) years.

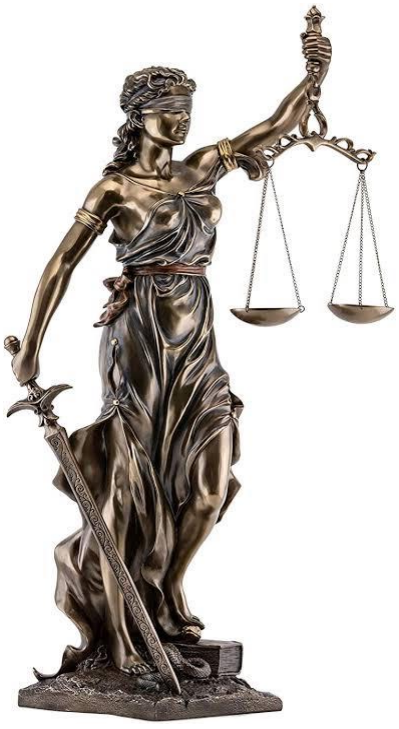
2. *A-Z Solutions and Allied Services Limited v. Mr. Ibrahim Diab*

Mr. Ibrahim Diab (Diab), a Lebanese, was employed by A-Z Solutions and Allied Services Limited (A-Z Solutions) as a Technician Supervisor responsible for the CCTV installation and other related security gadgets. Having worked for over three (3) years, Diab resigned from A-Z Solutions' employ. Prior to his resignation, A-Z Solutions had seized his travel document, withheld his salaries, and constantly threatened to hand him over to the Nigeria Immigration Service. To formalize the disengagement, A-Z Solutions mandated him to tender his resignation letter with an agreement not to engage in or work for any organization in the same line of business as A-Z Solutions or its direct competitors for a period of eighteen (18) months. The company also made the execution of the undertaking a condition for the payment of his arrears of salaries and release of his travel document. Diab, left with no other options, was forced to sign the undertaking.

After his exit from the company, Diab joined in the formation of a new company, D & K Electrical Solution Service Limited (D & K), engaging in similar services provided by the company. The Company sued Diab for breach of the undertaking by registering D & K and claimed a sum of US$120,000.00 (one hundred and twenty thousand United States Dollars) as compensation for breach of the undertaking. Diab denied the claim and argued that the undertaking was signed by fraud, undue influence, duress, and intimidation. He further submitted that he had the requisite training on CCTV installation before joining A-Z Solutions, being a CCTV technician expert.

The court found in favour of Diab, holding that the undertaking was not binding as it was vitiated by fraud, undue influence, and intimidation. The court further held that, assuming the undertaking was binding, the company's claim would still fail on the ground that the restriction was unreasonable as the company failed to show that any secret was passed to the Diab in relation to CCTV installment.

**Our comments:**



Generally, employment bond is prima facie unenforceable as it constitutes a restraint to trade, but would only be enforceable if it is fair and reasonable.[1] Also, the burden of proof is on the employer who seeks to enforce the covenant. Thus, to enforce an employment bond, an employer must show that same is fair and reasonable. An employment bond is considered reasonable if the specified period for which the employee must remain in the service of the employer is reasonable, the employer has incurred cost in training the employee, and the employer has offered the employee something extra, and not just employment, as a consideration for the employee's covenant to remain in its service for the specified period.

In the two cases under reference, the court missed no beat in holding the restrictions unreasonable having failed to pass the reasonability test. In *ATB's* case, ATB failed to show that it indeed trained or incurred costs in training Eniola. It was even established that she trained herself without the company's contribution, while in *A-Z Solutions'* case, A-Z Solutions failed to show that it passed any trade secret to Diab to justify the restraint. Thus, in both cases, the employer failed to show that it offered the employees something extra, and not just employment, as a consideration for the employee's covenant to remain in its service for the specified period. It is pertinent to state that the court will consider the interest of the employer, employee, and the

[1] See the earlier judgments of the Court in *Overland Airways Ltd v. Captain Raymond Jam, Suit no. NICN/LA/597/2012 and Overland Airways Limited v. Captain Raymond Jam, Suit NICN/LA/597/2012.*

public, as there is a need to balance the right of the employer to protect its business, the employee's right to work freely, and public policy.

In view of the above, an employer must, before executing an Employment Bond or undertaking restraining trade, note the following:

- Employers must not force or induce their employees to signing an an employment bond or undertaking. This is because fraud, duress, undue influence, threat, and intimation vitiates a contract and renders it unenforceable.
- To enforce a training bond, an employer must have indeed trained or expended money in training the employee. Thus, the employer must show that it incurred costs in training the employee.
- In case of restrictive covenants, an employer must show that a trade secret which it seeks to protect was passed or revealed to the employee.
- In all, the employer must ensure the contract was signed voluntarily and the employee clearly understands the terms of the contract.

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