

## **SADA Professional Advisory Bulletin**

- Clinical Bulletin - Scheme updates
- Legal Bulletin - Restraint of trade clauses in employment contracts

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Dear SADA Member

## **CLINICAL**

### **Scheme Updates**

We hope that the SADA Congress 2024 was a memorable experience, equipping you with valuable knowledge and practical tips to enhance your dental practice. SADA is grateful to all who attended. We are confident that the insights gained will contribute to your future success.

In this issue of the Clinical Bulletin, we will focus on essential updates from medical schemes that directly impact your dental practice. Stay informed about changes in tariffs, claims processes, and other relevant policies to navigate the evolving healthcare landscape.

### **Kaelo Prime Cure Dental Lab Protocol**

Kaelo Prime Cure issued a statement to all network providers reminding them that since they do not contract with dental laboratories, lab fees must be charged by the dentist using code 8099 when submitting claims for specialised dentistry. Thus, on completion of the procedure and the fitting of the appliance or prosthesis, the dentist will submit the lab invoice together with the amount claimed on the dental account and will be required to reimburse the lab directly.

### **Withdrawal of Agility Health (Pty) Ltd managed care organisation accreditation**

As per Circular 40 of the 2024 by the CMS, the Council has revoked Agility Health's managed care organization accreditation due to its failure to meet financial and compliance standards as set out in Regulation 15B(2)(d) to the Medical Schemes Act. The Council confirms that the company may reapply for accreditation once it can demonstrate full compliance with these standards.

### **Essential employee benefits dental benefits (EEB) now managed by DRC**

Dental Risk Company (DRC) announced on 17th September that, effective immediately, it will be taking over the management of EEB dental benefits for over 35,000 members. This change is due to previous issues with member validation by the prior administrator.

It has been requested that to ensure a smooth transition, all future dental claims for EEBS members must be routed to DRC as per the below contact information:

DRC Call Centre: [087 943 9611](tel:0879439611)

Claims: [claims@dentalrisk.com](mailto:claims@dentalrisk.com)

Provider enquiries: [enquiries@dentalrisk.com](mailto:enquiries@dentalrisk.com)

Authorisation: [auths@dentalrisk.com](mailto:auths@dentalrisk.com)

An updated manual outlining the new process will be sent to all providers.

## LEGAL

### **Restraint of trade clauses in employment contracts**

Dentists often enquire whether it is worthwhile to insert restraint provisions in employment contracts with their professional staff. There is a common misconception amongst many members that agreements in restraint of trade are invalid and unenforceable. As a matter of fact, and law, nothing could be further from the truth.

In South Africa, restraint of trade clauses are typically valid and enforceable unless they are unreasonable or contrary to public policy. The principle is based on the fact that parties who enter into contracts freely and voluntarily must honour their obligations. An unreasonable restraint of trade is one that prevents a party from engaging in trade or commerce without a corresponding interest deserving of protection.

Restraint of trade clauses have become an integral part of modern employment contracts, especially in competitive industries like dentistry, where professional clinical employees often have access to confidential information such as patient information, dental pricing, suppliers, practice management systems, revenue projections etc.

A restraint of trade is an agreement between an employer and an employee, or a provision in an employment contract that restricts an employee from entering into employment with a competitor of the employer, or establishing a business in competition with the employer, for a specified period in a specified geographical area, following termination of employment.

### **Purpose of restraints**

The primary purpose of restraints is to protect the practitioner owner's goodwill, patient lists and connections, suppliers and trade secrets including prices and systems. A practice owner typically invests considerable time and money into building up the goodwill of their practice, so they will want to protect that goodwill against the risk of a departing practitioner taking patients or staff with them. These clauses aim to restrict employees from opening similar practices or being employed in the area after leaving and actively soliciting patients of the practice.

It is necessary to understand that restraint of trade clauses in agreements do not fall under labour law, but is instead regulated by the Law of Contract. Employees are cautioned not to assume that a restraint agreement is a bluff by the employer. Signing (or later breaking) the contract should not be done lightly.

### **Challenges Faced by Employees**

Employees are often in a weaker bargaining position and may be unable to negotiate the terms of a restraint clause effectively. These clauses can be harsh or unfair, potentially preventing employees from pursuing their occupation even when they are not directly competing with their former employer.

## **Court cases**

The courts have held restraints are generally valid unless they are contrary to public policy. There is a need to balance the public interest in ensuring agreements are enforced against the benefit of allowing individuals the freedom to trade and pursue professions.

A court will always look at the circumstances of each case in deciding whether or not to uphold the restraint.

The enforceability of a restraint of trade is therefore dependent on various factors and there is no one size fits all approach. Each case will be determined based on its own set of facts.

As restraints of trade are regulated by the law of contract the circumstances surrounding every restraint of trade clause are different – simply because the employers are involved in different industries, and have different assets, trade secrets etc that need to be protected.

Therefore, no hard and fast rules can be laid down – as indeed is the case with many aspects of the employment relationship – circumstances are different, and each case must be examined separately.

Individuals should be free to sell their skills and to practice their trade in the market to make a living. This is a fundamental constitutional right. They are also free to conclude legally binding contracts, such as a restraint of trade, of their own free will. Having freely concluded a contract, they are expected to keep their promises. It follows that if a person freely signs a restraint of trade and then wants the court to set it aside – he or she is effectively asking the court to condone his breach of promise.

### **What does the court consider in restraint of trade cases?**

***Does the employer have a protectable interest?*** This is a “trade secret” – something unique which the practice has created to help it to compete in the market. By definition, the “secret” is not freely known or available in the public or other practitioners. As it is unique – it has a value which the practice has an interest in protecting. It could be confidential information such as patient lists, fees, medical scheme contracts, procedures performed, suppliers, practice management systems, operating procedures marketing strategies etc. formulas, recipes, production methods, and designs etc.

***Could the employee potentially prejudice the protectable interest?*** The practice does not have to show that actual harm has already been done. The court will enforce the restraint if the employer practitioner can show that there is serious potential for harm if the ex-employee is allowed to trade freely in the market. The facts of the case will determine whether the potential exists or not.

***Is the restraint of trade reasonable?*** If there is a protectable interest and the employee could potentially prejudice it – the court will consider whether the duration and the geographic area of the restraint are reasonable. The shorter the restraint period is and the smaller the area it applies to – the more reasonable the restraint is likely to be. For example, a restraint which is for two years and covers the whole of the country could be unreasonable – but one which is for six months and covers the province in which the employer’s business mainly operates could be reasonable.

The same principle applies to the scope of activities which the restraint covers. For example, if the employee is a dentist – it would be unreasonable to impose a restraint which stops him/her from working in the dental industry as a whole. But one which prevents him or her from working in the employer’s specific business niche – could be reasonable.

**Is the restraint against public policy?** If all these criteria for a restraint exist and its purpose is to protect the employer's legitimate business interests – it will probably be enforceable. If they are not, and the real purpose is simply to stop the employee from practising his/her dental occupation, the court will be less inclined to enforce it – because it would be against public policy.

Courts may also enforce parts of the restraint clause that are reasonable and allow them to modify the contract to reflect a more balanced agreement effectively.

The practitioner employer who is the applicant in a restraint enforcement application (usually the ex-employer) has, at the outset, only to prove the restraint agreement and the breach thereof. If he (or she) does so, then the onus is on the respondent (usually the ex-employee subject to the restraint, and sometimes the new employer) to show why the binding agreement should not be enforced.

An employee who wants to be released from a contract in restraint of trade must be able to persuade the court that his or her right to work outweighs the potential prejudice his ex-employer could potentially suffer if the employee leaves and competes with the ex-employer in the open market. Only then will a court relieve an employee of the need to keep his or her promise.

The court will consider the circumstances prevailing at the time enforcement is sought, not when the contract was concluded.

In South African law, there is no formal legislation relating to restraint of trade.

In conclusion, a restraint of trade is enforceable provided that it is reasonable, and the prejudice from applying such a clause does not outweigh the right to freedom of trade as provided for in the Constitution.

## PARTICIPATION CALL

### **Please participate in the following**

Sindisiwe Kubeka, an MPhil student from the Department of Business Management at the University of Pretoria is participating in an academic research study titled *"Exploring the Relationship of Digital Literacy on Healthcare Graduates' Employability."*

The purpose of this qualitative study is to determine the relationship between digital literacy and the employability of healthcare graduates. A generic qualitative research approach will be employed, and data for this research will be collected through semi-structured interviews.

The following inclusion criteria of participants apply:  
Individual participants must

- have graduated from a South African university.
- have a dental degree.
- have completed community service within the last three years in South Africa.
- be working in the healthcare field from which graduated.

If you meet the above criteria and wish to participate in this academic research study, please contact Sindisiwe Kubeka via email at [sindisiwe.kubeka@up.ac.za](mailto:sindisiwe.kubeka@up.ac.za) with the subject line: Academic research study participant.

SADA has been assured that all information will be maintained in a secure environment and only utilized as per the communication submitted by you.

Please ensure you include the following details in your communication:

- Title:
- First name:
- Last name:
- Mobile:
- Email:
- Professional number:
- University of graduation:
- Dental degree:
- Year of graduation:
- Community service year:
- Healthcare field in which I am currently engaged:

Yours in oral health

**Dr Tinesha Parbhoo - Head Clinical Support**

**Punkaj Govan - Head Legal and Corporate**

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