



NATIONAL UNIVERSITY OF LESOTHO

THE EXTENT TO WHICH NON-COMPETE AGREEMENTS IMPEDE  
DEVELOPMENT

By Mamphokoane, Ramakhale, 201801713

A mini-dissertation submitted in partial fulfilment of the requirements of the  
degree of Master of Laws (LL.M.) of the Faculty of Law of the National  
University of Lesotho

Supervised by: Dr Tsotang Tsietsi

May 2024

## ABSTRACT

The use of non-compete agreements has faced some criticism. Research has shown that non-compete agreements block employees from freely switching jobs. This may suppress wages and deprive them of better working opportunities. They further result in the lack of mobility and competition, which may reduce bargaining power for employees, consequently leading to lower wages. As a result, development is hindered. This study aims to determine the extent to which non-compete agreements impede development. The study has predominantly relied on secondary data through the desk study method of data collection and the information has come from sources such as journal articles, books, case studies, international instruments and reports. The results indicate that non-compete agreements impede development. On this basis, it is recommended that employers and employees use alternatives to non-compete agreements as they are less restrictive to employee's career growth.

Declaration:

I, MAMPHOKOANE RAMAKHALE, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

Name: Mamphokoane Ramakhale

Signature: M. Ramakhale

Date: 17 May 2024

Place: Maseru, Lesotho

## **ACKNOWLEDGEMENTS**

To everyone who have supported me throughout this journey, thank you.

<b>Chapter 1 – Introduction .....</b>	<b>8</b>
1.1 Background .....	8
1.2 Problem Statement .....	10
1.3 Research Questions .....	13
1.4 Significance of Study .....	13
1.5 Literature Review .....	13
1.6 Hypothesis .....	16
1.7 Research Methodology.....	17
1.8 Chapter Breakdown.....	17
<b>Chapter 2 - The Impact of Non-Compete Agreements on Job Mobility and Entrepreneurship, and Their Relation to Development.....</b>	<b>18</b>
2.1 Introduction .....	18
<b>2.2 Overview of Non-Compete Agreements.....</b>	<b>18</b>
2.3. Effects of Non-Compete Agreements on Job Mobility.....	19
2.4 Effects of Non-Compete Agreements on Entrepreneurship.....	23
2.5 Conclusion.....	25
<b>Chapter 3- The Enforceability and Legality of Non-Compete Agreements in Different Legal Frameworks.....</b>	<b>26</b>
3.1 Introduction .....	26
3.2 The Legality and Enforceability of Non-Compete Agreements .....	26
3.2.1 South Africa.....	30
3.2.2 Lesotho .....	32
3.3 The Economic Impacts of Non-Compete Agreements on Overall Development.....	34
3.4 Conclusion.....	39
<b>Chapter 4- Alternatives to Non-Compete Agreements.....</b>	<b>40</b>

4.1 Introduction .....	40
4.2 Exploring Different Options.....	41
4.2.1 Non- Disclosure Agreements.....	41
4.2.2 Non-Solicitation Agreements .....	44
4.2.3 Garden Leave Agreement.....	46
4.3 Conclusion.....	49
<b>Chapter 5 -Conclusions and Recommendations .....</b>	<b>50</b>
5.1 Introduction .....	50
5.2 Summary of Findings .....	51
5.3 Recommendations .....	51
5.4 Conclusion.....	52
<b>BIBLIOGRAPHY .....</b>	<b>54</b>

## **LIST OF ABBREVIATIONS AND ACRONYMS**

NCA	Non Compete Agreements
UNDP	United Nations Development Programs
HDR	Human Development Report
USA	United States of America
UNSDG	United Nations Sustainable Development Goals
GDP	Gross Domestic Product
HDI	Human Development Index
GLA	Garden Leave Agreement

## Chapter 1 – Introduction

### 1.1 Background

Non-compete agreements (NCA's) are a post-employment prohibition that bars the employee from his or her most productive use of skills, knowledge, and work experience.<sup>1</sup> NCAs legally bind a current or former employee from competing with an employer for a specific time after employment ceases.<sup>2</sup> These agreements are identified by clauses in the employment contracts that prevent workers from working for competitor companies during or after their current employment.<sup>3</sup> This means that an employee cannot work for a company offering the same goods and services or start their own company in competition with their current/former employer for a specific period of time. The first known case involving a non-compete was the Dyer's Case,<sup>4</sup> which took place in 1414. Mr. John Dyer had given a promise to not exercise his trade in the same town as the plaintiff for six months but the plaintiff had promised nothing in return. The plaintiff had not bothered to attend court for the hearing. On the plaintiff's attempt to enforce this restraint, the judge refused to enforce the non-compete and reportedly said that if the plaintiff were here he would go to prison until he paid a fine to the King. However, the tides of non-compete enforcement turned by 1621 when a non-compete that was limited in geographic scope was enforced.<sup>5</sup> Non-compete laws continued to evolve over time, specifically between 2007 and 2013.<sup>6</sup> States started to reevaluate their non-compete laws in several notable ways, triggering additional states to start reevaluating their laws.<sup>7</sup>

---

<sup>1</sup> Charles Tait Graves & James Diboise, 'Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?' (2007) 1 Entrepreneurial Bus. L.J pp. 323,330.

<sup>2</sup> Adam Hayes, 'What is a Non-compete agreement? Its Purpose and Requirements' ( Investopedia, 2023) <<https://www.investopedia.com> > accessed 30 May 2024.

<sup>3</sup> A Mark & O Lobel, 'Banning Non-compete Agreements to Create Competitive Job Markets '(2021) San Diego Legal Studies Paper No. 21-010 <<https://papers.ssrn.com> >accessed 31 August 2023.

<sup>4</sup> Dyer's case (1414) 2 Hen. V, fol, pl. 26.

<sup>5</sup> Alger v Tacher 36 Mass (1837) pp. 51-53.

<sup>6</sup> Fair Competition Law, 'A Brief History of Non-compete Regulation' (Fair Competition Law, 2021) <<https://faircompetition.com> > accessed 30 May 2024.

<sup>7</sup> Inc. v Douglas 727 S.W.2d 698.

These agreements were used to help companies protect confidential information like trade secrets for example.<sup>8</sup> They may also be known as non-competition agreements which are a restrictive covenant between an employer and employee that puts some restrictions on what an employee can do once they are no longer employed by that particular employer.<sup>9</sup> Consequently, they prevent workers from getting a job in their field if they leave a position.<sup>10</sup> They also ensure that the employee will not use the information learned during employment to start a business and compete with the employer once the employment has ended.<sup>11</sup>

Moreover, these contracts often impose limitations on employees in terms of time, profession, and/or location.<sup>12</sup> A geographic restriction might prevent someone from accepting employment in certain parts of the country. On the other hand, time restriction might stop someone from working for a competitor for a specific period after leaving a job. Lastly, an industry restriction might stop someone from working for a specific kind of business/in a certain sector. Non-compete agreements can occasionally stop employees from founding their own rival businesses.<sup>13</sup>

In a nutshell, a non-compete agreement is a contract between an employer and an employee whereby the employee agrees not to work for any competitor or start their own competing business for a specified period of time after leaving the company. The aim is to protect the employer's business interest and prevent the employee from taking any important information to a competitor.<sup>14</sup> Non-compete agreements also help companies to invest in employees but they can

---

<sup>8</sup> U.S. Government Accountability, 'Non-compete Agreements' (Gao, 2023) <<https://www.gao.gov>> accessed 8 December 2023.

<sup>9</sup> 'Non-competition Agreements' <<https://fiveminuteslaw.com>> accessed 26 April 2024.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> A Mark & O Lobel, 'Banning Non-compete Agreements to Create Competitive Job Markets' (2021) San Diego Legal Studies Paper No. 21-010 <<https://papers.ssrn.com>> accessed 31 August 2023.

<sup>13</sup> Ibid.

<sup>14</sup> John M McAdams, 'Non- compete agreements: A review of the literature' ( Federal Trade Commission, Bureau of Economic,2019) <<https://papers.ssrn.com>> accessed 31 August 2023.

also limit workers' choices.<sup>15</sup> Companies invest in employees by providing development programs in the form of workshops to educate and provide new skills to employees.

The law governing non-compete agreements can be quite confusing, causing some difficulties.<sup>16</sup> This is because laws regarding non-compete agreements vary greatly from state to state. There are also differences in the regulation of these agreements. Some states regularly uphold reasonable non-compete agreements while others rarely enforce any such provisions.<sup>17</sup> The first careful reformulation of the reasonableness test came in an English case decided in 1831.<sup>18</sup> By reasonable, it is meant that the length of time, geographic scope and the type of activities restricted are necessary to protect the former employer's business such as preserving the former employer's relationships with its customers.<sup>19</sup> In many cases, states fall somewhere in between, taking a closer look at non-compete agreements compared to other contracts but still permitting the enforcement of many of them.<sup>20</sup> Moreover, some states have statutes governing the enforceability of non-competes, whereas others have left the question of enforceability to common law development.<sup>21</sup> The aim of this dissertation is, thus, to examine the extent to which non-compete agreements can impede development by examining case studies, industry data and legal precedents.

## 1.2 Problem Statement

Initially non-compete agreements were designed to be used by firms to protect their interests, including confidential information, such as trade secrets and customer identities.<sup>22</sup> In addition to protecting proprietary information, non-compete agreements offer a number of advantages to the employer such as the employee's retention. Employee retention refers to the strategies employers

---

<sup>15</sup> Ibid.

<sup>16</sup> Griffin Pivateau, 'Putting the Blue Pencil Down: An Argument for Specificity in Non-compete Agreements' (2008) 86 NEB.L.REV pp. 672,705.

<sup>17</sup> Ibid.

<sup>18</sup> Beck Reed, *History of Noncompete Regulation* (2021).

<sup>19</sup> Inc. v Douglas 727 S.W.2d 698.

<sup>20</sup> Gillian Lester & Elizabeth Ryan, 'Choice of Law and Employee Restrictive Covenants: An American Perspective' (2010) 31 COMP.LAB.L pp. 389,392.

<sup>21</sup> Ibid.

<sup>22</sup> Marx M, *Essays on Employee Non-compete Agreements* (2009).

use to retain the employees in their workforce.<sup>23</sup> These advantages for firms, however, are obtained at the expense of individual's career flexibility.<sup>24</sup> This is because they block employees from freely switching jobs, which may also suppress wages and deprive them of better working conditions.<sup>25</sup> This is evident because job opportunities and competition become limited in the labor market.<sup>26</sup> Furthermore, the lack of mobility and competition can result in reduced bargaining power for employees consequently leading to lower wages.<sup>27</sup>

Non-compete agreements may also restrict workers in underpaid industries from increasing their pay and working conditions because these individuals may frequently earn more by switching jobs.<sup>28</sup> In some cases, an employer may present a non-compete contract as either a take it or leave it contract, forcing workers to sign it or to forego employment.<sup>29</sup> As a result of the abovementioned, it can be concluded that non-compete agreements can hinder the progress and development of a country.<sup>30</sup> Development refers to developing countries working their way up the ladder of economic performance, living standards, sustainability and equality.<sup>31</sup> This is in a sense that, non-compete agreements restrict employee mobility and competition in the labor market which may

---

<sup>23</sup> 'Employee Retention' <<https://cambridgedictionary.com> accessed 15 May 2024.

<sup>24</sup> Marx M, Fleming L and Others, *Regional Disadvantage? Non-compete Agreements and Brain Drain* (2010) SSRN Electronic Journal <<https://www.researchgate.net>> accessed 31 May 2024.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Fallick B & Rebitzer, 'Job hopping in Silicon Valley: Some Evidence Concerning the Micro Foundations of a High Technology Cluster' (2006) 3 *Review of Economics and Statistics* pp. 472

<sup>28</sup> Naija A. Farley, 'Non-compete Agreements' (Nelp, 2021) <<https://www.nelp.com>> assessed 21 January 2024.

<sup>29</sup> N Farley, 'Non-compete Provisions in Context : Why NELPS supports calls for reform' (Nelp, September 27 2018) <<https://www.nelp.org>> accessed 25 August 2023.

<sup>30</sup> Charles Tait Graves & James Diboise, 'Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?' (2007) 1 *Entrepreneurial Bus. L.J* pp. 323,330.

<sup>31</sup> 'Development' <https://globalsherp.org> accessed 12 December 2023.

discourage investment in some areas leading to poor progress of development and economic expansion.<sup>32</sup>

Furthermore, the labor market is extremely underdeveloped and constrained in nations like Lesotho.<sup>33</sup> Therefore, non-compete agreements that limit employee mobility may have a detrimental impact on the expansion and development of the economy.<sup>34</sup> This is due to the fact that non-compete agreements limit the freedom of talented and competent employees to switch professions and impart their knowledge and skills. As a result, it is more difficult for new enterprises to establish themselves, which is crucial for enhancing Lesotho's economy and general development. Additionally, as previously indicated, non-compete agreements depress employee earnings. As a result, since many employees in Lesotho already receive poor pay, these agreements worsen wage disparity, which in turn increases poverty.<sup>35</sup> Development is therefore impacted.

The United Nations Development Program's (UNDP) annual Human Development's Reports (HDR) defines human development as; "the expansion of people's freedoms and capabilities to lead lives that they value and have reason to value. It's about expanding choices. Freedoms and capabilities are a more expansive notion than basic needs"<sup>36</sup> The right to freedom and the right to work consequently is also infringed as non-compete agreements limits the employee's mobility and they could sometimes result in unemployment if employees have to leave a job and are unable to find a new job that meets the requirements of their non-compete contract.<sup>37</sup>

This work argues that non-compete agreements hinder development in one's country as a previous employee cannot exercise or expose the skills learned and the information they have gathered. This means they cannot share their skills and knowledge in a wider industry which may improve development. They cannot also start a new business which will eventually add to the development of a country by introducing new markets and creating jobs. Employee mobility is a key ingredient

---

<sup>32</sup> Smith J, 'The impact of Non-Compete Agreements on Economic Development' (2020) 15 Journal of Business Studies pp.45-62.

<sup>33</sup> Ibid 22.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 29.

<sup>36</sup> Ibid.

<sup>37</sup> A Farley, *Non-compete agreements* (May 26 2022).

in the formation of successful innovation of communities.<sup>38</sup> It is, therefore, important to explore other alternatives that strike a balance between protecting businesses and preserving worker's freedom to pursue new opportunities.

### 1.3 Research Questions

The aim of this dissertation is to examine the extent to which non-compete agreements can impede development. To reach this purpose, the study will interrogate the following questions:

1. What is the impact of non-compete agreements on job mobility and entrepreneurship, and their relation to development?
2. How do non-compete agreements impede overall economic development?
3. How do different legal frameworks and enforcement mechanisms influence the validity and enforcement of non-compete agreements?
4. What alternatives are available to protect businesses' interest without impeding individual and industry development?

### 1.4 Significance of the Study

This study aims to contribute to the realization that non-compete agreements have some legal implications and effects on individuals, businesses, and overall development by hindering employee's mobility, for example. It argues that it is, therefore, necessary to explore other alternatives that strike a balance between protecting businesses and preserving workers' freedom to pursue new opportunities. As a result, this may contribute to a more sustainable environment for growth and development.

### 1.5 Literature Review

Post-employment covenants to not compete (or non-compete agreements (NCA's)) have been increasingly used especially, in the United States of America (USA).<sup>39</sup> Accordingly, more studies have begun to investigate how NCAs might affect employees, organizations and the overall development.<sup>40</sup> Moreover, the Courts have also recognized a firm's right to use non-compete

---

<sup>38</sup> Charles Tait Graves & James Diboise, 'Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?' (2007) 1 Entrepreneurial Bus. L.J pp. 323,330.

<sup>39</sup> Kwan Seung Lee, Non compete agreements: History, Diffusion and Consequences (DPhil Cornell University 2019) pp 1 < <https://ecommons.cornell.edu> > accessed 31 May 2024.

<sup>40</sup> Ibid.

agreements due to the difficulty of detecting whether an ex-employee is abiding by non-compete agreement.<sup>41</sup> Nonetheless, some legal scholars, such as Dworkin argue that Courts are often reluctant to enforce these agreements and other contracts related to individuals divulging trade secrets.<sup>42</sup> The national survey of the USA finds that 18% of employees in the USA were bound by non-compete agreements as of 2014, and 38% had signed one at one point during their career.<sup>43</sup> Moreover, the use of non-compete agreements is generally higher in technical and high skilled labour occupations and industries.<sup>44</sup>

The existing research finds that non-compete agreements are uncommon use across states regardless of how enforceable the agreements are, and are only less common in states where they are completely unenforceable as compared to states with stricter enforceability.<sup>45</sup> This suggests that non-compete agreements don't exist in countries where they are not enforceable as compared to where they are restrictly enforced. Some explanations for non-compete agreements is that they potentially solve a hold up problem for certain types of investment (like training), allowing firms to make mutually beneficial investments in their work force.<sup>46</sup> A hold up problem is a situation where two parties may be able to work most efficiently by cooperating but they don't because of the fear of giving the other party increased bargaining power and thus reducing their own profits.<sup>47</sup> They also allow firms to reduce recruitment and training costs by lowering turnover, and firms may offer a wage premium to compensate signers.<sup>48</sup>

---

<sup>41</sup> Decker, *Covenants Not to Compete* (Semantic Scholar, 1993).

<sup>42</sup> Randall Thomas, Norman Bishara and others, *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post Employment Covenants* (2015) 68 *Vanderbilt Law Review* <<https://papers.ssrn.com>> accessed 31 May 2024.

<sup>43</sup> Kate Hamme, 'How Non-compete Clauses Cost Americans on a year' (Cnbc, 2023).

<sup>44</sup> John M McAdams, 'Non- compete agreements: A review of the literature' ( Federal Trade Commission, Bureau of Economic,2019) <<https://papers.ssrn.com> > accessed 5 December 2023.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> 'Hold-up Problem' <<https://www.cambridge.org>> accessed 13 May 2024.

<sup>48</sup> Ibid.

The most consistent observed finding is that non-compete agreements bind employees to their employers.<sup>49</sup> This is because they restrict workers' employment options ex post, resulting in lower job mobility.<sup>50</sup> Johnson and Lipsitz<sup>51</sup> argue that, offering or requiring non-compete agreements is yet another way for businesses to adjust compensation (downward, as they impose costs on employees) and capture a larger share of the match surplus. However, worker's mobility is an important source of wage growth for younger employees, with job changes accounting for approximately a third of early career wage growth.<sup>52</sup> Adding more, greater worker mobility may lead to knowledge spillovers that spread information to other firms, enhancing productivity.<sup>53</sup> Non-compete agreements restrict access not only to outputs but to inputs as well.<sup>54</sup> This is by prohibiting employees from working for or starting a new business.

Furthermore, non-compete agreements are not strictly limited to protecting information or training given to employees while at a specific firm, they also affectively give firms rights over any expertise deemed competitive.<sup>55</sup> These agreements for individuals may produce social consequences that open up several avenues for future work.<sup>56</sup> These include specialization versus generalism, which means having a broad range of knowledge and skills across various areas rather than specializing in one area,<sup>57</sup> also allocation of talent to various types of organizations,

---

<sup>49</sup> Marx M, '*Essays on Employee Non-compete Agreements*' ((Harvard Business School, 2009).

<sup>50</sup>John M McAdams, 'Non- compete agreements: A review of the literature' ( Federal Trade Commission, Bureau of Economic, 2019) <<https://papers.ssrn.com> > accessed 5 December 2023.

<sup>51</sup> Ibid.

<sup>52</sup>Topel and Ward, 'Job Mobility and the Careers of Young Men'(1992) 107 *The Quarterly Journal of Economics* pp. 439-479

<sup>53</sup> *Inc. v Douglas* 727 S.W.2d 698.

<sup>54</sup> Matt Marx, 'American Sociology Review'(2011) pp.76:695 <https://asr.sagepub.com> < accessed 6 December 2023

<sup>55</sup> Ibid.

<sup>56</sup>John M McAdams, 'Non- compete agreements: A review of the literature' ( Federal Trade Commission, Bureau of Economic,2019) <<https://papers.ssrn.com> > accessed 5 December 2023.

<sup>57</sup> 'Specialization versus Generalism' <<https://www.collinsdictionary.com>> accessed 5 December 2023.

geographic mobility and stratification.<sup>58</sup> Some school of thought by Seung argue that high employee mobility is conducive to innovations but that NCAs block the free flow of employees, and their knowledge which will end up stifling creativity and eventually economic growth.<sup>59</sup> While on the other hand, NCAs may facilitate innovations and acquisitions by easily protecting legitimate business interests like confidential information or trade secrets.<sup>60</sup>

However, there are other explanations that may account for slow development. These include economic instability.<sup>61</sup> This is achieved by obstructing the investment flow, which causes market volatility.<sup>62</sup> It also causes unemployment and inflation, which may reduce citizens' purchasing power and, as a result, it lowers living conditions and a cycle of underdevelopment.<sup>63</sup> Moreover, slow development may be caused by corruption in governance.<sup>64</sup> This is because corruption significantly hinders progress by shifting public resources away from vital services such as education, healthcare and infrastructure.<sup>65</sup> As a result, efficiencies may arise in the distribution of resources to the public, thereby impeding overall development.<sup>66</sup>

## 1.6 Hypothesis

Non-compete agreements can impede development of a country, to a certain extent, by restricting the ability of workers to move between companies and industries and also their right to work and choose freely where to work and when. This limits competition and it hinders the flow of talent and innovation in the market. Moreover, even though non-compete agreements are intended to protect a company's intellectual property such as trade secrets, it also limits an individual's ability for better standards of living and to compete in job markets. This may also impede development

---

<sup>58</sup> Ibid 51.

<sup>59</sup> Kwan Seung Lee, Non compete agreements: History, Diffusion and Consequences (DPhil Cornell University 2019) pp 1 < <https://ecommons.cornell.edu> > accessed 31 May 2024.

<sup>60</sup> Ibid.

<sup>61</sup> Arestis P and Sawyer M, *21<sup>st</sup> Century Keynesian Economics* ( Palgrave Macmillan, 2010) pp.1

<sup>62</sup> Ibid.

<sup>63</sup> Stiglitz J, 'Freefall: America, Free Markets, and the Sinking of the World Economy' ( *W Norton & Company*, 2010)

<sup>64</sup> Mauro P, 'Corruption and Growth' (1995) 110 *The Quarterly Journal of Economics*, 681-712

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

especially in industries where the free movement of talent is very important for development and growth.

### 1.7 Research Methodology

To determine the extent to which non-compete agreements impede development, the study will predominantly rely on qualitative research. The study has collected secondary data through the desk study method of data collection. This type of information will be come from sources such as journal articles, books, case studies, international instruments and reports. Primary data on the other hand, will be collected through observations.

### 1.8 Chapter Breakdown

Chapter 1 is the Introduction. It entails an overview of the study. It provides its importance, the problem that the study aims to address. It entails the research questions, it explains why our research is important, the literature review, the hypothesis and the methods used to conduct the study.

Chapter 2 provides the effects of non-compete agreements on job mobility and entrepreneurship and their relation to development. It sheds light on how job mobility and entrepreneurship are affected by non-compete agreements and the relationship of non-compete agreements and development.

Chapter 3 highlights the enforceability and legality of non-compete agreements. It examines the legal frameworks and factors that determine the enforceability of these agreements in different jurisdictions. It further explores requirements for the legality of non-compete agreements.

Chapter 4 is about alternatives to non-compete agreements. It examines alternatives to non-compete agreements in order to protect the business's interests and those of employees.

Chapter 5 explores the conclusions and recommendations. The chapter presents the conclusion reached regarding non-compete agreements which are drawn upon the findings and analysis of the research. It also provides recommendations to curb the problem.

## Chapter 2 - The Impact of Non-Compete Agreements on Job Mobility and Entrepreneurship, and Their Relation to Development

### 2.1 Introduction

This chapter provides an overview of the concept of non-compete agreements and how they consequently affect job mobility and entrepreneurship; impeding development. The chapter addresses the hypothesis of this study. Traditionally non-compete agreements have been in use to prevent workers from transferring trade secrets or research and development knowledge to competitors.<sup>67</sup> They were restricted from starting their own competing businesses as well.<sup>68</sup> Therefore, it can be concluded that these agreements affect job mobility and entrepreneurship opportunities. They affect workers in both low and high skilled labour businesses.<sup>69</sup> Employees with low skills are those that have required little or no education or advanced training.<sup>70</sup> On the other hand, high skilled labour are employees generally characterized by advanced education and the possession of knowledge and skills to perform complicated tasks.<sup>71</sup> This chapter will further shed light on how non-compete agreements are related to development.

### 2.2 Overview of Non-Compete Agreements

Non-compete agreements are contracts that are used in employment around the world.<sup>72</sup> They are used to protect employer's investments, talent or customer relationships while at the same time prohibiting employees from engaging in activities that would compete with the employer.<sup>73</sup> Young, in his article Non-Compete Clauses, Job Mobility and Job Quality explained that the nature of non-compete agreements is such that they prevent employees from leaving for rival companies

---

<sup>67</sup>Adam Hayes, Andy Smith and others, 'Non-Compete Agreements'( Investopedia, 2024) <<https://www.investopedia.com/terms/n/non-compete-agreement.html>> accessed 19 January 2024.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> 'High-skilled Labour' <<https://www.ilo.org>> accessed 19 January 2024.

<sup>72</sup> Cassie Boyle, Samantha Saltzman and others, *Non-Compete Around the World: Top Issues and Strategies for Global Employers* (Dla Piper, 2023).

<sup>73</sup> Ibid.

or disclosing private information such as trade secrets.<sup>74</sup> Moreover, he emphasises that these agreements have the benefit of encouraging expenditure in intangible assets, such as worker training programs and research, which may be advantageous to both the company and employees.<sup>75</sup> This is because employees gain more knowledge and skills becoming more advanced which further enhances their careers and for employer's, training programs promote better overall performance. Therefore, from Young's perspective, it can be understood that non-compete agreements may not only have a negative impact, but they may also be advantageous in some ways. This work argues that, be that as it may, the nature of non-compete agreements, although advantageous to some extent, such advantage is most likely to be seen to benefit an employer more than an employee. As will be seen throughout this study, employees are more disadvantaged by these agreements. Lavetti discusses the effects of non-compete agreements in his article, *Non-compete Agreements in Employment Contracts*.<sup>76</sup> He explains that one of their effects on employees is that they limit their freedom to switch jobs, as a result, such restriction on job mobility may cause them to lose negotiating strength and impede pay increases.<sup>77</sup> Below, the effect on job mobility and entrepreneurship will thoroughly be discussed.

### 2.3. The Effects of Non-Compete Agreements on Job Mobility

Job Mobility refers to the movement of employees across grades, positions or even occupations.<sup>78</sup> This section will provide the importance of job mobility which includes its advantages and disadvantages. It will further shed light on how non compete agreements affect job mobility and how the impairment of job mobility consequently impedes development.

Although the use of non-compete agreements is often associated with high skilled labour jobs, they are also common among low skilled labour jobs. The rationale behind this is that in high skilled

---

<sup>74</sup> Samuel Young, *Non-compete Clauses, Job Mobility and Job Quality: Evidence from a Low-Earning Non-compete Ban in Austria* (2021).

<sup>75</sup> Kurt Lavetti, *Non-compete agreements in employment contracts* ( Ohio State University, 2021).

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Trinet Team, 'Unlocking Career Mobility: A Path to Employee Retention and Growth' (2023) <<https://www.trinet.com>> accessed 15 May 2024.

labour jobs, employees are exposed and have access to confidential information. Examples of low-labour skilled job include taxi drivers or sandwich makers.<sup>79</sup>

Employees are restricted from working for the employer's competitor for a period of time after employment ceases, switch jobs and seek higher-paying opportunities. Therefore, this results in limited job mobility and the restriction normally benefits firms over workers.<sup>80</sup> They can increase a firm's productivity by protecting their trade secrets or increasing their investment in employee's training.<sup>81</sup> For workers, non-compete agreements could reduce their earnings by putting a restriction on their ability to move to higher paying firms or to bargain for pay raises.<sup>82</sup> They may result in lower wages for employees as a result of the limited ability to switch job.<sup>83</sup> This means that employees are not able to search for new jobs with better pay. Therefore, this may limit employee's economic opportunities and suppress their incomes.<sup>84</sup>

As employees cannot seek better opportunities, this affects their level of material comfort and degree of prosperity that individuals have which consequently may affect development to some extent. As a result of limited job mobility, levels competition in the market are decreased which consequently stifles innovation economic growth. This illustrates how development is affected.

Employee earnings are also impacted by these agreements because, if job mobility was not constrained as a result, changing jobs may be a means for employees to increase their wages which will further encourage economic growth, improve their living standards and improving development. This is because when employees earn more money, it means there is more money to spend on goods and services. The demand become high thereby stimulating economic growth which contributes to better overall development. Moreover, when the living standards of individuals are improved, their overall well-being is enhanced. It results in a sustainable

---

<sup>79</sup> Samuel Young, Non-compete Clauses, Job Mobility and Job Quality: Evidence from a Low-Earning Non-Austria' (SSRN Electronic Journal,2021) <<https://www.researchgate.net/>> accessed 20 April 2024.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> U.S. Government Accountability, 'Non-competeAgreements'(Gao, 2023) <<https://www.gao.gov>> accessed 2023.

<sup>84</sup> Ibid

environment for development. The constraint of job mobility due to non-compete agreements consequently affect the overall development. This is because workers are discouraged from creating their own firms or from looking for better opportunities that pay more. As a result of less mobility within the industry, there is less rivalry and fewer people develop knowledge and skills there. The aforementioned (limited job mobility) have an impact on economic growth by reducing it and living standards, as such, overall development is hindered.

Signing a non-compete agreement makes it more difficult for workers to leave for better and higher-paying jobs.<sup>85</sup> To that end, it can be opinionated that those who are bound by these agreements, cannot reap the benefits of job hopping. Job hopping, can be understood to refer to an instance whereby professionals change jobs frequently and voluntarily.<sup>86</sup> The advantage that comes with job hopping is that it may be correlated with stronger lifetime earnings, especially early in one's career, as postulated by Lettieri, in his article, Non –compete agreements and American workers- Testimony before the Senate Committee on Small Business.<sup>87</sup>

Taking the sentiments shared by Lettieri into consideration, it can be concluded that switching jobs more frequently over one's career can potentially result in higher overall wages since it allows employees to obtain more skills and information, which increases their value in the labour market. however, those who have signed non-compete agreements are usually not privy to such benefits, as their job mobility becomes restricted.

Job mobility helps stimulate the economy as it encourages development when information is shared.<sup>88</sup> This is because more people will be equipped with skills and information which may be of great contribution to the overall development also stimulating economic growth.

Non-compete clauses prevent employees from exploring better employment possibilities, and this could negatively affect their pay. Consequently, this may affect their standard of living. Standard

---

<sup>85</sup> White House, 'Fact Sheet: Executive Order on Promoting Competition in the American Economy' (2021). <https://www.whitehouse.gov> >assessed 21 January 2024.

<sup>86</sup> 'Job Hopping' <<https://www.iberdrola.com> >assessed 28 January 2024.

<sup>87</sup> John Lettieri, *Non-Compete Agreements and American workers: Testimony before the Senate Committee on Small Business, Economic Innovation Group* (Economic Innovation Group, 2019).

<sup>88</sup> Naija A. Farley, 'Non-compete Agreements' (Nelp, 2021) < <https://www.nelp.com> >assessed 21 January 2024.

of living refers to the level of material comfort and degree of prosperity that individuals have.<sup>89</sup> These agreements also impede advancement and economic expansion by discouraging workers from founding their own businesses. therefore, development is hampered as a result.

These agreements result in limited job mobility of employees as mentioned above and because of this, employees who seek to resign from one company and join another are side-lined,<sup>90</sup> as they are restricted from freely moving amongst firms within the industry. This leads to a situation where employees are not able to easily switch jobs or even explore new opportunities.

Professor Gilson referred to the dissemination of information and experience caused by employee movement as knowledge spill overs.<sup>91</sup> He believed that such spill overs were an essential component of national success.<sup>92</sup> Due to the notion that development rarely occurs in a vacuum, information sharing across organisations promotes innovation and development.<sup>93</sup> What this means is that development and innovation never happen in isolation or without any external influence.

Deterrence is the primary method by which the enforcement of a non-compete agreement is expected to discourage labour mobility.<sup>94</sup> Deterrence refers to the action of discouraging an action through installing doubt or fear of the consequences.<sup>95</sup> This can occur in a number of ways. For example, increased enforceability leads to an increase in the number of court cases and cases in which employees are found to be at fault, which deters potential departing employees from leaving

---

<sup>89</sup> ‘Standards of Living’ <<https://www.investopedia.com>> accessed 1 February 2024.

<sup>90</sup> Ibid 18.

<sup>91</sup>Feldman S, *Experimental Approach to the study of Normative Failures: Divulging of Trade secrets by Silicon Valley Employees* (Semantic Scholar, 2003) pp. 105.

<sup>92</sup>Ibid.

<sup>93</sup> Ronald Gilson, *The Legal Infrastructure of High Technology Industrial Districts* (Ssrn Papers, 1999) pp.575,594.

<sup>94</sup> Jane Flanagan, ‘*No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit Their Overuse*’ ( Acslaw, 2013).

<sup>95</sup> <<https://dictionary.cambridge.org> > accessed 28 January 2024.

a specific company.<sup>96</sup> Therefore, seldom would employees breach these agreements, consequently restricting job mobility further.

As a result of the preceding, it is possible to conclude that non-compete agreements discourage or reduce the likelihood of workers resigning from a specific firm because doing so may result in severe consequences. It is also possible to conclude that it is critical for companies or workers with superior skills and knowledge to share their knowledge and skills, as this plays an important role in development.

#### 2.4 The Effects of Non-Compete Agreements on Entrepreneurship

Entrepreneurship was defined by Vesper<sup>97</sup> as the creation of new business enterprises by individuals or small groups. This creation of new businesses brings out new markets, new services and goods that stimulate competition and economic growth which further promote development. However, studies by Samila in her article Non-compete covenants: Incentives to Innovate or Impediments to Grow, indicate that non-compete agreements may have an effect on entrepreneurship. This is by limiting the creation of new businesses.

Matt, making reference to a book by Hvide and Panos,<sup>98</sup> remarked that entrepreneurship is an inherently risky activity that draws founders who are true risk lovers and noted that it is because of the risks that most start up enterprises fail. Klepper on the other hand, is of the view that entrepreneurs perform better when they establish firms that draw directly upon their professional expertise and experience. This is by establishing a business in the same industry which they have experience in.<sup>99</sup> Similarly, Jeffers and Jessica explain that most entrepreneurs emanate from ideas encountered in previous employment and that experienced entrepreneurs tend to be more

---

<sup>96</sup>Marx M , Fleming L and Others, *Regional Disadvantage? Non- compete Agreements and Brain Drain* (2010) SSRN Electronic Journal <<https://www.researchgate.net>> accessed 31 May 2024.

<sup>97</sup> Vesper (1992) <<https://d1wqtxts1xzle.cloudfront.net>> accessed 28 January 2024.

<sup>98</sup> Ibid.

<sup>99</sup> Steven Klepper, 'Spinoffs: A Review and Synthesis' (2010) 6 *European Management Review* pp.159,171.

successful.<sup>100</sup> However, this is impeded by non-compete agreements, and ultimately, affects development.

It can, then, be concluded that non-compete agreements forbid employees from starting a rival company in the same sector as their place of employment. This implies that a worker cannot create their own company by spreading their knowledge and talents that they have acquired during employment. In order to increase their chances of success and growth, it is crucial and practical for employees who aspire to become entrepreneurs to leverage their professional knowledge and experience while starting a firm in the same sector.

Beyond the issue of whether employees quit or they remain with their employer, employee behaviour is influenced by the contracts that they sign during employment.<sup>101</sup> Companies develop a stronghold on employee's knowledge, ideas, and potential for innovation and for this entrepreneurship will be severely impeded.<sup>102</sup> This is by making employees sign non-compete agreements which excludes them from establishing their own firms after employment ceases. The risk that an employee may quit and start their own business is significantly reduced when they sign a non-compete contract because it consequently pre-assigns their capacity for innovation.<sup>103</sup>

The enforcement of non-compete agreements, therefore, impedes overall development by reducing the rate of entrepreneurship.<sup>104</sup> This inhibits entrepreneurship for two reasons being that entrepreneurs, even if pursuing ideas distinct from that of their former employers and developed on the entrepreneur's own time, could face problems from the employer.<sup>105</sup> Further, entrepreneurs may find it far more difficult to get their businesses off the ground if they cannot hire employees

---

<sup>100</sup> Jeffers and Jessica S, *The Impact of Restricting Labour Mobility on Corporate Investment and Entrepreneurship* (University of Chicago Booth School of Business, 2018)

<sup>101</sup> Matt Marx and Lee Fleming, 'Non-compete agreements: barriers to entry and exit' (2012) 12 pp. 39-64.

<sup>102</sup> Orly Lobel, 'Non-competes, Human Capital Policy and Regional Competition'(2020) 45 *Journal of Corporation Law*.

<sup>103</sup> *Ibid.*

<sup>104</sup> Sampsa Samila, *Non-compete Covenants: Incentives to innovate or impediment to Growth* (Jstor, 2009).

<sup>105</sup> *Ibid.*

with experience in the industry because non-compete agreements bind those potential hires.<sup>106</sup> This is by restricting employees from freely moving around firms in the same industry. Non-compete agreements inhibit innovation by preventing employees from starting their own companies in related industries and preventing knowledge spill overs. It can be concluded that non-compete agreements reduce and harm development. People are not given the chance to fully explore their full potential for starting a firm, which restricts their ability to support economic expansion. Growth in the economy is necessary for development. This is because it provides the basis for overcoming poverty and lifting living standards.<sup>107</sup>

## 2.5 Conclusion

This chapter has set out to find the impact of non-compete agreements on job mobility and entrepreneurship. It further examined the relationship of non-compete agreements to development. It argued that, although non-compete agreements were meant to protect business confidential information, it affects the job mobility and entrepreneurship opportunities of employees. As a result of limited job mobility, employees' wages may be suppressed and chances of improving their careers may be affected. This affects development as there is no flow of talent which affects competition in the markets. Individuals do not have enough money to purchase goods and services (demand becomes low) as a result of low wages. Moreover, non-compete agreements affect entrepreneurial opportunities. The chances of starting new businesses that may open new markets, therefore, improving development by improving the economy may be impeded.

This study contends that there is a relationship between non-compete agreements and development. Non-compete agreements influence important factors that determine or promote development. These include the level of competition in the industry and the creation of new markets. This is evident from limiting job mobility and preventing employees from freely moving between jobs. The next chapter acknowledges the legality and enforcement of non-compete agreements.

---

<sup>106</sup> Ibid.

<sup>107</sup> 'Importance of Growth' <<https://www.imf.org>> accessed 1<sup>st</sup> February 2024.

## Chapter 3- The Enforceability and Legality of Non-Compete Agreements in Different Legal Jurisdictions

### 3.1 Introduction

The enforceability of non-compete agreements differs from jurisdiction to jurisdiction and their legality is considered to be based on a valid business interest. What this means is that some states may enforce these agreements while others may have stricter laws concerning them. However, there must exist a legitimate reason for the business to protect its interests. Therefore, this chapter examines the legal framework and factors that determine the enforceability and legality of non-compete agreements. Additionally, it aims to address the second research question as provided in chapter one about the legality and enforcement of non-compete agreements. It further provides insights on the economic implications of these agreements.

### 3.2 The Legality and Enforceability of Non-Compete Agreements

The legality of non-compete agreements differs depending on the state.<sup>108</sup> Common law rules have always controlled these agreements and courts have typically upheld them provided that they are found to be reasonable and to safeguard a legitimate interest.<sup>109</sup> A legitimate interest typically involves a balance between the company's interests and the individual's rights and freedoms.<sup>110</sup> In the case of *Merrimack Valley Wood Prods v Near*,<sup>111</sup> it was established that a non-compete agreement is valid and enforceable as long as the agreement is no greater than necessary to protect the employer's legitimate interests. However, early English Common Law flatly prohibited non-compete agreements.<sup>112</sup> This was because of their nature as restraints of trade.<sup>113</sup> Thereafter, it

---

<sup>108</sup> Benjamin McBrayer, 'Non-compete Agreements Explained: Rules, Requirements and Definition' (2024) <<https://factorialhr.com/blog/non-compete-agreement/>> accessed 28 February 2024.

<sup>109</sup> Ibid.

<sup>110</sup> Legitimate Business Interest' <<https://ico.org.uk>> accessed 25 February 2024.

<sup>111</sup> *Merrimack Valley Wood Prods v Near* 876 A.2D pp. 757, 762 (N.H 2005).

<sup>112</sup> Kevin D Horvitz, 'An Unreasonable Ban on Reasonable Competition: The Legal Profession's Protectionist Stance Against Non-Compete Agreements Binding In-House Counsel' (2016) 65 pp.1007 <<https://www.scholarship.law.due.edu>> accessed 25 February 2024.

<sup>113</sup> 'Non-Compete Agreements' <<https://www.cambridge.org>> accessed 28 February 2024.

became apparent to the people being the business people, general public and the courts also that it was in the interest of trade that certain agreements be enforced.<sup>114</sup> Hence, dating back to 1711,<sup>115</sup> courts have allowed non-compete agreements relating to a business relationship but subject to a reasonableness test.<sup>116</sup> This test examines the reasonableness of the restrictions to determine how enforcement would impact the relevant parties.<sup>117</sup> The relevant people include the employer, the employee, and the public at large.<sup>118</sup> Non-compete agreements should also not impose an undue hardship on the employee and they should not be injurious to the public interest.<sup>119</sup> Courts respect a person's ability to support themselves and, as a result, non-compete agreements may need to meet specific requirements in order to be upheld.<sup>120</sup> Although state by state variations exist in the standards and reasoning of non-compete agreements, these agreements typically, while being reasonable, should also be supported by a good business reason.<sup>121</sup> Furthermore, it is established that a non-compete agreement must contain an offer, acceptance, intent, and a benefit given to the employee in exchange for their commitment in order for it to be enforceable.<sup>122</sup> This is because, for a contract to be valid, it must include an offer followed by an acceptance.

---

<sup>114</sup> Kevin D Horvitz, 'An Unreasonable Ban on Reasonable Competition: The Legal Profession's Protectionist Stance Against Non-Compete Agreements Binding In-House Counsel' (2016) 65 pp.1007 < <https://www.scholarship.law.due.edu> > accessed 25 February 2024.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> 'The Test for Reasonableness of a Non-Compete' < <https://mayalaw.com> > accessed 28 February 2024.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Justicia, 'Non-Compete Agreements in Employment & Their Legal Enforceability' (2023) < <https://www.justia.com> > accessed 25 February 2024.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

To be valid and binding, non-compete agreements, in some countries such as the United States of America (USA) must meet both procedural and substantive standards.<sup>123</sup> With connection thereto, in order to be procedurally valid, the agreement must be in writing and signed by both the employer and the employee.<sup>124</sup> This shows that both the employer and employee agree and understand the terms and conditions of the contract. Moreover, the agreement being in writing makes it easier for it to be enforced. Lastly, they must state that the employee has a right to consult a lawyer before signing the agreement.<sup>125</sup> In light of the above, it can, therefore, be concluded that it is important for these agreements to have a valid business reason. In that regard, to satisfy the requirement of a valid business reason, an employer would have to prove that it was important and necessary for them to protect the company's information from competitors. These agreements should also strike a balance between an individual's rights. These include the right to equal opportunities, the right to free competition<sup>126</sup> and the company's rights which may include the right to privacy and confidentiality.<sup>127</sup> It is important to protect the interests of both parties. Consequently, that's the point where they can be considered legitimate and fair.

As mentioned earlier, non-compete agreements must be reasonable in order to be legitimate and enforceable. Reasonableness is determined on a factual basis.<sup>128</sup> This involves taking into account the parties' circumstances and the public interest.<sup>129</sup> Adding more, they must be reasonable in terms of their duration, geographic scope, and the activities that they seek to restrict.<sup>130</sup> It has been established that these agreements should not exceed a reasonable duration, which is normally

---

<sup>123</sup> Katz Law Group, 'Non-Compete Agreements When are they Enforceable?' < <https://www.katzlawgroup.com> February 2024.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Others include the right to consumer protection, the right to contractual agreements etc.

<sup>127</sup> Other company rights include the right to enter into contracts, right to intellectual property etc.

<sup>128</sup> Ibid 115.

<sup>129</sup> Ibid 115.

<sup>130</sup> Cueto Law, ' Understanding the Enforceability of Non-Compete Agreements in Employment Law' (Cueto Law, 2023) < <https://cuetolawgroup.com>> accessed 25 February 2024.

considered to be two (2) years.<sup>131</sup> The rationale behind this is that, if it is too long, it cripples an employee's career growth and access to job opportunities. However, this usually differs from state to state. Geographic scope refers to the geographic area within which an employee is restricted from competing with their former employer for a period of time.<sup>132</sup> This aims to protect the legitimate business interests of the company. However, at the same time it should not be greater than what is necessary to provide that protection.<sup>133</sup> Recognised interests include protecting trade secrets and confidential information, such as clients lists and business plans. Therefore, it can be concluded that courts typically use a three-pronged approach to assess reasonableness.<sup>134</sup> Being that, a non-compete agreement is reasonable if it;

- protects the employer's legitimate interests
- does not cause undue hardship for the employee, and
- does not harm the public interest

Moreover, these agreements are also meant to maintain customer goodwill.<sup>135</sup> Customer goodwill refers to the positive reputation, trust, and loyalty that a business has built with its customers over time.<sup>136</sup> Hence, these agreements may not be used to hinder regular competition or deprive the employee of the right to use skills gained during employment that do not fall within a protected interest.<sup>137</sup> In general, public policy favours an employee's unrestricted ability to move from one job to another, so only a narrowly tailored agreement to protect a legitimate business interest will

---

<sup>131</sup> Katz Law Group, 'Non-Compete Agreements- When are they Enforceable?' <<https://www.katzlawgroup.com>> 25 February 2024

<sup>132</sup> Hendershot Coward, 'How Is The Geographic Scope Of A Non-Compete Determined- In Road Miles or As The Crow Flies' <<https://www.hchlawyers.com>> accessed 25 February 2024.

<sup>133</sup> Ibid.

<sup>134</sup> Technical Aid Corporation v Allen 591 A.2d pp. 262, 266 (N.H. 1991)

<sup>135</sup> Ibid.

<sup>136</sup> 'What is customer Goodwill and How to Build in Saas' <<https://userpilot.com>> (2022) > accessed 25 February 2024.

<sup>137</sup> Technical Aid Corporation v Allen 591 A.2d pp. 262, 266 (N.H. 1991)

<sup>137</sup> 'Non-Compete Agreements- When are they Enforceable?' <<https://www.katzlawgroup.com>> accessed 25 February 2024.

be acceptable.<sup>138</sup> Consequently, non-compete agreements should not be enforced when the sole justification by the employer is the need to protect their interest in employee goodwill.<sup>139</sup> The next subtopic discusses the enforceability of these agreements in context of South Africa and Lesotho.

### 3.2.1 South Africa

It is important to note that in South Africa (SA), there are currently no stated provisions in the South African Competition Act<sup>140</sup> that explicitly ban non-compete agreements.<sup>141</sup> This implies that they may be used in SA. The purpose of the Competition Act in SA is to promote and maintain competition.<sup>142</sup> This helps promote the efficiency, adaptability, and development of the economy.<sup>143</sup> Therefore, this means that non-compete agreements are not provided for under any specific piece of legislation in SA. However, in respect to non-compete agreements, the requirement is that these agreements are only enforceable if an employer has a legitimate proprietary interest and the restraint is reasonable in terms of geographical area and duration.<sup>144</sup> These requirements are applicable in SA as well. Following the case of *Basson v Chilwan and Others*,<sup>145</sup> this case is a landmark decision where the Appellate Division laid down the criteria for the enforceability of non-compete agreements. The court held that a non-compete agreement is valid and enforceable unless it is shown to be unreasonable.<sup>146</sup> It contended that the enforceability

---

<sup>138</sup> Ibid.

<sup>139</sup> Edward M. Schulman, *An Economic Analysis of Employee Noncompetition Agreements*, (1992) 69.

<sup>140</sup> South African Competition Act 1998.

<sup>141</sup> Ryan Goodman, Lameez Mayet and Erykah Rantho, 'South Africa: Watch Out Employers: Your Non-Compete and No-poaching Agreements May Also Be Considered Anti-Competitive in South Africa' (2023) <https://intelligens.africa/2023/08/08/watch-out-employers-your-non-compete-and-no-poaching-agreements-may-also-be-considered-anti-competitive-in-south-africa/>> accessed 26 February 2024.

<sup>142</sup> Competition Act No. 89 of 1999.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid 133.

<sup>145</sup> *Basson v Chilwan and Others* (1993) 1 SA 742 A.

<sup>146</sup> Ibid.

depends on balancing the interests of the contracting parties against the public interest.<sup>147</sup> Furthermore, the court established four key criteria to determine the reasonableness of a non-compete agreement:<sup>148</sup>

1. Does the party seeking to enforce the restraint have a legitimate interest to protect?
2. Is that interest threatened by the conduct of the other party?
3. Does the non-compete go no further than necessary to protect that interest?
4. Is the non-compete agreement prejudicial to the public interest?

In light of the above mentioned, it can be concluded that in the context of SA, the employer must have a legitimate interest before enforcing non-compete agreements on employees. The restriction of the non-compete agreement must be within a reasonable scope, within reason time and area. Lastly, non-compete agreements should not go against public policy. Public policy refers to a system of laws, regulatory measures to solve relevant problems and implemented by programs.<sup>149</sup> The above case of Basson has provided for these requirement.

The case of *Reddy v Siemens Telecommunications (Pty) Ltd* also puts the above mentioned in effect.<sup>150</sup> Reddy, an employee of Siemens, was restrained from working for a competitor after his employment ended. The Supreme Court of Appeal upheld the restraint, finding it reasonable.<sup>151</sup> The court emphasized that Siemens had a protectable interest in its confidential information and customer connections that justified the enforcement of the restraint.<sup>152</sup> As a result, this case reinforced the principle that restraints of trade are enforceable if they protect legitimate business interests without being overly restrictive.<sup>153</sup> The court further contended that a non-compete agreement is valid and enforceable unless they are contrary to public policy.<sup>154</sup>

---

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> 'Public Policy' <https://www.dictionary.org> accessed 15 May 2024.

<sup>150</sup> *Reddy v Siemens Telecommunications (Pty) Ltd* (2007) 2 All SA 529 (SCA).

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

Legitimate proprietary interest refers to the business' confidential information.<sup>155</sup> Moreover, non-compete agreements in South Africa are legitimate and enforceable unless they violate public policy.<sup>156</sup> These agreements are subject to legal scrutiny and this is for the purpose of ensuring their enforceability.<sup>157</sup> The legal system is based on the basic legal premise that a contract should remain enforceable in order to lend certainty to commercial dealings.<sup>158</sup> Therefore, a non-compete agreement should be specific and not determined to violate public policy.<sup>159</sup> It is further contended that a restraint that is excessively broad or fails to protect the former employer's interests may be considered unenforceable.<sup>160</sup> The above South African cases have illustrated the requirement of reasonableness when enforcing non-compete agreements.

### 3.2.2 Lesotho

Lesotho respect for international intellectual property laws and its legal structures to protect intellectual property rights is relatively strong.<sup>161</sup> International intellectual property law refers to a set of laws that govern the creation, protection, sharing and use of intellectual property.<sup>162</sup> Some forms of intellectual property, such as patents and trademarks, are clearly defined and protected by statute in Lesotho.<sup>163</sup> These statute include the Industrial Property Order of 1989.<sup>164</sup> It was

---

<sup>155</sup> Pulver Crawford Munroe, 'The Canadian Employee Competition Blog' (2020) < <https://competingemployee.com> > accessed 26 February 2024.

<sup>156</sup> State of Nations, 'Non-Compete Clauses' < <https://hsfnotes.com> > accessed 25 February 2024.

<sup>157</sup> Ryan Goodman, Lameez Mayet and Erykah Rantho, 'South Africa: Watch Out Employers: Your Non-Compete and No-poaching Agreements May Also Be Considered Anti-Competitive in South Africa' (2023).

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> 'Lesotho- Property Rights' < <https://www.privacyshield.gov> > accessed 26 February 2024.

<sup>162</sup> Upcounsel, 'International Intellectual Property Law: Everything You Need to Know' (2024) < <https://www.upcounsel.com/international-intellectual-property-law> > accessed 26 February 2024.

<sup>163</sup> Maema Chaka, 'Your Trade Secrets Are Safe with Me: How to Protect Trade Secrets in Lesotho' (2023) < <https://www.webbernew.com> > accessed 26 February 2024.

<sup>164</sup> Industrial Property Order of 1989.

established to protect patents, trademarks and industrial designs.<sup>165</sup> However, trade secret law has been a creation of court precedents over the years.<sup>166</sup> This means that regulations regarding trade secrets have been established through decisions made by the courts in Lesotho. To date, there is no legislation that particularly deals with trade secrets in Lesotho.<sup>167</sup> Some investors in Lesotho have even complained that the enforcement of intellectual property rights is somewhat weak.<sup>168</sup> Due to the lack of legislative protection, trade secrets are protected by the application of the general principles of law of delict and the law of contract.<sup>169</sup> In terms of contract law, the types of contracts that are usually used in the protection of trade secrets are non-disclosure agreements and restraint of trade agreements.<sup>170</sup> The non-disclosure agreement applies to employees and it bars a party to such a contract from disclosing confidential information related to a business for a period of time provided for in the contract.<sup>171</sup> On the other hand, a restraint of trade agreement is an agreement which enjoins an employee to not use the trade secrets of the business for their own benefit and in competition with the business.<sup>172</sup> The duty persists even after the relationship has been terminated.<sup>173</sup> One case that is seen illustrating the above is the case of *Attorney General v Tek Corporation (Pty) Ltd and Another*.<sup>174</sup> The case involved a dispute over a non-disclosure agreements where the plaintiff alleged that the defendant had breached the agreement by disclosing confidential information to third parties.<sup>175</sup> The court upheld the importance of maintaining

---

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Maema Chaka, 'Your Trade Secrets Are Safe with Me: How to Protect Trade Secrets in Lesotho' (2023) <<https://www.webbernew.com>> accessed 26 February 2024.

<sup>168</sup> 'Lesotho- Property Rights' <<https://www.privacyshield.gov>> accessed 26 February 2024.

<sup>169</sup> Ibid 41.

<sup>170</sup> Ibid 159.

<sup>171</sup> Ibid.

<sup>172</sup> Maema Chaka, 'Your Trade Secrets Are Safe with Me: How to Protect Trade Secrets in Lesotho' (2023) <<https://www.webbernew.com>> accessed 26 February 2024.

<sup>173</sup> Ibid.

<sup>174</sup> *Attorney General v Tek Corporation (Pty) Ltd and Another* CIV/T/249/2006 [2007] LSHC 47.

<sup>175</sup> Ibid.

confidentiality agreements to protect proprietary information, emphasizing that such agreements are crucial for safeguarding business interests and intellectual property.<sup>176</sup>

The decision of the above case may affect development because it promotes more restriction regarding the flow of skills and talent of employees by limiting employee mobility. Consequently, this blocks the creation of new ideas in the markets and hinders inclusive development.

It can, then, be concluded that, in Lesotho, court precedents, and not specific legislation, serves as the foundation for trade secret law.

### 3.3 The Economic Impacts of Non-Compete Agreements on Development

Samuel Young, in his article titled *Non-compete Clauses, Job Mobility and Job Quality: Evidence from a Low-Earning Ban in Austria*<sup>177</sup> has taken the view that non-compete agreements affect employee's job mobility and limits their entrepreneurial opportunities. The author further articulates that, because of these effects, there is a greater tragedy of reduced competition and development growth that befalls the development of the economy.<sup>178</sup> The Radcliffe, in his article, *The Economics of Labour Mobility*, elaborates further on how the economy may suffer a great tragedy due to the effects of non-compete agreements on job mobility.<sup>179</sup> The author explains that the economy benefits as a result of increased labour mobility.<sup>180</sup> This is in the sense that, when employees seek employment in different companies, resources can be efficiently allocated; meaning that employers can match their skills with jobs that are more suitable for them. Consequently, productivity will be increased and so too will economic growth. This is also because greater freedoms tend to result in happier workers and the filling of job positions, including less glamorous ones.<sup>181</sup> As a result, when workers are happy about their job environment, they become more productive. Being more productive means an improved economy as efficiency and output

---

<sup>176</sup> Ibid

<sup>177</sup> Samuel Young, *Non-compete Clauses, Job Mobility and Job Quality: Evidence from a Low-Earning Non-Austria* (SSRN Electronic Journal,2021) <<https://www.researchgate.net/>> accessed 20 April 2024.

<sup>178</sup> Ibid.

<sup>179</sup> Brent Radcliffe, 'The Economics of Labor Mobility' (2023) <<https://www.investopedia.com>>accessed 19 February 2024.

<sup>180</sup> Ibid.

<sup>181</sup>Ibid.

are increased, thus promoting development. Greater freedoms refer to the ability of employees to choose their jobs after previous employment. The less glamorous job positions refer to jobs that may not be seen to be prestigious compared to others,<sup>182</sup> for example jobs in cleaning.<sup>183</sup>

As a result of limited entrepreneurship opportunities, the economy is affected because entrepreneurship promote the starting of new businesses, the creating new technologies, developing new products, and opening up new markets.<sup>184</sup> Therefore, all this is hindered by non-compete agreements. Consequently, these improved technologies such as automation technologies and cloud computing,<sup>185</sup> help businesses to become more productive and increase efficiency while the development of new products helps to promote competitiveness among companies.<sup>186</sup> This helps contribute to the general economy because competition may encourage the attraction of investment, create jobs, and provide consumers with a wider range of high-quality choices.<sup>187</sup> New markets which refer to emerging areas where new businesses can actually expand their markets,<sup>188</sup> on the other hand, reduce unemployment as a result of the creation of jobs. This helps to improve the living standards of individuals, improving the economy, and overall development.<sup>189</sup> Moreover, non-compete agreements restrict activities that raise the productivity of firms and

---

<sup>182</sup>< <https://dictionary.cambridge.org> > accessed 19 February 2024.

<sup>183</sup> Ibid.

<sup>184</sup> Audretsch, D. B., 'The dynamic role of small firms- Evidence from the US' (2002) 18 *Small Business Economics* pp.13-40 < <https://wol.iza.org> > accessed 20 February 2024.

<sup>185</sup> Mark Sheldon Villanueva, *6 Ways Technology Increases Productivity* ( Intelligent Technical Solutions, 2022).

<sup>186</sup> Kritikos A., 'Entrepreneurs and their impact on jobs and economic growth' (2014) 8 < <https://wol.iza.org/uploads/articles/8/pdfs/entrepreneurs-and-their-impact-on-jobs-and-economic-growth.one-pager.pdf>> accessed 26 February 2024.

<sup>187</sup>Virjan D, Manole AM and other, 'Competitiveness- the engine that boosts economic growth and revives the economy' (2023)11 < <https://doi.org> > accessed 21 February 2024.

<sup>189</sup> 5 benefits of expanding into new markets < <https://www.safeguardglobal.com> >(2023) accessed 21 February 2024.

economies.<sup>190</sup> These activities include stifling competition as non-compete agreements hinder employees to start their own businesses or move to a competing companies.

Furthermore, non-compete agreements make it difficult to turn the economy around in instances where there is high unemployment or where the economy is stagnant.<sup>191</sup> This is by limiting the development of novel products due to the fact that employees have a restricted and limited ability to find new job opportunities. In such situations of a stagnant economy, dynamic entrepreneurship could be of great help. Novel products are referred to as new or improved products, not only new to the enterprise but also to the enterprise's market.<sup>192</sup> While dynamic entrepreneurship refers to the idea of engaging in entrepreneurial activities that are characterised by innovation and adapting.<sup>193</sup>

Non-compete agreements make it difficult for each individual to transfer to a job where they can contribute and learn the most; which is beneficial to an economy.<sup>194</sup> This is because when employees are free to change jobs, it promotes competition among companies as each company strives to get the best employees. As a result, these businesses aim to offer better chance for development. Employees that feel trapped in their jobs are less motivated and productive.<sup>195</sup> They become less productive because they are less motivated with little drive to perform at their best because they feel trapped.<sup>196</sup> It is, therefore, preferable for people to move on to jobs that they

---

<sup>190</sup> Inc. v Douglas 727 S.W.2d 698.

<sup>191</sup> A stagnant economy could be explained as an economy that is experiencing very little growth or no growth at all

<sup>192</sup> European Custom Portal, 'Novel Products' <<https://www.tariffnumber.com>> accessed 21 February 2024.

<sup>193</sup> Thi Thu Tra Pham and others, 'Dynamic entrepreneurship, planned innovation and firm profitability: <<https://www.sciencedirect.com> > accessed 21 February 2024.

<sup>194</sup> Ibid.

<sup>195</sup> Peter Gassner, 'Non-competes are Bad for Employees and the Economy' (July 14, 2021) <<https://medium.com/@peter.gassner/non-competes-are-bad-for-employees-and-the-economy-bf2a69c123b7>> accessed 20 February 2024.

<sup>196</sup> Richard Clark and Bror Saxberg, '4 Reasons Good Employees lose Their Motivation' (2019) <<https://hbsp.harvard.edu/product/H04UA7-PDF-ENG>> accessed 25 February 2024.

prefer, if they wish to. companies are hurt because they cannot hire workers that they want to hire, thus productivity is depressed.<sup>197</sup> This is because it makes it hard to find a suitable person for a specific job. As a result of low economy, development is also affected because living standards change negatively. This is because improved living standards include improved economic growth, improved infrastructure and improved quality of life in general. These are all necessary to create a sustainable environment for development. Therefore, poor living standards affect the process of development. Defining low economy refers to when there is high unemployment rates, low wages so the overall situation of the country are not really performing well.<sup>198</sup>

In addition, a non-compete agreement is not economically efficient if it does not maximise social welfare.<sup>199</sup> This means that if it does not ensure that employees have the opportunity to pursue their careers while at the same time protecting the business interest.<sup>200</sup> However, many commentators have argued that non-compete agreements are good nonetheless.<sup>201</sup> This is because, by assuring firms that they will be able to expand output while retaining secrets, gives firms an incentive to develop new processes and ideas and to exploit these innovations.<sup>202</sup> Therefore, when non-compete agreements do not interfere with the economy, the labour market creates competition for workers because they must compete against each other for their desired employment opportunities.<sup>203</sup> As a result, when employers compete for workers, and workers compete for

---

<sup>197</sup> Isaac Chotiner, 'What a Ban on Non-compete Agreements Could Mean for American Workers' (2021) 54(4) <<https://journals.sagepub.com/doi/abs/10.1177/08863687221105010>> accessed 23 February 2024

<sup>198</sup> Stephen Hall, 'Explainer: What is a recession?' (2024) <<https://www.weforum.org>> accessed 12 May 2024.

<sup>199</sup> Maureen B. Callahan, 'Comment, Post-Employment Restraint Agreements: A Reassessment' (1985) 2 U. CHI. L. REV. 703.

<sup>200</sup> Federal Trade Commission, 'Non-Compete Agreements' <<https://www.toppr.com>> accessed 28 February 2024.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3484 (Jan. 19, 2023)

employment opportunities, there are higher earnings for workers, more productivity for employers, and better economic outcomes.<sup>204</sup> Non-compete agreements constrain this dynamic.<sup>205</sup>

Looking into the concept of development and how it is affected, it can be concluded that non-compete agreements impede or affects development. The United National Sustainable Development Goals (UNSDGs) establish a comprehensive structure that help understand development more and how to measure it.<sup>206</sup> This is because they outline that long-term guideline for what will be needed, accepted and supported by societies in the coming decades and therefore, consequently, what will be demanded by the markets long term.<sup>207</sup> In addition, the SDG development process was formally kicked off in Brazil in 2012.<sup>208</sup> The intent was, therefore, to create a new set of global goals to address the going challenges to a sustainable development.<sup>209</sup> The concept of development in line with the UNSDGs includes economic development which basically involves increasing a country's Gross Domestic Product (GDP) growth consequently improving the living standards of people.<sup>210</sup> It also involves social development initiatives such as assuring access to excellent education, improving access to healthcare facilities, and promoting gender equality.<sup>211</sup> Furthermore, in accordance with the UN Sustainable Development Goals, development should incorporate environmental sustainability through the construction of sustainable societies and increased resource efficiency.<sup>212</sup> The UNSDGs provide a set of 17 goals

---

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Claus Stig Pedersen, 'The UN Sustainable Development Goals (SDGs) are a Great Gift to Business' (2018) 69 *Procedia CIRP* pp. 21-24.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid 201.

<sup>211</sup> Ibid 201.

<sup>212</sup> Ibid 201.

and 169 targets to measure and track progress towards development.<sup>213</sup> Key indicators include Gross Domestic Product, Human Development Index (HDI) .<sup>214</sup>

### 3.4 Conclusion

This chapter set out to investigate the legality and enforceability of non-compete agreements in different jurisdictions. The chapter argued that non-compete agreements must be reasonable in order to be lawful and enforceable. However, enforcement varies from state to state. It can therefore be concluded that non-compete agreements are mostly governed by common law norms. However, they can only be recognised as legitimate and enforceable in a court of law if they are determined to be reasonable. This is demonstrated by geographical limitations, duration, and public policy. These agreements must also be backed by a valid proprietary interest.

In South Africa, these agreements are scrutinised to ensure their enforceability and they must not violate public policy in order to be considered enforceable. However, there is no particular statute that governs non-compete agreements. This also applies in Lesotho. Non-disclosure and restraint to trade agreements are utilised, which are somewhat similar to non-compete agreements in that they all prohibit specific activities of the employee. This contributes to the third research question of this work. The next chapter, therefore, investigate alternatives to non-compete agreements that will assist defend both the corporate interests and those of employees.

---

<sup>213</sup> Study Smarter, *Measurement of Development* (Studysmater, 2023).

<sup>214</sup> Others include poverty rates, access to education and healthcare.

## Chapter 4- Alternatives to Non-Compete Agreements

### 4.1 Introduction

Chapter two have discussed how non-compete agreements have long been used by corporations to protect their competitive edge and intellectual property.<sup>215</sup> These include companies that use confidential information such as trade secrets.<sup>216</sup> However, these agreements have been shown to have been criticized for their restrictive nature towards employees as shown in chapter two. One of the consequences of non-compete agreements that was explored in chapter two is that they limit employees' future career opportunities, and bar them from leaving their current employer.<sup>217</sup> As a result, this prevents employees from contributing to the sector and the economy, further affecting development. Fortunately, there are several alternatives to non-compete agreements that promote a fair and open labour market while simultaneously protecting enterprises.<sup>218</sup> This chapter explores these different options for how businesses can protect their interests without affecting employee's careers and impeding development. It aims to examine the effectiveness of these alternatives to non-compete agreements and shed light for employers and employees to consider when dealing with complexities of non-compete agreements and finding alternatives to these agreements. This chapter contributes to the overall objective of the research of providing or giving a fairer way to protect the rights of the employer and employees without impeding development.

---

<sup>215</sup> Federal Trade Commission, 'Exploring Alternatives to Non-Compete Agreements' <<https://www.asha.org>> accessed 9 March 2024.

<sup>216</sup> Steve Harvey Law, *What businesses frequently use non-compete agreements* (2024) <<https://www.steveharveylaw.com>>

<sup>217</sup> Ibid 210.

<sup>218</sup> Ibid 210.

## 4.2 Exploring Different Options

The Legislature and the Courts have devised alternative statutes and legal doctrines to safeguard employer's trade secrets and proprietary business knowledge.<sup>219</sup> This was to try to balance the interests of a company and those of employees' without burdening workers or hindering development.<sup>220</sup> Thus, in addition to non-compete agreements, there are other employment contract options that are available. These substitutes allow companies to protect their interests without preventing individuals from pursuing their careers. They are discussed in detail below.

### 4.2.1 Non- Disclosure Agreements

The concept of non-disclosure agreements is not new in business law.<sup>221</sup> their use has grown in popularity since they are legally binding.<sup>222</sup> This is because non-disclosure agreements (NDAs) acknowledge the existence of a confidential connection between the employer and the employee.<sup>223</sup> This means that employees who sign NDAs are not allowed to disclose private information to other employers during or after their employment.<sup>224</sup> NDAs may be explained as contracts that are intended to preserve confidential information, trade secrets, and intellectual expertise of companies.<sup>225</sup> These agreements are sometimes referred to as a confidentiality

---

<sup>219</sup> Abigail Shechtman Nicandri, 'The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternative Approaches for Protecting Employers Proprietary Information and Trade Secrets' (University of Pennsylvania Law School, 2011) 13

<sup>220</sup> Ibid.

<sup>221</sup> Tarun Sharma and Rajat Srivasta, 'Non-Disclosure Agreement: A Curve in a Glossy Path' (2020) 1 DME Journal of Management <<https://www.dmejournals.com>> accessed 13 March 2024.

<sup>222</sup> Ibid.

<sup>223</sup> CFI Team, 'What is a Non-compete Agreement' < <https://corporatefinanceinstitute.com> > accessed 10 March 2024.

<sup>224</sup> Ibid.

<sup>225</sup> Federal Trade Commission, 'Exploring Alternatives to Non-Compete Agreements' <<https://www.asha.org>> accessed 9 March 2024.

agreements.<sup>226</sup> Unlike non-compete agreements, NDAs are an excellent alternative because they allow the employee to work for a competitor or to establish their own firm.<sup>227</sup> They are only concerned with protecting personal information while leaving people free to pursue their careers.<sup>228</sup> The reason behind these agreements was the employer's fear that former employees may take vital information, such as trade secrets, and use it in another practice.<sup>229</sup>

Generally there are two categories of NDAs<sup>230</sup>

- unilateral and
- mutual .<sup>231</sup>

In a unilateral NDA, one party commits not to disclose sensitive information. in a mutual NDA, both parties agree to not to discuss confidential information.<sup>232</sup> NDAs are often employed in industries where confidentiality is essential, such as technology, healthcare, and finance.<sup>233</sup> This is because these sectors deal with a lot of sensitive and confidential information.<sup>234</sup> companies dealing with technology, for example, there is valuable intellectual property and trade secrets that must be preserved. In healthcare, patients' privacy must be strictly protected. financial institutions manage sensitive financial information that must be kept secure from third parties.<sup>235</sup> As a result,

---

<sup>226</sup>CFI Team 'What is a Non-compete Agreement' <<https://corporatefinanceinstitute.com> > accessed 10 March 2024.

<sup>227</sup> <<https://fastercapital.com>> 'Non-Compete Alternatives: Exploring Alternatives to Non-compete Agreements' (2023) accessed 10 March 2024.

<sup>228</sup> Federal Trade Commission, 'Exploring Alternatives to Non-Compete Agreements' <<https://www.asha.org> > accessed 9 March 2024.

<sup>229</sup> Ibid.

<sup>230</sup>'Non-Disclosure Agreements(NDA's): Everything You Need to Know' <https://ironcladapp.com> accessed 12 March 2024.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> <https://fastercapital.com> ' (2023) <<https://fastercapital.com> > accessed 10 March 2024.

<sup>234</sup> Ibid.

<sup>235</sup>Federal Trade Commission, 'Non-Compete Alternatives: Exploring Alternatives to Non-compete Agreements' <<https://fastercapital.com>> (2023) accessed 10 March 2024.

non-disclosure agreements serve to protect this secret knowledge from competitors or unauthorized people.

These agreements offer a level of protection to businesses in cases of accidental breaches.<sup>236</sup> Consequently, due to the legal nature of NDAs being legally enforceable, breaking them would trigger a host of legal ramifications, including lawsuits, financial penalties, and/or criminal charges.<sup>237</sup> Be that as it may, enforcing the NDA can be challenging, particularly if the information that has been disclosed, or if the scope of the NDA, is too broad.<sup>238</sup> This is because NDAs only provide protection for information that is specifically identified and defined in the agreement.<sup>239</sup> Therefore, it should be clear with no ambiguity. Additionally, it is contended that NDAs may effectively protect an employer's trade secrets without significantly limiting an employee's future career opportunities, in the way that non-compete agreements do.<sup>240</sup>

A case that illustrates the use of non-disclosure agreement is the case of *Waymo v Uber*.<sup>241</sup> Waymo, Google's self-driving car subsidiary, sued Uber for allegedly stealing trade secrets.<sup>242</sup> The lawsuit claimed that former Waymo engineer Anthony downloaded thousands of confidential files before leaving to start his own company, which was later acquired by Uber. However, the case was settled with Uber agreeing to pay.<sup>243</sup>

---

<sup>236</sup>Ironclad, 'Non-Disclosure Agreements(NDA's): Everything You Need to Know' <https://ironcladapp.com> accessed 12 March 2024.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup>Ironclad, 'Non-Disclosure Agreements(NDA's): Everything You Need to Know' <https://ironcladapp.com> accessed 12 March 2024.

<sup>240</sup> Ibid.

<sup>241</sup> *Waymo v Uber Technologies* NP 3:17 WHA (N.D Call.2017).

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

#### 4.2.2 Non-Solicitation Agreements

A non-solicitation agreement is an employment contract that seeks to prohibit employees from soliciting their co-workers for their own benefit after leaving their employment.<sup>244</sup> This means trying to convince or persuade someone to harm or end their employment.<sup>245</sup> These agreements also prohibit employees from recruiting the company's clients or customers on behalf of a competitor.<sup>246</sup> They normally outline what the former employee is not allowed to do, how long the limitation will continue, and the repercussions for breaching the agreement.<sup>247</sup> The reason for these agreements is the employer's concern that a former employee will take clients with them when they leave.<sup>248</sup> As a result, a customer non-solicitation agreement prevents these practices of attracting business away from their former employer.<sup>249</sup> These agreements are most prevalent in service industries with strong client ties.<sup>250</sup> Example of service industries include . financial services like banks and healthcare (hospitals). This is to protect the company's customer information. Furthermore, they are typical in service organizations with a small consumer base.<sup>251</sup> Having a small consumer base refers to a circumstance in which there is a restricted number of possible clients.<sup>252</sup>

---

<sup>244</sup> Steven C Kahn and Barbara Berish Brown, 'Legal Guide To Human Resources'(2006)8:21 <https://uknowledge.uky.edu> accessed 10 March 2024.

<sup>245</sup> 'Non-Compete Agreements' <<https://www.lawinsider.com>> accessed 16 March 2024.

<sup>246</sup> Lisa Guerin, 'Understanding Non-solicitation Agreements'(2023)< <https://www.nolo.com> > accessed 12 March 2024.

<sup>247</sup> Ibid.

<sup>248</sup> Federal Trade Commision, 'Exploring Alternatives to Non-Compete Agreements' <<https://www.asha.org> > accessed 10 March 2024.

<sup>249</sup> Elizabeth Nicholas, 'Drafting Enforceable Non-Solicitation Agreements in Kentucky' (2006) Kentucky Law Journal volume 95 issue 2.

<sup>250</sup> Jacob Orosz <<https://morganandwestfield.com> > accessed 12 March 2024.

<sup>251</sup> Ibid 241.

<sup>252</sup> < <https://www.techtargget.com> > accessed 16 March 2024.

A non-solicitation agreement, unlike a non-compete agreement that bars employees from working for a competitor in the same industry,<sup>253</sup> only prohibits employees from recruiting employees or clients of the business that they have left.<sup>254</sup> They do not ban the employee from working for a competitor.<sup>255</sup> Thus, these agreements allow employees to change jobs freely.<sup>256</sup> This is not the case with non-compete agreements as they prevent workers from freely changing jobs. Non-solicitation agreements do not prevent employees and customers from moving to a competitor voluntarily.<sup>257</sup> This is as long as the departing employee hasn't improperly solicited them.<sup>258</sup> Therefore, these agreements do not prevent the former employee from competing altogether, but merely require him or her to hire employees in some other manner or from other sources.<sup>259</sup> This means that non-solicitation agreements safeguard a former employer's interests without impeding employee's career growth and development.<sup>260</sup>

The enforceability and legitimacy of non-solicitation agreements remain contentious.<sup>261</sup> there are several viewpoints and perspectives on the subject. Some scholars argue that these agreements can be overly restrictive and limit job opportunities, while others believe that they are necessary to protect businesses.<sup>262</sup> However, they are likely to be implemented as long as they do not make it too difficult for an employee to earn a livelihood or unfairly limit a competitor's capacity to hire

---

<sup>253</sup>CFI Team, 'What is a Non-Solicitation Agreement?' (2023).

<<https://corporatefinanceinstitute.com>> accessed 12 March 2024.

<sup>254</sup> David Koeppl, 'Lose the Employee, Keep the Business' (N.Y Times 1990) at C5

<sup>255</sup> Ibid.

<sup>256</sup> Federal Trade Commission, 'Exploring Alternatives to Non-Compete Agreements'

<<https://www.asha.org>> accessed 11 March 2024.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Elizabeth Nicholas, 'Drafting Enforceable Non-Solicitation Agreements in Kentucky' (2006)  
95 Kentucky Law Journal

<sup>260</sup> Ibid 251.

<sup>261</sup>CFI Team, 'What is a Non-Solicitation Agreement?' (2023)

<<https://corporatefinanceinstitute.com>> accessed 12 March 2024.

<sup>262</sup> Ibid.

workers or attract customers through legitimate ways.<sup>263</sup> This simply means that they must be obvious, unequivocal, and reasonable.<sup>264</sup> If the agreement is vague, it will be unenforceable in court.<sup>265</sup> Moreover, the employer must have a legitimate business justification to safeguard the company's sensitive information.<sup>266</sup> If one of the goals of a non-solicitation agreement is to protect the client list, the customer list must be valuable.<sup>267</sup> This means that it must be worth protecting. An illustration of non-solicitation agreement is seen in the case of *Arthur Gallagher & Co v Anthony*,<sup>268</sup> Arthur sued the former employees for violating non-solicitation agreements by attempting to recruit clients and employees for a competitor.<sup>269</sup> The court issued an injunction enforcing the non-solicitation agreements, emphasizing their importance in protecting business interest and client relationships.<sup>270</sup>

#### 4.2.3 Garden Leave Agreement

Another alternative to non-compete agreements is the garden leave agreement (GLA).<sup>271</sup> This is a protectionist strategy that is used by employers when an employee is terminated or resigns.<sup>272</sup> This agreement is quite similar to a non-compete agreement in that it prohibits a former employee from

---

<sup>263</sup> Lisa Guerin, *Understanding Non-solicitation Agreements* (UC Berkeley School of Law, 2023) <<https://www.nolo.com>> accessed 12 March 2024.

<sup>264</sup> CFI Team, 'What is a Non-Solicitation Agreement?' (2023) <<https://corporatefinanceinstitute.com>> accessed 12 March 2024

<sup>265</sup> Ibid.

<sup>266</sup> Ibid 258.

<sup>267</sup> Ibid.258

<sup>268</sup> *Arthur Gallagher & Co v Anthony* No 16-2839, 2016 WL 4523104 (N.D Aug 29, 2016).

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Abigail Shechtman Nicandri, 'The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternatives Approaches For Protecting Employers Proprietary Information and Trade Secrets' (2011) 13:4 <<https://scholarship.law>> accessed 13 March 2024.

<sup>272</sup> Julia Kagan, 'Garden Leave: What it is, Pros and Cons for Employers, Employees' (2013) <<https://www.investopedia.com>> accessed 15 March 2024.

working for a competitor for a set duration.<sup>273</sup> However, under the garden leave agreement, the employer agrees to pay the employee during the non-compete term.<sup>274</sup> This means that, if the employee agrees to not start their own competing business or work for a competitor for at least 2 years, the employer will compensate him/her for those 2 years. Julia Kagan, in her article *Garden Leave: What it is, Pros and Cons for Employers and Employees*, explains that the garden leave is a transitional period for employees who give or receive a notice of termination.<sup>275</sup> This is a period when an employee is in the process of changing companies and ,during this period, employees remain on the payroll but are absent from work.<sup>276</sup> Employees who have entered into a GLA are banned from working for competitors, or for themselves, during their absence.<sup>277</sup> The purpose of the GLA is to protect an employer’s interests in trade secrets and other proprietary business information.<sup>278</sup> They also help prevent competition from former employees.<sup>279</sup> These agreements also provide a measure of protection to the employer against the employee’s solicitation of client and co-workers.<sup>280</sup>

Another reason to implement a GLA is that an employee may have access to current information that could be useful to the employer’s competitors.<sup>281</sup> Therefore, placing an employee on garden leave may help to ensure that, by the time the individual is contractually free, they have not been

---

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> Julia Kagan, 'Garden Leave: What it is, Pros and Cons for Employers, Employees'(2013) <<https://www.investopedia.com> > accessed 15 March 2024.

<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

<sup>278</sup> Abigail Shechtman Nicandri, 'The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternatives Approaches For Protecting Employers Proprietary Information and Trade Secrets' (2011) 13:4 < <https://scholarship.law> > accessed 15 March 2024.

<sup>279</sup> Jeffrey Klein and Nicholas Pappas, ' Garden Leave Clauses in Lieu of Non-Competes' (2009) 241 N.Y Law Journal pp.24. < <https://www.weil.com> > accessed 14 March 2024.

<sup>280</sup> Ibid.

<sup>281</sup> Julia Kagan, 'Garden Leave: What it is, Pros and Cons for Employers, Employees'(2013) <<https://www.investopedia.com> > accessed 15 March 2024.

privity to the information been long enough to mitigate any potential harm.<sup>282</sup> Moreover, following these agreements, an employee remains an employee of the former employer during the garden leave period.<sup>283</sup> This means that the former employee continues to owe their former employer a duty of loyalty.<sup>284</sup> As a result, he/she may not work in competition with his/her employer as such conduct would violate the employee's continuing duty of loyalty.<sup>285</sup> The departing employee typically has limited physical access to the premises, files, or sensitive company's information.<sup>286</sup> This means that he/she does not have access to the company's confidential information. Additionally, if the employee fails to abide by the garden leave agreement, the employer may apply to the appropriate court for an injunction that would enforce the agreement.<sup>287</sup> In considering whether to grant injunctions enforcing these agreements, courts consider the necessity and reasonableness of the agreement.<sup>288</sup> Jeffrey Klein and Nichols Pappas in their article Garden Leave Clauses in Lieu of Non-Competes, share the sentiments that courts appear to be much more willing to find the reasonableness balance tipping towards an employer.<sup>289</sup> This is if an employment contract included a requirement that the employer continue the employee's salary during the period of the garden leave period.<sup>290</sup>

---

<sup>282</sup> Ibid.

<sup>283</sup> Jeffrey Klein and Nichols Pappas, 'Garden Leave Clauses in Lieu of Non-Competes' (2009) 241 N.Y Law Journal < <https://www.weil.com> > accessed 14 March 2024.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid.

<sup>286</sup> Julia Kagan, 'Garden Leave: What it is, Pros and Cons for Employers, Employees' (2013) <<https://www.investopedia.com>> accessed 15 March 2024.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Jeffrey Klein and Nichols Pappas, 'Garden Leave Clauses in Lieu of Non-Competes' (2009) 241 N.Y Law Journal < <https://www.weil.com> > accessed 15 March 2024.

<sup>290</sup> Ibid.

Following the case of *Lombard Risk Management v. Paul Thompstone*,<sup>291</sup> Lombard Risk Management placed Thompstone on garden leave when he resigned to join a competitor.<sup>292</sup> Thompstone contested the enforceability of the garden leave clause, but the court upheld it, emphasizing that the employer's decision to place an employee on garden leave to protect its business interests was valid.<sup>293</sup> Moreover, in the case of *Symbian Ltd v Christensen*,<sup>294</sup> the case dealt with the enforceability of garden leave agreements, where the court upheld the employer's right to place an employee on garden leave to prevent immediate competition.<sup>295</sup>

#### 4.3 Conclusion

As this chapter has shown, non-compete agreements are not the only option in employment contracts to protect the intellectual property and interest of the business while protecting employer's rights too. Among these are non-disclosure agreements, which forbid employees from disclosing trade secrets and proprietary information to an employer's competitor. The chapter also investigated the possibility of non-solicitation agreements, which forbid workers from approaching former colleagues for personal gain after leaving their jobs. Finally, it was revealed that garden leave agreements can be utilized in cases of employee resignation or termination from their job. An employee receives compensation for the duration of their non-compete period following a garden leave agreement.

All of these alternatives are utilized to safeguard the company's trade secrets and private information from competitors. This is the same function as non-compete agreements. However, these alternatives do not limit employees' career opportunities, which would eventually impede development, as argued in chapter 3. As a result, these agreements provide an effective means of preventing trade secrets and other sensitive information from coming into the hands of a rival while also allowing individuals to grow and develop. They help to balance the interests of the firm and the worker without limiting progress. The next chapter explores recommendations regarding the use of non compete agreements and provide a detailed conclusion on the matte

---

<sup>291</sup> *Lombard Risk Management v. Paul Thompstone* [2008] EWHC 174 (QB).

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*

<sup>294</sup> *Symbian Ltd v Christensen* [2001] IRLR 77.

<sup>295</sup> *Ibid.*

## Chapter 5 - Conclusions and Recommendations

### 5.1 Introduction

This study set out to find out how much development is hampered by non-compete agreements. A review of the literature and an outline of the study's methodology were provided in chapter one. An overview of the effects of these agreements on job mobility and entrepreneurship was covered in chapter two together with their relation to development. The study also examined the enforceability and legality of non-compete agreements in various jurisdictions and their effects on development from an economic standpoint. In order to safeguard the interests of a company and an employee, it recommended that other employment contracts could be taken into consideration as substitutes for non-compete agreements in chapter four. Therefore, chapter five offers a conclusion based on the submissions in the previous chapters.

According to this study, non-compete agreements were developed by companies to protect their interests and sensitive data, including trade secrets. This is achieved by prohibiting workers from working for rival companies of their employer or even starting their own rival company for a predetermined amount of time. This includes being prohibited from bringing their knowledge and abilities to rival companies. The study also argued that non-compete agreements provide a certain level of legal defence to the owners of the company in the event that an employee chooses to break the terms of the agreement.

It did, however, stress that non-compete agreements have some effects on job mobility and entrepreneurship. This is by limiting workers' freedom to select where and when to work, as well as their capacity to transfer between enterprises and industries. This, it was argued, can impede national development, to some extent. They also restrict a person's capacity to compete in the labour market and make a living. Potentially this obstructs progress, particularly in fields where talent mobility is critical to both economic expansion and development.

Based on the research, non-compete agreements must fulfil specific conditions in order to be valid and enforceable. Among these is a requirement that they must be deemed reasonable, which implies that they shouldn't take away an excessive amount of the employee's chances- for creativity and earning a living. Nevertheless, different jurisdictions have varied laws regarding the enforcement of non-compete agreements.

## 5.2 Summary of Findings

As the study suggests, non compete agreements were put in place as safety measures to shield companies' exclusive knowledge and interests. However, employees' living standards may be negatively impacted by limitations on their ability to change jobs and possibilities to launch new ventures in the same sector of the economy. Development may, thus, hampered by the aforementioned factors because of the impediment to the movement of talent, which, in turn, stifles innovation, which is a crucial component of development.

Additionally, the research has indicated that the reasonability of non compete agreements may be used to judge their legality and enforceability. However, this isn't the same with all jurisdictions. It also depends on the rationale behind the agreement, such as whether or not it is intended to safeguard the company's interests against rivals. These agreements must be within an acceptable time frame or geographic bounds. Lesotho has more laws protecting private company information like other nations, such as South Africa.

Furthermore, in order to protect a company's interests and encourage individual progression that advances development, there are alternative solutions that perform similarly to non compete agreements. These options help to achieve a balance between safeguarding each party's interests. Consequently, these substitutes offer a just means for businesses to safeguard their interests without impeding progress.

## 5.3 Recommendations

Based on the findings in the discussed chapters, this study makes the following recommendations.

1. Increased knowledge of non-compete agreements. Before employees sign any agreements, they should be fully informed about these agreements. This means that, in order for employees to make an informed decision, they need to be fully informed on the benefits and drawbacks of non compete agreements. To inform the employees of non-compete agreements is the duty of the employer and the legal team of the company. This is because it will make them be aware of their rights and responsibilities under the contract, which may have ramifications for limited career mobility and entrepreneurial potential. However, this may result in increasing disagreements between the company and the employee. This is because the employee will now have a better knowledge of the factors that make non-compete agreements valid. As a result, the employer will face

- additional legal challenges, which could be costly. The benefit of increasing awareness about non-compete agreements is that both the employer and the employee will be fully educated about what they involve.
2. Expanding the usage of substitutes of non compete agreements. It is imperative to provide employees with viable options in case they are uncomfortable signing a non-compete agreement. Considering the options available to them, gives them a pool of options to choose from and choose what may be suitable for them. In order to effectively safeguard their interests, employers and employees should encourage alternatives to non-compete agreements. Additionally, this can keep the employee's possibilities for further exploration from being restricted. Expanding the use of substitutes for non-compete agreements may increase the danger that the substitutes do not provide the same level of security that non-compete agreements do. However, non-compete agreement replacements are less restrictive since they strike a balance between protecting the interests of the firm and employees.
  3. Additional laws and regulations governing non compete agreements should be created. An example of this may be the Mandatory Disclosure Requirements Provisions,<sup>296</sup> this would require employers to disclose the terms and implications of non-compete agreement when hiring.<sup>297</sup> This could make sure that employers don't treat workers too harshly or restrict their prospects for advancement in their careers or prevent them from developing their entrepreneurial abilities. Employees would therefore know what they are getting themselves into. Moreover, a more defined framework for the operation of non-compete agreements will be facilitated by the enactment of these additional laws or rules.

## 5.4 Conclusion

The study sought to examine the extent to which non-compete clauses inhibit progress. According to the study, non-compete agreements have an impact on employee development since they limit job mobility and entrepreneurial chances. As a result, employees' wages are reduced because they are unable to freely shift between positions, affecting demand supply. Demand supply is vital for

---

<sup>296</sup> Law Insider, *Mandatory Disclosure* (Law Insider, 2024) < <https://www.lawinsider.com> > accesses 14 May 2024.

<sup>297</sup> Ibid.

development because when it is high, the economy improves because more people buy goods and services, which leads to increased development. There is also a limit to the number of new employment that may be created, which can lead to the development of new technology. To avoid limiting employees' career advancement, it is critical to strike a balance between preserving their rights and those of their employers. To do so, employees and employers should examine alternatives that are less restrictive than non-compete agreements. These include the non-solicitation, non-disclosure, and garden leave agreements.

## BIBLIOGRAPHY

### Cases

1. Attorney General v Tek Corporation (Pty) Ltd and Another CIV/T/249/2006 [2007] LSHC 47
2. Alger v Tacher 36 Mass (1837) pp. 51-53
3. Arthur Gallagher & Co v Anthony No 16-2839, 2016 WL 4523104 (N.D Aug 29, 2016)
4. Dyer's case (1414) 2 Hen. V, fol.5, pp. 26
5. Inc v Douglas 727 S.W 2d 698
6. Lombard Risk Management v. Paul Thompstone [2008] EWHC 174 (QB)
7. Merrimack Valley Wood Prods v Near 876 A.2D pp. 757, 762 (N.H 2005)
8. Symbian Ltd v Christensen [2001] IRLR 77
9. Technical Aid Corporation v Allen 591 A.2d pp. 262, 266 (N.H. 1991)

### Statutes and Statutory Instruments

10. Competition Act No. 89 of 1999
11. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3484 (2023)
12. South African Competition Act 1998

### Books

13. Cassie Boyle, Samantha Saltzman and others, *Non-Compete Around the World: Top Issues and Strategies for Global Employers* (Dla Piper, 2023)
14. Feldman S, *Experimental Approach to the study of Normative Failures: Divulging of Trade secrets by Silicon Valley Employees* (Semantic Scholar, 2003) pp. 105
15. Farley N, 'Non-compete Agreements' (Nelp, 2021)
16. Jane Flanagan, 'No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit Their Overuse' ( Acslaw, 2013)
17. Hamme K, *How Non-compete Clauses Cost Americans on a year* (Cnbc, 2023)
18. Jeffers J, *The impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* (July 5 2019)
19. Kahn S and Brown B, *Legal Guide to Human Resources* (Lslf edn, 1996)
20. Lavetti K, *Non-compete agreements in employment contract* (Ohio State University, 2021)

21. John Lettieri, *Non-Compete Agreements and American workers: Testimony before the Senate Committee on Small Business, Economic Innovation Group* (Economic Innovation Group, 2019).
22. Marx M, 'Essays on Employee Non-compete Agreements' ((Harvard Business School, 2009)
23. Marx M , Fleming L and Others, *Regional Disadvantage? Non- compete Agreements and Brain Drain* (2010) SSRN Electronic Journal <<https://www.reseachgate.net>> accessed 31 May 2024.
24. Reed B, *History of Non-Compete Agreements* (2021)
25. Samila S, *Non-compete Covenants: Incentives to innovate or impediment to Growth* ( Jstor, 2009)
26. Starr E, *Non-competes in the U.S Labor Force* (August 2019)

#### **Journal Articles**

27. Maureen Callahan, 'Comment, Post-Employment Restraint Agreements: A Reassessment' (1985) 2 CHI. University Law Review pp. 703
28. Charles Tait Graves & James Diboise, 'Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?' (2007) 1 Entrepreneurial Bus. L.J pp. 323,330
29. Klepper S, 'Spinoffs: A Review and Synthesis' (2010) 6 European Management Review pp.159,171
30. Lester G and Ryan E, 'Choice of Law and Employee Restrictive Covenants: An American Perspective' (2010) Comparative Labour Law Journal 31 pp.389, 392
31. Lobel O, 'Non-competes, Human Capital Policy and Regional Competition' (2020) 45 Journal of Corporation Law
32. Nicandri A, 'The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternative Approaches for Protecting Employers Proprietary Information and Trade Secrets' (University of Pennsylvania Law School, 2011) 13 Business Law Journal
33. Nicholas E, 'Drafting Enforceable Non-Solicitation Agreements in Kentucky' (2006) 95 Kentucky Law Journal
34. Pivateau, 'Putting the Blue Pencil Down: An Argument for Specificity in Non-Compete Agreements' (2008) 86 Nebraska Law Review pp.672,705

35. Rogerson W, 'Contractual Solutions to the Hold-Up Problem: The Review of Economic Studies' *The Review of Economic Studies* (1992) 4(59) pp.777-793
36. Schulman E, 'An Economic Analysis of Employee Noncompetition Agreements' (1992) 69 *Den University Law Review*
37. Topel and Ward, 'Job Mobility and the Careers of Young Men'(1992) 107 *The Quarterly Journal of Economics* pp. 439-479

### Online Journals

38. Chotiner I, 'What a Ban on Non-compete Agreements Could Mean for American Workers' (2021) 54(4)<<https://journals.sagepub.com/doi/abs/10.1177/08863687221105010>> accessed 23 February 2024
39. Decker L, *The Role of Trauma in Spiritual Development* (1993) 33 *Journal of Humanistic Psychology* pp.33 < <https://journals.sagepub.com> > accessed 31 May 2024.
40. David Audretsch,' The dynamic role of small firms- Evidence from the US' (2002) *Small Business Economics* 18 pp.13-40 < <https://wol.iza.org> > accessed 20 February 2024
41. Dworkin T, Baucus M and others, 'A Comparison of Whistleblowing Processes' (1998) *Journal of Business Ethics* 17 pp.1281, 1298 < <https://doi.org> > accessed 5 December 2023
42. Klein J and Pappas N,' Garden Leave Clauses in Lieu of Non-Competes' (2009) 241 *N.Y Law Journal* pp.24. < <https://www.weil.com> > accessed 14 March 2024
43. Horvitz K, 'An Unreasonable Ban on Reasonable Competition: The Legal Profession's Protectionist Stance Against Non-Compete Agreements Binding In-House Counsel' (2016) 65 pp.1007 < <https://www.scholarship.law.due.edu> > accessed 25 February 2024
44. Kritikos A,' Entrepreneurs and their impact on jobs and economic growth' (2014) 8<<https://wol.iza.org/uploads/articles/8/pdfs/entrepreneurs-and-their-impact-on-jobs-and-economic-growth.one-pager.pdf>> accessed 26 February 2024
45. Pham T and others, 'Dynamic entrepreneurship, planned innovation and firm profitability:evidence from a Southeast Asian country (2021) 7(7) < <https://www.sciencedirect.com> > accessed 21 February 2024
46. Sharma T and Srivasta R, 'Non-Disclosure Agreement: A Curve in a Glossy Path'(2020) 1 *DME Journal of Management* <<https://www.dmejournals.com> > accessed 13 March 2024

47. Thomas R, Norman Bishara and others, An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post Employment Covenants (2015) 68 Vanderbilt Law Review <<https://papers.ssrn.com>>accessed 31 May 2024
48. Virjan D , Magda Manole and others, ‘Competitiveness- the engine that boosts economic growth and revives the economy’ (2023) 11 < <https://doi.org>> accessed 21 February 2024

### **Working Papers**

49. A Mark & O Lobel, ‘Banning Non-compete Agreements to Create Competitive Job Markets ‘(2021) San Diego Legal Studies Paper No. 21-010 <<https://papers.ssrn.com>>accessed 31 August 2023

### **Conference**

50. John M McAdams, ‘Non- compete agreements: A review of the literature’ ( Federal Trade Commission, Bureau of Economic,2019) <<https://papers.ssrn.com> >accessed 31 August 2023.

### **Papers**

51. White House, ‘Fact Sheet: Executive Order on Promoting Competition in the American Economy’ (2021). <https://www.whitehouse.gov> >assessed 21 January 2024

### **Thesis**

52. Kwan Seung Lee, Non compete agreements: History, Diffusion and Consequences (DPhil thesis Cornell University 2019) pp 1 < <https://ecommons.cornell.edu> > accessed 31 May 2024.

### **International Instruments**

53. National Bureau of Economic Research 2012

### **Websites and blogs**

54. Boyle C, Samantha Saltzman and others, ‘Non-Compete Around the World: Top Issues and Strategies for Global Employers’ (2023)
55. Cueto Law,’ Understanding the Enforceability of Non-Compete Agreements in Employment Law’ (2023) < <https://cuetolawgroup.com>> accessed 25 February 2024
56. CFI Team, ‘What is a Non-Solicitation Agreement?’ (2023) <<https://corporatefinanceinstitute.com> > accessed 12 March 2024
57. Chaka M,’Your Trade Secrets Are Safe with Me: How to Protect Trade Secrets in Lesotho’
58. < <https://www.webbernew.com>> accessed 26 February 2024

59. Clark R and Saxberg B, '4 Reasons Good Employees lose Their Motivation' (2019) <<https://hbsp.harvard.edu/product/H04UA7-PDF-ENG>> accessed 25 February 2024
60. Farley N, 'Non-compete Provisions in Context : Why NELPS supports calls for reform' (Nelp, 2018) <<https://www.nelp.org> > accessed 25 August 2023
61. Fair Competition Law, 'A Brief History of Non-compete Regulation' (Fair Competition Law, 2021) < <https://faircompetition.com> > accessed 30 May 2024
62. Fallick B and Rebitzer, 'Job Hopping in Silicon Valley: Some Evidence Concerning the Micro Foundations of a High Technology Cluster' (2006)
63. Goodman R, Mayet L and Rantho E, 'South Africa: Watch Out Employers: Your Non-Compete and No-poaching Agreements May Also Be Considered Anti- Competitive in South Africa (2023). <https://intelligens.africa/2023/08/08/watch-out-employers-your-non-compete-and-no-poaching-agreements-may-also-be-considered-anti-competitive-in-south-africa/>> accessed 26 February 2024
64. Gassner P, 'Non-competes are Bad for Employees and the Economy' (July 14, 2021) < <https://medium.com/@peter.gassner/non-competes-are-bad-for-employees-and-the-economy-bf2a69c123b7>> accessed 20 February 2024
65. Guerin L, 'Understanding Non-solicitation Agreements'(2023)< <https://www.nolo.com> > accessed 12 March 2024.
66. Hayes A, 'What is a Non-compete agreement? Its Purpose and Requirements' ( Investopedia, 2023) <<https://www.investopedia.com> > accessed 30 May 2024
67. Kagan J, 'Garden Leave: What it is, Pros and Cons for Employers, Employees'(2013) <<https://www.investopedia.com> > accessed 15 March 2024
68. Logue A, 'What is Stagnation' (2022) <<https://www.thebalancemoney.com> > accessed 21 February 2024
69. Mark A and O Lobel, 'Banning Non-Compete Agreements to Create Competitive Job Markets' (2021) < <https://papers.ssrn.com> > accessed 31 August 2023
70. Munroe P, 'The Canadian Employee Competition Blog' (20220 < <https://competingemployee.com> >accessed 26 February 2024
71. Radcliffe B, 'The Economics of Labor Mobility' (2023) <<https://www.investopedia.com> >accessed 19 February 2024

72. Samuel Young, 'Non-compete Clauses, Job Mobility and Job Quality: Evidence form a Low-Earning Ban in Austria' (2021). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3811459](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3811459) >accessed 26 February 2024.
73. State of Nations, 'Non-Compete Clauses' < <https://hsfnotes.com> > accessed 25 February 2024
74. Steve Harvey Law, 'What businesses frequently use non-compete agreements'(2024) < <https://www.steveharveylaw.com>
75. Up counsel,' International Intellectual Property Law: Everything You Need to Know' (2024) < <https://www.upcounsel.com/international-intellectual-property-law>> accessed 26 February 2024
76. U.S. Government Accountability, 'Non-compete Agreements' (Gao 2023) <<https://www.gao.gov>> accessed 8 December 2023
77. McBrayer B, 'Non-compete Agreements Explained: Rules, Requirements and Definition' (2024).< <https://factorialhr.com/blog/non-compete-agreement/>> accessed 28 February 2024
78. Samuel Young, Non-compete Clauses, Job Mobility and Job Quality: Evidence from a Low-Earning Non Austria' (SSRN Electronic Journal,2021) <<https://www.researchgate.net/> > accessed 20 April 2024.
79. 'Exploring Alternatives to Non-Compete Agreements'<<https://www.asha.org> > accessed 9 March 2024
80. Hendershot Coward 'How Is The Geographic Scope Of A Non-Compete Determined- In Road Miles or As The Crow Flies' <<https://www.hchlawyers.com> >accessed 25 February 2024
81. Naledi Chambers, 'Lesotho- Property Rights' <<https://www.privacyshield.gov>> accessed 26 February 2024
82. Federal Trade Commission, 'Non-Compete Agreements in Employment & Their Legal Enforceability' (2023) <<https://www.justia.com> >accessed 25 February 2024
83. Katz Law Group, 'Non-Compete Agreements- When are they Enforceable?' <<https://www.katzlawgroup>> accessed 25 February 2024
84. Faster Capital, 'Non-Compete Alternatives: Exploring Alternatives to Non-compete Agreements' (2023) <<https://fastercapital.com>>accessed 10 March 2024

85. Ironclad, ‘Non-Disclosure Agreements (NDA’s): Everything You Need to Know’  
<<https://ironcladapp.com> >accessed 12 March 2024
86. User Pilot, ‘What is customer Goodwill and How to Build in Saas’ (2022)  
<<https://userpilot.com> >accessed 25 February 2024
87. Safeguard, ‘5 benefits of expanding into new markets’ (2023)  
<<https://www.safeguardglobal.com>> accessed 21 February 2024
88. Global Sherp, ‘Development’ <<https://globalsherp.org> >accessed 12 December 2023
89. ‘Hold-up Problem’ <<https://dictionary.cambridge.org> >accessed 19 February 2024
90. ‘Specialization versus Generalism’ <https://www.collinsdictionary.com> accessed 5  
December 2023
91. ‘Non-Compete Agreements’ <<https://www.investopedia.com> >accessed 19 January 2024
92. ‘High-skilled Labour’ <<https://www.ilo.org> >accessed 19 January 2024
93. ‘Job Hopping’ <<https://www.iberdrola.com> >assessed 28 January 2024
94. ‘Importance of Growth’ <<https://www.imf.org> >accessed 1<sup>st</sup> February 2024
95. ‘Legitimate Business Interest’ <<https://ico.org.uk> >accessed 25 February 2024
96. European Custom Portal, ‘Novel Products’<<https://www.tariffnumber.com> > accessed 21  
February 2024

### **Newspaper Articles**

97. Orosz J <<https://morganandwestfield.com> > accessed 12 March 2024.
98. Koepfel D, ‘Lose the Employee, Keep the Business’ (N.Y Times 1990) at C5.
99. Romano B, ‘Microsoft Loses Another to Google’ Seattle Times (2006).  
<<https://achieve.seattletimes.com> >