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**RESTRAINT OF TRADE COMPLIANCE AND ITS EFFECT ON BUSINESS
MODEL CREATION IN THE COVID 19 ERA IN HARARE**

BY

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DEDICATION

To my beloved son Tadiwanashe Vincent Mutomani, as young as you were, you appreciated that mom was studying and endured loneliness in my presence. I dedicate this piece of work to you and always remember if mommy did it you will do better and more!

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ABSTRACT

This study seeks to ascertain the level of compliance with the covenant in restraint of trade during the Covid-19 era in Harare between March 2020 and January 2022 and its impact on the creation of new business models. The research was largely qualitative with also features of quantitative approach to ensure that the level of compliance was ascertained first and then the assessment of how that level of compliance affected creation of business models during the Covid-19 period in Harare. The study focused on former employees who had been laid off during the period stretching from March 2020 to January 2022 in the central business district in Harare and had signed contracts with covenant in restraint of trade clauses. The sampling method that was used is snowball sampling. The population of interest was hard to access therefore 10 people within the writer's circle were chosen and these assisted in identifying other potential subjects and this led to the desired number of the sample size which was 50. The results showed that the number of people who complied with the restraint of trade during the period under review were more than those who did not comply and this affected creation of business models. It is therefore recommended that restraint of trade clauses should be limited to apply to the situations that are economically stable to ensure continuity and innovation in the business environment.

Keywords: Restraint of trade, Covid-19 era, Creation of business models

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CHAPTER 1 INTRODUCTION

1.1 Introduction

The law of contract is at the centre of most businesses all over the world. The country recognizes that every person has the right to choose and carry on any profession, trade or occupation although the practice of a profession, trade or occupation may be regulated by law (Section 64 Constitution of Zimbabwe). Employment contracts usually form the relationship between employers and employees. These contracts are therefore usually couched with different clauses that bind the contracting parties. One such clause is the restraint of trade clause. A restraint of trade is an agreement by which someone is restricted in his or her freedom to carry on his or her trade, profession, business or other economic activity (Van de Merwe et al 2003). The consequence of a contractual restraint of trade is that the freedom of one of the parties to engage in one or more specified commercial activities is restricted after the termination of the contract (Kerr, 2002). What is important to note is that covenants in restraint of trade clauses are enforceable unless it is proved that the clause goes beyond the protection of employer's interests and intellectual property. Further, the circumstances that are considered are those prevailing at the time of enforcement of the clause. The Covid-19 pandemic that hit the world in 2019 did not spare Zimbabwe thus affecting the business environment as well. This study seeks to ascertain the level of compliance with the restraint of trade clause and how this affected the creation of business models in Harare during the period extending from March 2020 to January 2022. This chapter shall discuss the background of the study, research objectives and shall give a brief overview on the significance of the study and the research methods to be used.

1.2 Background of the study

The restraint of trade is not a doctrine that is common in Zimbabwe only but in every nation because it is a principle in environment of business. Therefore it is crucial at this point to also highlight how the principle has evolved and how it has been applied in other countries.

1.2.1 United States

The restraint of trade doctrine has its roots in freedom of contract and competition laws. In the midst of ancient practices and rules of common law, it was laid down that general restraints of trade were void (Cassidy 1896). Initially, the restraint of trade was partial as to time or space and had no weight whatsoever when the contract restrained the industrial or business freedom of the individual (Cassidy 1896). That position remained settled for so many years until the decision in *Mitchell v Reynolds* (1711 I.P. Wms, 181), where the learned judge said, “What does it signify to a tradesman in London what another does in Newcastle?”. It appeared that in those times a general restraint was too unreasonable as it served no legitimate purpose for a person’s business. It made a distinction between a general and a limited restraint of trade, and the contemporary law today still basically withdraws its principles from that case. Since that decision covenants in restraint of trade that are general in nature have been ruled to be unenforceable whilst those that have limitations in respect of time, space and the individual have been held to be valid and therefore enforceable.

The above concept was later established in English common law and is codified under US statutes like Clayton Act and Federal Trade Commission Act (Christie 1985). It is now accepted as a common law principle that an employee can enter into a contract with the employer that prevents him from exercising his trade, profession or calling, or practice the same business as the employer, for a specified period, and within a specified area after leaving employment. (Seddon et al, 2012). Currently under the United States law restraining clauses are enforceable if there is a legitimate interest in need of protection for instance business connections and secrets and where the restraint is reasonable so as to protect the employer’s interests and nothing more (Houck et al 2022).

1.2.2 South Africa

In South Africa restraint of trade agreements are enforceable, except where the court can be convinced as to their unenforceability (Marcus 1994). Previously, the South African position was based on the English law that stated that a restraint of trade agreement was *prima facie* (on the face of it) contrary to public policy thus invalid and unenforceable (Tladi 2002). The unanimous change came as a result of the case of

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA which described the restraint of trade as an undertaking voluntarily made by an employee not to exercise his right to trade . In that case it was held to be a valid restraint and the *onus* is on the employee who seeks to resile from its burden to show that it is nonetheless against public interest and unenforceable. To date the South African position remains the same (Van der merwe 2015).

1.2.3 Zimbabwean position

In Zimbabwe every person has the right to choose and carry on any profession, trade or occupation of his choice, however that practice may be regulated by law (Constitution of Zimbabwe 2013). One can safely say one of the regulations that is in place through common law is the restraint of trade clause. The doctrine is entrenched in common law, and states that the law respects the freedom of the employer and employees to enter into these agreements, therefore as a general rule they are valid and the onus is on the employee who seeks to resile from it to show that it is nonetheless against public policy and unenforceable (Book v Davison 1988 (1) ZLR 365 (S) 1t 385D) . In *Mangwana v Muparadzi* 1989 (1) ZLR 79 the court simply took the position taken by the South African case of *Magna* and stressed that the conditions in the clause should be reasonable and not in conflict with public policy. In summation it can safely be concluded that currently the position locally and internationally is settled. The restraint of trade clause is enforceable and the part that seeks to resile from it should prove that it is against public policy. The business community operates on competition thus it is a necessity to ensure that business' interests are protected.

1.2.4 Implication of the restraint of trade clause on business operations

The main reason for the covenant is for the employer to protect:

- his goodwill
- his clients
- his business

Covenant in restraint of trade is used to protect the employer's business interests and are mainly found in contracts of employees who by virtue of their positions or jobs

could threaten the business in the event that they join competitors or become the competition. An example is a lawyer who leaves a law firm and opens his own law firm. The clients he represented in court might still follow him and he might actually become a competitor because he already knows confidential information about the former employer and those clients. It is even worse if he opens in the same area as that of the former employer. (Mangwana v Muparadzi)

A restraint of trade goes beyond the mere protection of confidential information but it also focuses on employee's right to exercise his chosen trade, occupation or profession freely (Dooka 1999). The employee is obliged not to place himself in a position where his interests will conflict with those of the employer therefore he is mandated not get involved in undertakings which are in competition with his employer (Wespro 1994). What this entails is that starting your own business similar to that of the employer is restricted and joining a competitor is also restricted. This obviously have a negative impact on the creation of business models. The truth of the matter is that when a person gets employed he would not care less of some of the clauses due to the enjoyment of getting the job. The reality only dawns when one seeks better opportunities. However, the impact of the restraint of trade is less felt in stable and certain conditions because usually it is for a specified period or for a certain location. The problem is when the dismissal was unforeseen and at a time where the business environment is already suffering from a non controlled situation like the Covid-19 situation. This study therefore seeks to ascertain the implications of restraint of trade during the Covid-19 period in Zimbabwe.

1.2.5 Restraint of trade in the Covid-19 period

In the Covid-19 era many businesses were affected financially and employees were retrenched, some businesses struggled and are yet to fully recover. It was not easy to get employment after that save to use acquired skills and knowledge. Hiring was put on hold but people had to survive notwithstanding the prevailing situation (Organization for Economic Cooperation and Development 2020). In the neighbouring country South Africa, cases regarding the restraint of trade reached the courts and they had differing judgments. In the case of Prima Interactive(Pty) Ltd v Lemon J246/2021) the court held that Covid-19 had adverse effects not only for employees but that employers were made very vulnerable hence they should be compliance with the restraint of trade. In contrast,

in the case of *Oomph Out of Home Media (Pty) Limited v Brien* 2021 it was held that in considering the prevailing circumstances at the time of enforcement the court could not ignore the unexpected invasion of the Covid-19 in South Africa and globally. The court rejected the company's position that the employee could still survive and succeed by working in a different field. It stated that it was unfair to force the employee out of a career he chose and to start afresh in another field at a time when many businesses were closing down, retrenchments and lay-offs being witnessed daily and people trying by all means to survive. It therefore refused to enforce the restraint. Clearly the courts already have conflicting views. In Zimbabwe, the courts are yet to deal with similar cases hence the position remains unclear but there are companies that laid off workers during that period and others did out of court settlements. CBZ Bank Ltd is one such company that laid off employees during the period in question (Bloomberg 2021). A Zimbabwean government report in August 2021 (Xinhua 2021) reported that the most affected business sectors included motor industry, printing and packaging, fertilizer, retail, dairy, baking and textile and clothing. In the printing and packaging sector it was noted that there was reduction in employment as casual and contract workers were laid off. The study therefore seeks to ascertain if these former employees were able to comply with the restraint of trade clause and how this affected the business environment particularly in terms of innovation, threats of new entries and creation of new business models.

The research is important in that it relates to a point in time where the businesses are struggling due to a natural cause and a restraint of trade is a covenant entered before. At the same time it might be a chance for creation of business models as people are pushed to their limits. It becomes necessary to ascertain the relevance of the restraint of trade and its compliance in such an environment as it has a direct impact on the business environment itself and competition law.

1.3 Statement of the research problem

A restraint of trade restricts a person's freedom of trade or work. Its aim is to protect business interests such as client information, intellectual property, employees and trade secrets by regulating the actions of former employees or shareholders. The first port of call when ascertaining whether or not a restraint of trade is enforceable is for the employer to prove that a restraint of trade exists. (*SPP Pumps v Stoop* 2015). It is

generally accepted that the restraint of trade clause is enforceable. Once it is proved to exist the employees can then show that it is unreasonable and therefore not enforceable. There have been studies on the enforceability and constitutionality of restraint of trade (Mahuni 2020). Studies have also been done on the recent developments on the restraint of trade (Singo 2020). These studies sought to ascertain if the constitutional provisions in Zimbabwe and South Africa which states that there is right to trade and freedom of occupation affects the applicability, constitutionality and enforceability of the restraint of trade. Another study focused on the enforcement of restraint of trade agreement in employment relationships (Mparutsa 2021). The settled position is that they are enforceable and any contention should be decided by the courts using the settled principles. There have been however no studies to ascertain if compliance or non compliance with this covenant in the Covid-19 in Zimbabwe have an impact on creation of business model. When these studies were done there was no consideration of the Covid-19. It is important to research on whether the impact of restraint of trade in a stable environment is different from in an unstable business environment. Further, it is unknown if this would have an impact on the creation of business models. Frankly speaking, most of these studies focused more on legal framework rather than impact on creation of business model, especially in the Covid-19. This study seeks to close that gap and ascertain if the same principles that are applied in an unstable environment should also be applied in the Covid-19 or unstable environments. Further, to ascertain if there is any relationship between restraint of trade compliance and creation of business models.

1.4 Purpose of the study

The purpose of this study is to ascertain the level of compliance with the covenant in restraint of trade during the Covid-19 era in Harare and its impact on the creation of new business models. Ultimately it will provide answers on whether high or low compliance have an impact on the creation of new business models bearing in mind that former employees are the ones who might be capable of doing so given the chance.

1.5 Research objectives

The main research objective of this study is to assess the level of compliance with the covenant in restraint of trade during the Covid-19 era between March 2020 and January 2022 in Harare.

This study seeks to address the following specific objectives :

- a) To ascertain the level of compliance with the restraint of trade covenant during the Covid-19 era in Harare
- b) To determine the extent to which the level of compliance affected the creation of new business models during the Covid-19 era in Harare.
- c) To ascertain the reasonableness of the restraint of trade and whether or not Zimbabwe should enforce restraint of trade covenant in uncertain times like Covid-19 period.

1.6 Research questions

- 1) Is there compliance with the restraint of trade covenant during Covid-19 era in Harare.
- 2) To what extent does the level of compliance affect the creation of new business models
- 3) Is the enforcement of the restraint of trade covenant reasonable in the covid-19 era and should the country enforce restraint of trade covenants during uncertain times like Covid-19 era.

1.7 Justification of the study

Covid-19 is just but one occurrence which had far reaching consequences. This research has been necessitated by the fact that the pandemic has caused loss of employment and it has become more than inevitable that people might just need to use their acquired skills and experience to set up their own business which might result in creation of new businesses. However, there is need to ascertain if this can be achieved if there is strict adherence to the covenant in restraint of trade and if it is even necessary to enforce these clauses. The research therefore seeks to ascertain the impact of compliance on creation of business models since on the other hand employers need to protect their proprietary interests and there is no doubt that they need the protection more now than ever.

1.8 Significance of the study

This study is important to different stakeholders in the business environment like employees, employers and the Judiciary. They are all affected in one way or the other.

1.8.1 The Judiciary

The judiciary consists of all judicial officers namely the judges and magistrates who decide civil and criminal matters (Veritaszim 2022). Where a dispute concerning the enforcement of a restraint of trade arises it is settled by the judiciary and this is why a lot of literature is derived from case law locally and internationally. These are the interpreters of the clauses and the law hence this study will be crucial to them because they will be tasked to adjudicate upon this cases during the Covid-19 period or to deal with matters that arose within the Covid-19 era. This study will assist them to see the impact that their decisions will have not only on the parties involved but on the business environment as well. Their decisions are binding and will bind future disagreements thus it is important for them to see the impact of their decisions in the creation of business models. The judiciary will be able to have an insight on the impact of ordering compliance with a restraint of trade in uncertain times and the effect of also resiling from the same.

1.8.2 The employees

This study is important to employees as they can take lessons on what kind of restraints to accept or avoid so that they are not affected in the event of unforeseen events . Most entrepreneurs started off as employees of other companies. Setting up a business is almost every person's dream and this is also an advantage on the business domain however, where there are restrictions it becomes difficult. Covid-19 took almost 2 good years and an employee restricted to practice in Harare for 2 years after leaving employment would be greatly disadvantaged. This study will shed light on those kind of predicaments and assist the employees. Further, those employees who seek to work for a short period of time and move on to build their own businesses would be guided accordingly so that when they sign contracts they are aware what impact they would have in their future goals and creation of their businesses.

1.8.3 The employers

Employers usually have the upper hand in any negotiations with the employees, however too much restrictions will not work in their favour. This study will assist the employers to see the bigger picture, if they impose too much restrictions that are unreasonable, they are dragged to the court, they lose resources at the same time the clauses will not be enforced. On the other hand their business will not grow or become innovative if there is less competition. While lack of pro-competition regulation increases the prices of services , lowers their quality and limits access, competition improves the productive efficiency of firms and well functioning product markets that provide essential inputs for other industries can generate broader spillover effects across the economy (Licetti et al 2017) . Competition is necessary for innovation, growth and creation of business models and employers needs that for survival.

1.9 Contribution of the study

As previously highlighted in this chapter there has been literature on the enforceability, constitutionality and applicability of the restraint of trade in Zimbabwe, South Africa and globally. These have assisted a lot in understanding what a restraint of trade is and how it is affected by contemporary law. These studies have mainly focused more on the legal implications and less on the impact on creation of businesses. The Covid-19

is a pandemic that came as an unexpected occurrence such that they had been no researches about the Covid-19 and the restraint of trade compliance. This study will therefore contribute to the existing literature by providing more on the enforcement and compliance of the restraint of trade in the Covid-19 period. The study will also endeavour to ascertain the relationship that could possibly be there between the creation of business models and compliance with the restraint of trade during the pandemic. The main principle is that the employee's right to earn a living and remain active economically must be weighed against the employer's right to protect his proprietary interest (Hock 2003). However, there is the need to ascertain if this principle would remain so in Covid-19, therefore this study will contribute to existing literature in relation to creation of business models.

There was a study that was conducted on the implications of Covid-19 on intellectual property rights, case study of unfair competition and restraint to trade (Pelemo et al 2021) . Their study examined how the Covid-19 affected business owners' intellectual property rights, how it enhanced unfair labour competition and violated the principle of the restraint to trade. The study noted that the issue of working at home was dangerous as it exposed companies' confidential information and weakening of the restraint of trade thereby resulting in unfair labor practices. The study recommended that companies adopt best practices and policies to safeguard their interests and mitigate litigation on restraint of trade infringement. Likewise, this study contributes in a different way to the issue of intellectual rights and economic growth. This study seeks to show that whilst the protection of trade secrets is crucial, economic growth is equally important by showing that a strict adherence to restraint of trade clause might have negative impact on the creation of business as former employees are not allowed to engage in businesses of their own. There should a balance between protecting employers and future employees thereby creating new businesses.

The previous studies highlighted above used statutes, legislation (Pelemo et al 2021) and secondary information in gathering information however, this study will engage with the employees that were laid off and had signed contracts with restraint of trade clauses. This study acknowledges that getting first hand information from these employees will provide accurate information on how the compliance or non compliance with the restraint of trade affect creation of business models. This will assist future

studies since they would be an inclusion of those employees affected in the Covid-19 period unlike relying on case law and legislation only.

1.10 Delimitations

1.10.1 Temporal

The study will be limited to the period during the Covid-19 era from March 2020 to January 2022. The first case of the Covid-19 in Zimbabwe was recorded in March 2020 and the pandemic was declared a national disaster on 27 March 2020. The first lock down was effected on 30 March 2020. The situation worsened as time went on and companies began laying off workers. As of January 2022 most companies were operating fully and most restrictions were being relaxed by government bit by bit (International Organization for Migration Zimbabwe 2022) . The writer is of the view that this is the period when issues of restraint of trade arose as everyone was struggling to make a living through starting businesses or joining other companies that were hiring.

1.10.2 Geographical boundary

The study will be limited to Harare as it is the largest city in Zimbabwe, although a comparison might be there between Harare and the neighbouring country South Africa. Harare has also been chosen because this is where most businesses are and it is easier to conduct a survey as it is highly packed with businesses of different kinds.

1.10.3 Conceptual boundary

This study will be limited to the restraint of trade and the creation of business models during the Covid-19 era. This concept is closely related to freedom of contract and sanctity of contract concepts but the study will not dwell on that lest it diverts the study to the legal framework or implications of signing a contract with a covenant in restraint of trade. This study seeks only to ascertain the relationship between compliance with the restraint of trade and creation of business models.

1.11 Limitations

Considering that this study looks into employer-employee relationship the researcher feels that employers will not be forthcoming with information and some employees will not be willing to divulge how they handled their restrictions after leaving employment. However, the researcher will focus more on employees rather than employers and ensure them that the information provided will solely be used for this study and not to confront or engage the employers to ensure accurate results.

1.12 Ethics

Protection of all participants shall be at the core of the research and confidentiality shall be maintained.

1.13 Overview of Chapters

Chapter two of this study will focus on literature review. It shall outline the conceptual, theoretical and empirical framework. Chapter 3 will discuss methodology with regards to research design, philosophy, sampling methods and also data collection techniques. The results attained in chapter 3 will be analyzed in chapter 4, thus chapter 4 will comprise of data analysis and presentation. Finally, chapter 5 will focus on conclusions, recommendations and suggestions for further studies.

1.14 Chapter Summary

This chapter was the introduction to the study. It highlighted the background of the study, statement of the research problem, research objectives, research questions, significance of the study, its purpose and contribution. The chapter also provided for the limitations and delimitation of the study. There was an overview of all the chapters to follow and the chapter also gave a general understanding of the whole study and its main purpose.

CHAPTER 2 : LITERATURE REVIEW

2.1 Introduction

The first chapter saw the introduction of the study and a general overview of the whole study. This chapter focuses on reviewing literature surrounding the restraint of trade doctrine, its compliance or non compliance during the Covid-19 era and the effect thereof on creation of business models. This shall be done with efforts to address the research objectives and questions as laid down in the first chapter. This chapter shall be structured as follows:

- **2.2** Conceptual framework
- **2.3** Theoretical framework
- **2.4** Research gap
- **2.5** Chapter Summary

2.2 Conceptual framework

A conceptual framework is a representation of the relationship between variables and is generally developed based on a literature review of the existing studies about the study. In this study compliance of the restraint of trade is the independent variable whilst creation of business models is the dependent variable.

2.2.1 Compliance with the covenant in restraint of trade and creation of business models during the Covid-19 era in Harare between March 2020 and January 2022 in Harare.

This part seeks to ascertain if the creation of business models during the Covid-19 period was dependant on the level of compliance with the restraint of trade. The table below shows that low level of compliance with the restraint of trade has a positive effect on the creation of business models and high level of compliance has a negative impact on the creation of business models. In other words if there is no compliance employees

will be free to engage with competitors, to be innovative and to build their own competitive business unlike when they are restricted.

Table 2.2.1 Effect of compliance with the covenant in restraint of trade on creation of business models during the Covid-19 period between March 2020 and January 2022 in Harare

Restraint of trade compliance	Creation of business models
High level of compliance with the restraint of trade	-
Low level of compliance with the restraint of trade	+

2.2.2 Restraint of trade

Covenant in restraint of trade is an offspring of an agreement between an employee and the employer which restricts the employee's freedom to contract or start a similar business after leaving the employment. A contract in restraint of trade is one that prevents an employee from exercising his or her trade, profession or calling, or engaging in the same business venture as the employer, for a specified period, and within a specified area after leaving employment (Basson et al 2009). If the law regulates or restrains his mode of doing business, the law should be obeyed (Wilberforce, Campbell & Elles 1966). As a matter of common law restraint of trade covenants are enforceable in Zimbabwe as long as they are not contrary to public policy. The covenant has been long part of competition law. The term restraint of trade applies only to those agreements not to pursue a particular trade, profession or business while the broader term has to do with attempts to control the markets (Wash 1913). Over the years the doctrine has been developed and in Zimbabwe it has been described as an obligation voluntarily taken by the employee to refrain from the exercise of freedom of trade in favour of the employer for a certain period (Mangwana v Muparadzi 1986). The purpose of a restraint of trade covenant is to preserve the employer's goodwill and

trade secrets which may cause commercial harm to the employer's business interests if not preserved.

2.2.3 Business Models

The essence of a business model is in defining the manner by which enterprise delivers value to customers, entices customers to pay for value and converts those payments to profit (Teece 2010). Business models are necessary features of market economies where there is consumer choice and transaction costs among consumers, producers and competition. They are usually necessitated by the need for innovation thereby creating the need to bring discoveries to market. Merging strategy and business model analysis is needed to achieve competitive advantage resulting from new business model design (Shuen 2008). Innovative business models assist businesses to differentiate themselves from competitors by imposing unique marketing, production and sales strategies. The crucial goal of business model innovation is to gain new revenue sources by improving product value and how products are delivered to customers. This uniqueness in creating business models justifies the restraint of trade in most companies because there is the need to protect this information and company's goodwill. Organizations run the risk of grooming future competitors using their own strategies if they do not use the covenant in restraint of trade. Ultimately, restraint of trade is an accepted mode of regulating and protecting a company's business model.

2.2.4 Relationship between restraint of trade compliance and creation of business models

Diagram 2.2.1 above shows the relationship between restraint of trade compliance and creation of business models. There can be creation of business models only if there are no restrictions on people especially former employees. It is therefore important to ascertain if at all there is a relationship between restraint of trade compliance and business model creation especially during the Covid-19 in Harare. As a general known perspective, the economies of many countries including Zimbabwe suffered a huge setback and companies had to lay off workers (The Herald 5 May 2020). Some were lucky as they continued working from home receiving salaries but some were

unfortunate. Prospects of securing jobs were bleak thus some resorted to opening trades of their own in line with their skills and profession. There is therefore the inevitable aspect of employers finding former employees becoming their competition. If these employers seek to enforce the restraint of trade covenant what then will become of creation of business models?

According to the World Bank (2021) about 500 000 Zimbabweans had lost their jobs by 2021. It also stated that in 2020 the pandemic and its impacts disrupted livelihoods especially in urban areas and added 1.3 million Zimbabweans to the extreme poor. The survey found out that the most commonly stated reason for losing jobs in urban areas was due to closure of companies due to hard lock-downs. Others were laid off but the companies continued operating as government almost grounded the economy in order to contain the pandemic. On the international community, new US freelance registrations rose by 48% during July to September 2020 and the freelancers were laid off workers who dealt with services like graphics and design, digital marketing, writing and computer programming (Mackrael 2020). There was creation of business models here because these people managed to start up their businesses based on the expertise and skills that they had acquired during the time they were formerly employed.

Restraint of trade covenants come in different ways. There is a non-competition clause which prevents a former employee from working for a company that conducts work that is similar to their former employer's business. Then there is non-solicitation which allows a former employee to work for a company in a similar field or industry but they would not be allowed to contact clients from their former employer about the new business. The non-competition is more restrictive and largely affects the creation of business models because it basically forbid a person from engaging in any business similar to that of the former employer unlike the non-solicitation which only prevents the poaching of employees and customers. It basically allows a former employee to start up his own business as long as he does not take the former employer's clients and this is fair competition. However, some agreements may even go a little further and impose restrictions on geographical set up for example the clause in the classical case of *Books v Davison* (SC67/88) p4 where parties were restrained from operating or engaging in the business of enameling within the Magisterial province of Mashonaland within 3 years of leaving the partnership . Those workers who were laid off during the Covid-19 period by companies situated in Harare were probably permanently resident

in Harare such that complying with a restraint of trade that prohibited them from engaging in similar work in Harare would mean that they were basically prohibited from doing anything that they have skills for as they can neither join another company nor start their own business.

There might be a relationship between compliance with the restraint of trade and creation of business models. A former employee is restricted as long as he complies with restraint of trade. During the Covid-19 era the economy was already at its lowest and companies would not risk having customers taken from them or their proprietary rights exposed. Low levels of compliance with the restraint of trade would mean that employees are free to create their businesses as long as they have resources to do so. On the other hand, high level of compliance would mean that there is no freedom to create a business or to pursue and join other companies dealing with a similar line of work.

2.3 Theoretical framework

There is a key theory that help explain the concept of restraint of trade and the creation of business models and it is called the theory of trade secret protection theory.

2.3.1 Theory of trade secret protection

Trade secrets are a type of intellectual property that includes formulas, practices, processes, designs, instruments, patterns or compilations of information that have inherent economic value because they are not generally known or readily ascertainable by others, and which the owner takes reasonable measures to keep secret (Lin, Thomas 2013). Intellectual property therefore gives owners or custodians of a trade secret the right to restrict others from disclosing it. Trade secret protection theory has its roots in Roman law (Schiller 1929). In the Roman law there was an action known as *actio servi corrupti* meaning an action for making a slave worse where the Roman jurists used to grant commercial relief under the guise of private law actions. The theory gained so much momentum because of the need to protect property rights. In the Commonwealth common law jurisdictions, confidentiality and trade secrets are regarded as an equitable right rather than a property right (Radhakrishnan et al 2008).

Generally, information that constitute a trade secret should be of value commercially since it is a secret, it should be known by a few people or a limited group of people and the rightful holder of the information should have taken reasonable steps to ensure non disclosure like confidentiality agreements or restraint of trade agreements. The major propositions of this theory lies in the conditions that must be met before an action for breach of confidence is granted (*Coco v A.N Clark Engineers) Ltd (1969) R.P.C* which are:

- The information itself must have the necessary quality of confidence about it
- That information must have been imparted in circumstances imparting an obligation of confidence
- There must be an unauthorized use of that information to the detriment of the party communicating it.

The restraint of trade concept has its roots in the theory of secret trade protection theory because the employers need to protect their intellectual property and it is usually the position that a person working in an organization would have access to information and a relationship with clients. If that person leaves he still has to respect the former employer and protect his trade secrets thus the birth of the restraint of trade.

The theory has an advantage in that proprietary competitive advantages may be achieved through the use of a certain trade secret which might have an advantage of an increased market share. However, most restraints of trade have an expiry date but trade secret protection has no expiry date, in other words one can never be sure of what the former employee intends to do with the information he got and a restraint of trade may not always assist that employer. The intention of another to create his own brand or to be innovative under a competitor can influence the divulging of such information. At the end of the day creation of business models can only be achieved if there is no much restriction on the other person regardless of the information he might have gained whilst working for the previous employer.

2.4 Empirical literature review

This part focuses on studies that have been done by other writers relating to restraint of trade compliance in the Covid-19 period and its effect on creation of business models.

This is done by discussing empirical literature relating to each objective of this study separately.

2.4.1 The level of compliance with the restraint of trade law.

The restraint of trade doctrine is an old concept of competition law, and its compliance has differed worldwide. One of the earliest study on restraint of trade dealt immensely with the history of the concept, how it evolved and developed. It summarized cases that were decided upon from the time when its application started and the writer, (Cassidy 1896) concluded that there is no evidence that restraints of trade are a bad practice nor that they deprive man of employment or jeopardize competition. He however, stated that the issue of public policy should not be a reason to uphold or decline enforcing contracts in restraint of trade. His findings in my view are justified in a nation where there is a statute which guides compliance with the restraint of trade as these will also ensure that the restraint is kept within its limits so as to avoid eliminating competition or hinder the creation of business models.

Singo (2020) studied recent law and developments of the restraint of trade. She mainly gained information from decided cases worldwide but mainly from South Africa. Her main aim was to explore the existing approach by the courts in deciding on matters regarding the enforceability of restraint of trade agreements.. What was clear from her research was that most people were not willing to comply with the agreement and those cases ended up with the employer taking them to the courts. Her conclusion was that courts continue to realize the need of enforcing restraint of trade agreements and what is crucial is for the employer to show the existence of a proprietary interest in need of protection, because in the absence of that the claim will not succeed. What is apparent from these findings is that employees are not readily willing to accept that they signed a contract rather they join competitors or start their own businesses only for the former employer to sue them for the breach. The level of compliance is therefore generally low and is made high through court intervention.

The above studies did not relate to the time which is subject of this study, which is the Covid-19 period. There has been so much debate in South Africa as to whether there should be compliance with the restraint of trade during the Covid-19 period. (Cogger

2021) analyzed the case of *Oomph Out of Home Media (Pty) Limited v Brien* and stated that the prevailing circumstances may include a consideration of the impact of Covid-19 on the economy and the availability of work at that time before the court considers ordering compliance with the restraint of trade agreement. The court's view in that case was that the effects of Covid-19 on employees could not be overlooked. Further, it was stated that it was relevant to consider that the employer was not able to pay the employee as a result of the impact of Covid-19 on the economy and therefore it would be unreasonable to enforce a restraint of trade agreement during the Covid-19 period.

Whilst workers who lost their jobs desperately sought new streams of income in their fields of qualification and trade, employers were faced with a new reality of more trade competition at a time of enormous challenges (Schulenburg 2022) . The issue of compliance during the Covid-19 was therefore crucial as most employees were not willing to do so. Surely an employer who has retrenched an employee due to operational requirements as a consequence of the Covid-19 pandemic cannot expect an employee to adhere to a restraint of trade clause which for example may restrict him to work for a competitor as this would be contrary to public policy (Arnold 2020). In *Bearings International (Pty) (Ltd) v Veeradu D280/21* it was held that, “ ... *the economic world has been hard hit by the advent of Covid-19. Very many employees have since lost their jobs and in this country as with many others, unemployment has risen to uncontrollable levels leaving the families destitute. Finding a job at this time is notoriously difficult. In the circumstances the restraint should be rejected*”. The court in this case ruled that compliance with a restraint of trade was unnecessary as it would render former employees vulnerable. This position suggests that there should not be much compliance with the doctrine of restraint of trade during the Covid-19 era, therefore this study seeks to ascertain what this position entails for business model creation.

There are critics to the above mentioned position who have stated that the judgment is deeply concerning and could lead to the exploitation of proprietary interest and information, confidential information, trade secrets, client connections and goodwill by opportunistic competitors (Mulligan 2021). The same was stated in the case of *Prima Interactive(Pty) Ltd v Lemon J246/2021* which held that Covid-19 had adverse effects

not only for employees but that employers were made very vulnerable hence they should be compliance with the restraint of trade. None of the foregoing conflicting judgments have conclusively settled the issue of whether restraints of trade are enforceable during the Covid-19 pandemic. Humphries (RSM Global 2021) is of the view that the correct approach should be the one in the case of Prima Interactive case supra because an employee would have signed a contract and cannot seek to breach the terms of that contract under the guise of public policy or unforeseen occurrences.

In Zimbabwe pre-Covid-19 it was held that in terms of the common law, restraint clauses are perfectly legal and enforceable as long as they are not unreasonable and in conflict with public policy (National Foods Ltd v J.A Mitchell (Pvt) Ltd T/A Mitchell's Bakery 1997 (2) ZLR 14). In other words it will be enforceable where it protects a legitimate and recognized business interest. These interests include trade secrets and confidential information.

Legally, the Zimbabwean position remains unclear because no cases reached the courts during the Covid-19 period however, during this study it became apparent that the issues arose although there has been no research on that . There are people who actually managed to start up businesses because they were not restrained and others did not comply with the covenant. In the USA it was noted that many laid off workers became new entrepreneurs, one personal trainer who used to work at a gym managed to build his own fitness business firstly, managing at his backyard and later finding a good place (Mackrael 2020). According to the Herald dated 25 April 2021 CBZ Bank Ltd began voluntary job cuts as it was dealing with the fallout from the Corona-virus pandemic on the corporate landscape. Air Zimbabwe which is state owned airline also put its workers on indefinite unpaid leave after revenue dried up with the corona-virus outbreak (Reuters Staff 2020). These are big companies and one can imagine what became of small and medium enterprises and companies which employed skillful workers.

The reading of literature shows that during the Covid-19 most people sought to utilize their skills to the fullest as a matter of survival thereby disregarding any contract in restraint of trade that they would have signed. The most perception was that in Harare one can only survive through using acquired skills. Some laid off workers therefore did not comply with the restraint of trade during the Covid-19 period in Harare due to the

need for survival and the need to grow business wise. In one interview, it involved a former employee who had been retrenched from a company that offered packaging and delivery services. He then looked for 3 drivers and started specializing in delivery as he owned 2 medium open trucks. He stated that he mainly handled clients whilst at the previous company so it was easy for him to get clients. He had signed a covenant in restraint of trade, but he insisted that his employer might not be offended as his was a very small business compared to the company. At the time of interviewing him it seemed the company was unaware of this development and was stealing clients.

2.3.2 The extent to which the level of compliance affected creation of new business models in the Covid-19 era in Harare.

The study takes cognizant of the fact that the implications of restraint of trade compliance is not the only factor that would affect creation of business models. However, the clause being legally recognized obviously have weight on the creation of business models. The Zimbabwe Economic Update Overcoming Economic Challenges, Natural Disasters and the pandemic (2020) stated that surveys conducted in 2020 showed that nearly 500 000 Zimbabwean households have at least one member who lost his or her job causing many households to fall into poverty. This entails that these were people who by all means wanted to sustain a living. As previously shown there is literature on restraint of trade cases during the Covid-19 pandemic but little is known on impact of it on creation of business models and this is exactly what this study seeks to achieve. There is need to ascertain if at all there is a relationship between these two variables.

2.3.3 The desirability/applicability of restraint of trade clauses in difficult economic environments.

It is submitted that our courts should continue to strive to harmonize the conflicting principles of freedom of contract and freedom of trade, when ruling on restraint of trade in the employment context (Mahuni 2020). The circumstances that should be taken into account when enforcing the restraint of trade are not restricted to those existing at the time the restraint was entered into but must be widened to include circumstances existing at the time of enforcement of the restraint of trade (Modise 2013). Restraints

are determined on a case by case basis and much will turn on the particular facts of a case and the prevailing circumstances at the time of enforcement of the agreement (Cogger 2021). What can be derived from the above studies is that a consideration of the existing circumstances at the time of enforcement is crucial thus this might mean that it is not desirable to enforce or comply with a restraint of trade in difficult economic environment

In the Greendale Hardware case cited above it was stated that an employee is not prohibited from using personal skills or experience which he got from the former employer therefore a restraint that is very wide in terms of time or place will be not reasonable. That approach taken there should in my view be the country's approach. It is pertinent that in crafting clauses in restraint of trade in employment contracts due care must be placed on the scope of restraint clauses to ensure that they are not patently meant to stifle competition and not unnecessarily wide, lest they will be deemed unnecessary and unenforceable by the courts of law (Marume and Furidze 2021).

Restraints of trade agreements remain a valuable mechanism utilized by employers to protect their genuine business interests. The provisions of such agreements are enforceable against employees (Mahuni 2020). A contract in restraint of trade is one by which a party restricts his future liberty to carry on his trade or business in a manner he or she chooses. Such contracts place restrictions upon the parties' freedom to contract with whosoever they want and wherever they choose. (Maja 2019) These authors agree that a restraint of trade is a relevant mechanism in competition for the protection of an employer's goodwill. Therefore doing away with restraint of trade might not be the necessary tactic but parties who enter into those contracts should be able to negotiate on conditions such that the doctrine do not apply where the employee is dismissed due to circumstances that do not arise from his misconduct but where there is an unexpected retrenchment or dismissal so that he is able to carry on and join other competitors or to start his own business thereby facilitating the creation of business models in the country . As a country Zimbabwe needs all the business ideas and models it can get, competition law can regulate on the side but considering also the need to expand the market and create business models.

2.4 Research gap

Available literature shows that the restraint of trade covenant is a universally accepted concept which is derived from competition law. Over the years it has been developed and as it stands now it is generally accepted that as long as the restraint is reasonable and is not against public policy it is enforceable. The onus is on the person seeking to resile from it to show that it is not enforceable. There have been studies on the enforceability and constitutionality of restraint of trade (Mahuni 2020). Studies have also been done on the recent developments on the restraint of trade (Singo 2020). These studies sought to ascertain if the constitutional provisions in Zimbabwe and South Africa which states that there is right to trade and freedom of occupation affects the applicability, constitutionality and enforceability of the restraint of trade . Another study focused on the enforcement of restraint of trade agreement in employment relationships (Mparutsa 2021). The settled position is that they are enforceable and any contention should be decided by the courts using the settled principles. However, there have been no studies to ascertain if compliance or non compliance with this covenant in the Covid-19 in Zimbabwe have an impact on creation of business model. When these studies were done there was no consideration of the Covid-19. It is important to research on whether the impact of restraint of trade in a stable environment is different from in an unstable business environment. Further, it is unknown if this would have an impact on the creation of business models. Most of these studies focused more on legal framework rather than impact on creation of business model, especially in the Covid-19. This study therefore seeks to close that gap and ascertain if the same principles that are applied in an unstable environment should also be applied in the Covid-19 or unstable environments. Further, if the compliance or non compliance would have a bearing on business models. It is significant to ascertain if compliance with restraint of trade has a relationship with creation of business models.

This study therefore accepts and recognizes researches done on the constitutionality, enforceability and reasonableness of the restraint of trade clause and desires to go a step further and research on the impact of compliance with this doctrine in difficult economic environment like the Covid-19 period and what effect does it have on the creation of business models.

2.5 Chapter summary

The chapter saw the conceptual framework of this study showing the independent and dependent variable. It also saw a brief discussion on theoretical framework and lastly the analysis of existing literature. It became apparent that there is a gap business wise, as they have been no studies specifically on the relationship between compliance with the restraint of trade and creation of business models. Much has been researched on the enforceability and constitutionality of this doctrine considering the right or freedom of trade or profession as enshrined in the Constitution of Zimbabwe. This study therefore recognizes the existence of these researches but goes a little deeper on the economic side or rather the business environment of the country particularly Harare in Covid-19 period and how compliance with this doctrine affected creation of business models.

CHAPTER 3 : RESEARCH METHODOLOGY

3.1 Introduction

The ultimate goal of this research was to ascertain the effect of restraint of trade compliance on business model creation in the Covid-19 era in Harare. For that purpose, this section describes elements with regard to research design, data collection, observation, philosophy, data types and sources used.

3.2 Research design

This research was largely qualitative with also features of quantitative approach because the writer had to ascertain the level of compliance first which had to be ascertained through figures. Thereafter, there was the objective of ascertaining how the level of compliance affected creation of business models during the Covid-19 period in Harare. There was the use of questionnaires with open ended questions. The questions provided answers as to where a person was employed, when he was dismissed from the job, the line of work he is in or the experience that he has, whether or not he had signed a restraint of trade covenant and whether or not he complied with the restraint, if not what he is doing, and how grown he has become in that business. The answers to these questions enabled the writer to ascertain how compliance with the restraint of trade covenant affected creation of business models in Harare.

The second objective of this study was to determine the extent to which the level of compliance affected the creation of business models in the Covid-19 era in Harare. Accordingly the writer was of the view that there was a need to identify causal relationships. The view that qualitative research methods can be used to identify causal relationships and develop causal explanations is now accepted by a significant number of qualitative and quantitative researchers (Maxwell 2022). The research therefore took a causative approach in trying to identify the relationship between compliance with the restraint of trade and creation of business models during the Covid-19 period. Through the questionnaires it would be established if the high or low level of compliance had anything to do with creation of business models during the Covid-19 period.

3.2.1 Survey

In this study a survey will be the first port of call. This is so because it will assist in guiding the whole research from choosing samples to be used, types of questions etc. A survey is usually a successful method because much data can be generated from many people.

3.3 Philosophy

The study took a form of critical research philosophy. Critical researchers suggest that although people can consciously act to change their social and economic circumstances,

their ability to do so is constrained by various forms of social, cultural and political domination and that not all interpretations are given equal weight in any given social situation (Bronner 2011). In this study we explored how former employees sought to change their circumstances by engaging in businesses that might be similar to their former employers or to join competitors. Unfortunately, because there is a contract which forbade them and which would enable the former employer to take them to court or to order them to quit competing with them it meant that their ability was constrained by those factors. The study focused on the the ability to comply with restraint of trade which is constrained by the economic situation which was necessitated by the Covid-19. In other words their decision to engage in similar business is not automatic. It is qualified by multiple factors ranging from signing a restraint of trade contract, the Covid-19 pandemic and the subsequent dismissal from work. Their ability to change their circumstances was therefore constrained by these factors. If they comply they cannot engage in similar business or create their own businesses.

The critical research philosophy was the most appropriate philosophy in this study because it focuses on the context, conflict and contradictions in contemporary society. This study was not about the restraint of trade and creation of business models only but it focused on the context of Covid-19 and it assisted a lot in evaluating and understanding that the situation does not always remain the same but changes due to factors that are beyond anyone's control like the Covid-19 pandemic. Interpretivism philosophy could have been chosen since it has similarities with the critical research philosophy however, interpretivism pays no regard to causal explanation. As stated earlier, this study also focused on finding the relationship between compliance and creation of business models. In doing so it was crucial to adopt the critical research philosophy which does not exclude causal explanation like the interpretivism.

3.4 Population of study

This study focused on former employees who had been laid off during the period stretching from March 2020 to January 2022 in the central business district in Harare and had signed contracts with covenant in restraint of trade clauses. Not all laid off workers were necessary in this study but those that had skills or expertise that could easily enable them to work for competition or to set up their businesses. The targeted employees were from advertising and marketing, printing and packaging, fitness

trainers, transport services and external sales representatives. These were chosen because of the interaction with clients and knowledge of proprietary rights that they would have of the previous employer which resulted in them signing covenant in restraint of trade agreements.

3.5 Sampling methods and strategy

This study was quite sensitive in that it involved identifying companies that laid off workers during the Covid-19 era and that also forbade these employees from joining competition or starting up their businesses. The sampling method that was therefore seen to be best suitable for this research was snowball sampling. The population of interest was also hard to find or to access therefore the writer simply had to find about 10 people from the above mentioned departments within her own circle and these would assist in identifying other potential subjects. It was also decided during the study that identifying companies was not the important factor in the research but identifying those who had been laid off and who had signed covenant in restraint of trade contracts was the important thing. Ten former employees from different companies were identified and they were asked to assist in identifying others and this was very useful as this led to the desired number of the sample size which was 80.

3.6 Sampling frame

The information that the study sought to find was not easily found. It was hard to find a list of companies that laid off workers during the covid-19 period in Harare or the list of people who had been laid off and restrained that is why the snowball was chosen because there was lack of a sampling frame.

3.7 Sample size

Although many people lost their jobs during the Covid-19 period in the country not all of these people were bound by the restraint of trade covenant and some were not in Harare so this study chose a sample size of 80. All of the 80 people had lost their jobs during the time under review and they had also signed covenant in restraint of trade agreements that restricted them after leaving employment with their employer. The 80 were drawn from advertising and marketing, printing and packaging, fitness trainers,

transport services and external sales representatives. 48 were males and 32 were females. Since it was mainly qualitative the goal was to attain saturation and 80 provided the saturation point.

3.8 Data Collection techniques

In order to get the required data, data collection techniques that were used are questionnaires and interviewing former employees and/or new entrepreneurs.

3.8.1 Interviews

A total number of 80 people were interviewed. The interviews were a blend of structured and unstructured interviews. This was so because some questions like where a person used to work, his/her position and when he/she was dismissed were close ended and required a yes/no answer. However, they were questions that needed flexibility that enabled the writer to ascertain if compliance or non compliance had a role in what the person was currently pursuing. Identifying companies that laid off workers and that had the workers sign restraint of trade covenants was a challenge because most companies were not willing to divulge such information. In interviewing these people, the companies that they were working for were then identified. The interviews were conducted in the central business district of Harare. The questions were also structured in a way that they would provide both numerical and nominal data. Numerical data was crucial as it was needed to ascertain the level of compliance with the restraint of trade and nominal data to ascertain the causal relationship between compliance and creation of business models.

3.8.2 Observations

Observations were also used from within Harare central business and decided cases during Covid-19. Secondary data was also drawn from newspapers in the country around that time such as The Herald especially challenges faced by laid off workers and on information of people who started their businesses around that time in Harare who were interviewed by the newspapers.

3.9 Chapter Summary

This chapter outlined how the research was done. The research was largely qualitative with some quantitative features. Snowball sampling was used in the identification of participants as this was somehow a sensitive field. A sample size of 80 was used and the data collection techniques used ranged from questionnaires to structured and semi structured interviews that allowed the writer to get both numerical and nominal data which was crucial for the study.

CHAPTER 4 : DATA PRESENTATION, ANALYSIS AND DISCUSSION

4.1 Introduction

This chapter presents the results of the restraint of trade compliance and creation of business models. The study sought to measure if there is a relationship between restraint of trade and the creation of business models. The restraint of trade being the independent variable and the creation of business models being the dependant variable. In this chapter the results to be presented show the level of compliance with the restraint of trade during the Covid-19 period in Harare, how the level of compliance had a bearing on the creation of business models and whether compliance with the restraint of trade during economic difficult times is reasonable in relation to the creation of business models.

4.2 Descriptive and demographic statistics for respondents

The 80 respondents that were interviewed consisted of 48 men and 32 females all Zimbabwean aged between the ages of 29 to 55. 90 % of them were educated people with different skills in fields like sales and marketing, transport and delivery, packaging and fitness training whilst 10 % consisted of people who had been laid off during the period under review but were not acquainted with much special skills.

4.3 Restraint of trade compliance

The first objective of this study was to ascertain the level of compliance with the restraint. The results that were obtained are as shown below. Of the 80 people that were interviewed 11% did not know what a restraint of trade was and 26% knew about it but did not sign a contract with the covenant in restraint of trade. 35% complied with the restraint of trade and 28% did not comply with the restraint of trade agreement. It is clear that the number of the people who complied were more than those that did not comply however, the main reasons that was given by these people are lack of resources, failure to get another job in similar companies since most companies were not fully operating and fear of being sued by the previous company. The answers therefore showed that most of those who complied did not do so willingly but due to factors beyond their control. For those who failed to comply, their main reason was that they had no other choice, they would not miss opportunities at a point in time when it was difficult for everyone especially because their dismissal was not their fault.



Figure 4.1 Level of compliance with the restraint of trade during the Covid-19 period.

4.3 Effect of restraint of trade compliance on creation of business models

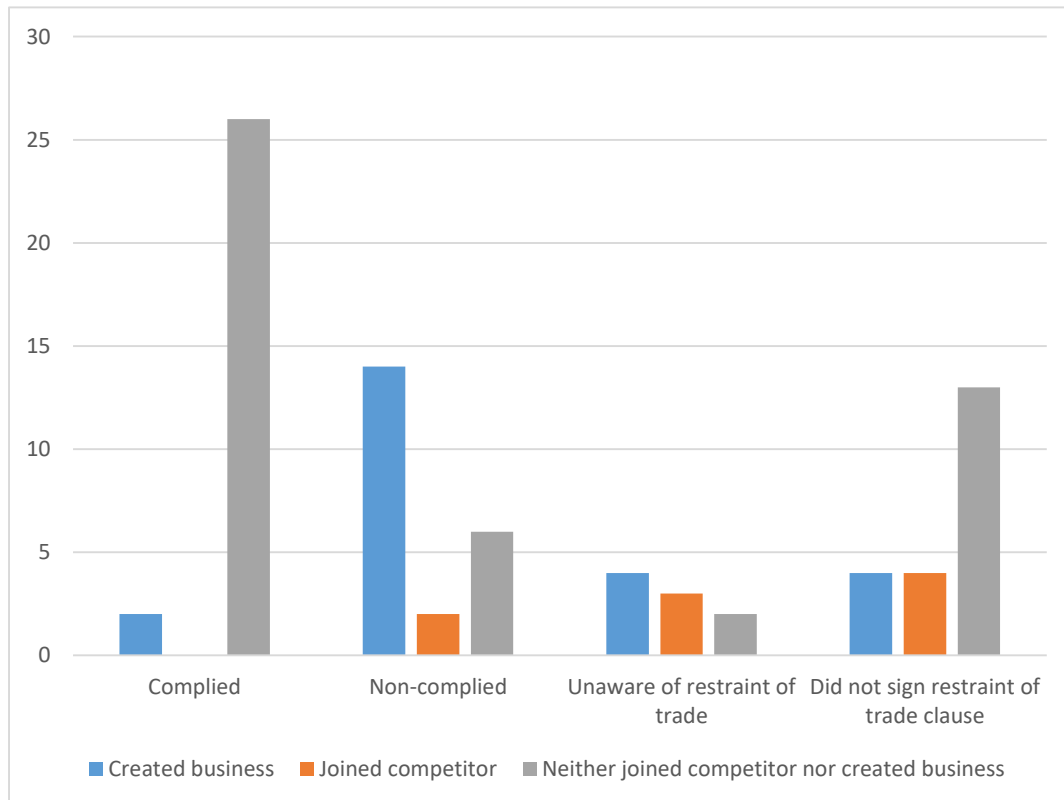
A contract in restraint of trade restricts an employee's future liberty to carry on his trade, business or profession with such persons as he or she chooses. Such contracts place restrictions upon the parties' freedom to contract with whosoever they want and wherever they choose (Seddon, N et al 2012). A person who is therefore bound by a restraint of trade lacks that freedom of contracting whenever he wants or of forming his own business. This objective sought to ascertain if the creation of business models during the covid-19 period was affected with the level of compliance with the restraint of trade. The Covid-19 period was different, the business environment was generally affected, most companies were not hiring but still people were being laid off. The most available solution was being creative and innovative using acquired skills therefore, it became necessary to ascertain what impact the restraint of trade clause had on the creation of business models.

It emerged that not all of the people who were surveyed knew about the restraint of trade clauses. Figure 4.2 below categorizes the groups into four to represent those who complied, who failed to comply, who did not know about the restraint of trade and those who did not sign. Within those categories there consists information of those who managed to start up their own businesses, those who joined competitors and those that neither joined companies nor joined competitors. Those who did not know about the restraint of trade and those who did not sign indicated that the challenges they faced were just general and normal considering the economic situation at the time. This also mainly consisted of those individuals who did not have any special skills or expertise.

Figure 4.2 shows that of the people who complied with the restraint of trade only a few managed to create businesses and they were using the skills that they attained from their previous employer although not utilizing their full potential. It was noted that none of these employers were aware of these developments. On the other hand, most of those who did not comply with the restraint of trade managed to create their own businesses. One of them indicated that he had attempted to join a competitor but the recruiting company called his former employer for references and character evaluation and they were told that he was bound by a restraint of trade clause. He therefore was not hired. Most of these employees who started their own businesses were not fully utilizing their skills in fear of facing lawsuits, however they were able to create small businesses to keep them afloat during the Covid-19 period. One participant indicated that he was a sales representative for a company specializing in agricultural inputs therefore to avoid clash with the employer he began a business specializing in hardware. Using his acquired skills he was able to lure clients he previously interacted with to do business with him. He had a good reputation together with the company's goodwill they agreed to engage with him. His former employer found out about the business but he was able to hide on the pretext that he did not sell agricultural inputs. The responses from the participants showed that compliance with the restraint of trade had an impact on creation of business models because it was not possible to engage in similar business or join competition especially in Harare. This was further worsened by the fact that most companies were struggling and having to deal with employees taking their clients was even a bigger blow for them. For those who complied with the restraint of trade clause, they indicated that this had taken a huge toll on them but what they feared most

was having to face lawsuits when they were already suffering. Most of them resorted to very small businesses that were entirely different and non-competitive whilst most of them engaged fully into farming and poultry as they already owned farms.

Figure 4.2 shows the effect of restraint of trade compliance on creation of business models.



Out of the 28 people who complied with the restraint of trade, 2 were able to create businesses that were quite different from their previous employer, none of them was able to join another company and 26 of them neither created nor joined any other company. Of the 22 people who did not comply with the restraint of trade clause 14 were able to create small businesses mostly similar to what they used to do, 2 joined other companies and 6 neither joined nor created their own businesses. Of the 9 people who did not know about the restraint of trade clause 4 started their small businesses, 3 joined other companies and 2 still had nothing to do. Finally, of the 21 people who did

not sign restraint of trade agreements 4 of them created their small businesses, 4 joined other companies and 13 were not doing anything.

It was found that the effect of restraint of trade on the creation of new business models is not automatic. Whilst it is clear that those who complied rarely contributed much to the economic developments in the Covid-19 those not bound by a restraint of trade were also affected. Some stated that generally companies were not hiring and it was not easy to find resources to allocate to creating business models. Be that as it may fig 4.2 shows that those who complied were worse thus one can conclusively say there is an effect on the creation of business. Operating without a restraint of trade means working or manoeuvring without limits. It is also shown that a high number of people who neither joined competition nor created business in the category of those who did not sign contracts with restraint of trade clauses. The reason for this was because this category had a low number of people with skills to an extent that they were entrusted with confidential information or trade secrets such that even starting up their own businesses or joining other companies was difficult for them.

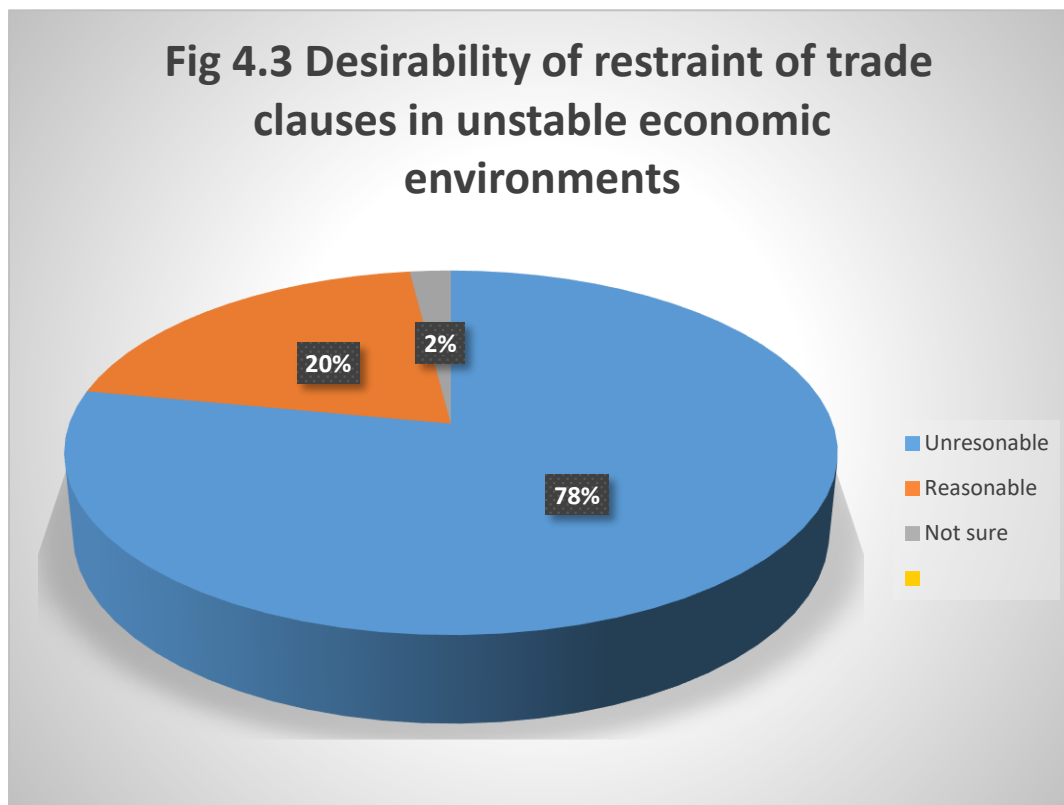
4.4 Reasonableness/ Desirability of the restraint of trade clause in unstable economic environments.

Restraint of trade clause is a necessary tool for the protection of intellectual property. They are used to protect to protect the employer's business interests (Marume 2020). The question that however arises is that does the same remain necessary and crucial in unstable economic environments considering that they limit the freedom of another to contract or to venture in the same line of business. Participants were asked to comment on whether in their experience it was desirable to to comply or enforce the restraint of trade clause in unstable environments. Covid-19 caused one such unstable environment in the business domain. Therefore the participants, views were based from that kind of experience.

Most of the participants were of the view that the restraint of trade clause was not reasonable because during the Covid-19 period everyone was striving to make a living. They were of the view that it is the time that the economic environment should be kept running no-matter the situation because creation of business models not only affect them but the country also. 20% were of the view that employees might take advantage

of the economic situation to sabotage their former employer's interests thus it remains necessary and reasonable. 2% stated that they were not sure because restraint of trade clause was the least of their worries. Their view was that there were so many reasons why creation of businesses was a major problem in the country and restraint of trade was definitely not on the top. It is therefore clear that the majority views the restraint of trade as a hindrance to creation of business models especially in unstable economic environments like the Covid-19 period.

Fig 4.3 shows the responses that were received on whether or not the restraint of trade clause is reasonable in unstable economic times.



4.5 CHAPTER SUMMARY

The main focus of this chapter was to analyse, represent and discuss the results of this study. The first objective of this study was to ascertain the level of compliance with the

restraint of trade. The results showed that the number of people who complied with the restraint of trade clause was higher than those that failed to comply. The second objective was to ascertain if the restraint of trade had any effect on the creation of business models. The results showed that of the 28 people who complied 93% were neither in any form of employment nor did they start or create any other form of business. However, of the 22 people who did not comply 64% managed to start up their small business. It was clear that indeed restraint of trade clauses have an impact on creation of business models although it is a not straight calculated answer. This is so because even those that were not bound by a restraint of clause did not entirely manage to join other companies or to start their own businesses. All in all, among other factors that are not part of this study the restraint of trade clause is definitely related to creation of business models and high levels of compliance means low levels of business creation.

CHAPTER 5 :SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter summarizes the entire study and provides for recommendations that may also bring other research gaps. The recommendation shall be made after consideration of the results that were presented in the previous chapters. This chapter shall thrive to ensure that all the research objectives and results are addressed.

5.2 Summary of the study

This study sought to ascertain the level of compliance with the restraint of trade covenant during the Covid-19 period , to determine the extent to which the level of compliance affected the creation of new business models during the Covid-19 era in Harare and to ascertain whether or not Zimbabwe should enforce restraint of trade covenant in unstable economic environments like Covid-19 period. A total number of 80 people were identified through snowball sampling and where interviewed. The results showed that the number of people who complied with the restraint of trade clause during the period under review were more than the people who did not comply. The study also showed that this high level of compliance had an impact on the creation of business models. The majority of the participants also indicated that it was undesirable to enforce or comply with the restraint of trade clause in unstable economic environments like the Covid-19 period.

5.3 Summary of research findings

This study had three main objectives and these are to ascertain the level of compliance with the restraint of trade covenant during the Covid-19 period , to determine the extent to which the level of compliance affected the creation of new business models during the Covid-19 era in Harare and to ascertain whether or not Zimbabwe should enforce restraint of trade covenant in unstable economic environments like Covid-19 period. This section shall therefore summarize the findings on each objective.

5.3.1 Summary of findings on compliance with the restraint of trade

The results showed that the number of people who complied was more than those who did not comply. It cannot be said that there was high compliance per se but the percentage of those who complied with the restraint of trade was 7% higher than those who failed to comply. Therefore the study found that the people who chose to comply with restraint of trade were many and outnumbered those who failed to comply.

5.3.2 Summary of findings on effect of compliance with the restraint of trade clause

The results showed that although there was some high compliance, those people did not manage to join other companies or to start their own businesses. Out of the 28 people who complied with the restraint of trade, 2 were able to create businesses that were quite different from their previous employer, none of them was able to join another company and 26 of them neither created nor joined any other company. Of the 22 people who did not comply with the restraint of trade clause 14 were able to create small businesses mostly similar to what they used to do, 2 joined other companies and 6 neither joined nor created their own businesses. It was clear that compliance with the restraint of trade had an impact on the creation of businesses. Those who did not comply were able to create some small business even though some were different from their employer's. All in all those who were restrained failed largely to create their business or to at least join similar companies.

5.3.3 Summary of findings on desirability of the clause

From the recommendations by the participants 78% of them were of the view that the restraint of trade clause was not reasonable because during the Covid-19 period everyone was striving to make a living. 20% were of the view that employees might take advantage of the economic situation to sabotage their former employer's interests thus it remains reasonable. 2% stated that they were not sure because during the Covid-19 it was a whole combination of factors that affected creation of business models and restraint of trade clauses was not the main reason. The majority was of the view that without a restraint one can do much and be innovative without the fear of being sued.

5.4 Conclusion

The study sought to ascertain whether the impact of restraint of trade in a stable environment is different from in an unstable business environment. It was unknown if this would have an impact on the creation of business models. Previous researches that had been conducted focused on the enforceability and constitutionality of the restraint of trade clause. This study sought to ascertain if there is a relationship between restraint of trade compliance and creation of business models. The first port of call was to assess the level of compliance. It actually emerged that more people complied with the restraint of trade as opposed to the number of people who failed to comply. Those same people who complied had difficulties in securing other jobs or in creating their own businesses. It therefore emerged that indeed there is a relation between restraint of trade compliance and creation of business models. However, the study also discovered that they were other people who were not aware of the restraint of trade clause and those who did not sign restraint of trade clauses. Still, these people faced challenges in creating their own businesses during the period under review due to other circumstances but in terms of restrictions they were not affected. It was clear that restraint of trade clause compliance have an impact on creation of business models because those that did not comply were better as they managed to create their businesses and even join competitors. This study is therefore evident that whilst restraint of trade clauses protect an employer's goodwill and intellectual property it also hinders the progress of the business environment. It limits innovation and creation of more business models thereby limiting competition in the business environment.

5.5 Recommendations

From the above analysis and findings the writer makes the following recommendations:

- Currently restraint of trade clauses are applicable in any situation and can be enforced as long as it is not contrary to public policy however it is recommended that they should be limited to apply to the situations that are economically stable to

ensure continuity and innovation in the business environment. The judiciary should therefore refuse to enforce those clauses during that period.

- Restraint of trade law is not codified in the Competition Act or any other relevant act thus it is recommended that it should be codified in the Zimbabwean law perhaps in the Competition Act by the law makers so that it is regulated by law rather than focusing on decided cases only
- The law makers should also consult with economists when making laws affecting the business environment because they are well versed with the current business situation as this have an impact on creation of businesses.
- Most employees sign contracts in the excitement of getting a new job without fully understanding the implications. It is recommended that restraint of trade clauses should be explained to employees fully by the employers or company lawyers before they can sign the contracts.
- The creation of new businesses is not a simple task therefore it is recommended that Restraint of trade should not be enforced in conditions where employees were dismissed due to the company's choice not the actions of the employee.
- All in all, trade secrets and goodwill are a crucial part of any business, employees should be able to show utmost good faith and refrain from engaging with employer's clients after they leave their employment.

5.4 Areas for further study

To further improve the findings of this study, some researchers may need to consider if the restraint of trade is such a strong tool for employers to protect their goodwill, business and trade secrets such that it deserves to be codified in Zimbabwean law.

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APPENDICES: Appendix A: Questionnaire

QUESTIONNAIRE to the study of restraint of trade compliance and creation of business models between March 2020 to January 2022 in Harare.

My name is Ethel R Chichera, a Masters in Business Leadership student at Bindura University of Science Education. I am doing a study titled, “ Restraint of trade compliance and its effect on business model creation in the Covid-19 era in Harare” The purpose of this study is to assess the level of compliance with the restraint of trade in the Covid-19 period and whether this had an effect on the creation of business models. I am kindly asking for your assistance in completing this questionnaire to the best of your ability. Where questions seek for your experiences or opinion kindly provide your honest and true experiences so that accurate results will be achieved. Thank you!.

Section A: Biographical Data (Please tick the appropriate box where appropriate)

a) Age _____ b) Sex F Male

c) Employment status : Formally employed Unemployed Self employed

d) Current Activities

e) Level of education ZJC & below O level A level Degree Masters
Phd Other [Please specify]

f) Work experience

g) Trade/Skill/expertise

h) Period of previous employment

Section B: Knowledge of the Restraint of Trade clause. (Please provide accurate and honest answers as best as you can)

a) Have you ever heard about a restraint of trade? Yes No Maybe

b) Do you know what a restraint of trade is? Yes No Maybe

c) If yes, how did you know about it?

d) In your own words can you briefly explain what a restraint of trade is?

Section C: Experiences with the Restraint of trade clause

a) Have you ever signed a contract with a restraint of trade clause? Yes No

b) When did you sign it?-----

c) Did you know what implications it had at the time of signing? Yes No

d) Briefly outline the conditions that it had

e) When did you leave that company?

f) How did you leave that employment?

g) What did you go on to do after leaving?

h) In your plans did you intend to comply with the restraint of trade clause. Yes
No . Please explain your answer.

i) Did the restraint of trade affect your capability or endeavors? Please explain further.

j) How were you able to deal with the implications that it had on you?

k) In your opinion would your circumstances have been better if you had not signed the clause. Please explain your answer.

Section D: Recommendations

a) As someone who came across the restraint of trade clause do you think it has a bearing on the development of other businesses?

a) Do you think a covenant in restraint of trade is necessary in a difficult economic environment like in the Covid-19 period. Give reasons for your answer.

b) Would you recommend a person to sign a contract with a restraint of trade clause? Give reasons for your answer.

BINDURA UNIVERSITY OF SCIENCE EDUCATION

FACULTY OF COMMERCE

GRADUATE SCHOOL OF BUSINESS

RESEARCH SUPERVISION CONSULTATION REPORT FORM

STUDENT'S NAME: ETHEL RUTENDO CHICHERA B210167B

DISSERTATION SUPERVISOR: Dr. GILBERT KICHINI

PROGRAMME: MASTER OF BUSINESS LEADERSHIP

DISSERTATION TITLE: RESTRAINT OF TRADE COMPLIANCE AND ITS EFFECT ON BUSINESS MODEL CREATION IN THE COVID 19 ERA IN HARARE

DATE	STAGE OF RESEARCH	SUPERVISORS' COMMENTS AND INITIALS
28.10.2022	1. Proposal	Proceed to chapter 1 after effecting corrections Initials:G.K
05.11.2022	2. Chapter 1	Proceed to chapter 2 after effecting corrections Initials:G.K
10.11.2022	3. Chapter 2	Proceed to chapter 3 after effecting corrections Initials:G.K
16.11.2022	4. Chapter 3	Proceed to chapter 4 after effecting corrections Initials:G.K
10.12.2022	5. Chapter 4	Effect necessary changes and proceed to chapter 5 Initials:G.K

10.12.2022	6. Chapter 5	Proceed to preliminary pages after effecting corrections Initials:G.K
15.12.2022	7. All together	Proceed to submit Initials:G.K

OVERALL COMMENTS BY THE SUPERVISOR:

The student complied with supervision requirements.

STUDENT'S SIGNATURE: ER Chichera

DATE: 15-12-22

SUPERVISOR'S SIGNATURE: G.Kichini
15.12.2022

DATE: