

**RESTRAINT OF TRADE
IN THE
EMPLOYMENT CONTEXT**

by

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SUMMARY

Clauses in restraint of trade agreements concluded between an employer and an employee often present difficult legal issues to deal with. This complexity is due to the fact that a court, in deciding whether to enforce a restraint provision, has to strike a balance between two equal but competing policy considerations, namely, the sanctity of the contract and the freedom of movement of people in a market economy.

In striving to balance the sanctity of contract with the right of freedom to trade, it is necessary to decide which of these two policy considerations should take precedence by having regard to the public interest served by them in the particular circumstances.

In the watershed case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*, the Appellate Division decided the sanctity of contract had greater precedent in South African law and that undertakings in restraint of trade were *prima facie* valid and enforceable, unless the party seeking to avoid its obligations could show that the restraint of trade was contrary to public interest.

The second consideration, namely that a person should be free to engage in useful economic activity and to contribute to the welfare of society, tempers the sanctity of contract considerations. Accordingly, the courts have struck down any unreasonable restriction on the freedom to trade where it was regarded as contrary to public interest.

In considering the reasonableness and therefore the acceptability of restraint of trade provisions from a public policy perspective, the following five questions need consideration:

- Is there a legitimate interest of the employer that deserves protection at the termination of the employment agreement?

- If so, is that legitimate interest being prejudiced by the employee?
- If the legitimate interest is being prejudiced, does the interest of the employer weigh up, both qualitatively and quantitatively against the interest of the employee not to be economically inactive and unproductive?
- Is there another facet of public policy having nothing to do with the relationship between the parties but requires that the restraint should either be enforced or rejected?
- Is the ambit of the restraint of trade in respect of nature, area and duration justifiably necessary to protect the interests of the employer?

In enforcing a restraint, the court will consider all the facts of the matter as at the time that the party is seeking to enforce the restraint. If a court finds that the right of the party to be economically active and productive surpasses the interest of the party attempting to enforce the restraint, the court will hold that such restraint is unreasonable and unenforceable.

Consideration of the enforceability of restraints is often found to be challenging in view of the answers to the above stated five questions often remaining of a factual nature and subjective, *i.e.* the view and perceptions of the presiding officer play an important role.

A further complexity is the limited early effect which the Constitution of the Republic of South Africa had on dispute resolution pertaining to restraints of trade in the employment context and the prospects of imminent changes to the pre-Constitutional era *locus classicus* of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.

CHAPTER 1

INTRODUCTION

The relationship between the employer and employee in South Africa is regulated by a complex set of rights and obligations with sources in common law, custom and practice, contract, and legislation.

The focus of this treatise is restricted to restraints of trade in the employment context.

Restraints of trade are common in employment contracts, or as supplementary agreements to employment contracts, especially in the case of more senior employees and managers in the private employment sphere.

Employers have a legitimate interest in protecting themselves against competition from their employees, not only during the employment relationship, but also thereafter when the employment relationship has been terminated for whatever reason.

For the employee concerned, concluding a restraint of trade agreement on occasion has some form of financial advantage. Either the employee is remunerated at a higher level during the course of employment or, if the restraint becomes active on termination of his or her employment, the employee subject to the restraint receives monetary compensation.

The debate as to whether restraint of trade agreements are enforceable or not has raged for many years. This area of South African law remains confusing to many practitioners and a number of misconceptions have arisen as a result.

The following are some of the misconceptions which may exist in respect of restraint of trade:

- A restraint of trade is only enforceable if the employee is accordingly compensated in the form of a restraint payment.

- Restraint of trade agreements are no longer enforceable in view of clause 22 of the Constitution of the Republic of South Africa¹ (hereinafter referred to as the Constitution) which provides that every citizen has the right to choose their trade, occupation or profession freely.
- If an employee's employment contract is unlawfully or unfairly terminated by the employer, then the restraint becomes unenforceable.
- Clauses in an employment agreement protecting the employer's confidential information, trade secrets, intellectual property and preventing an employee from soliciting customers or fellow employees are also restraints of trade.
- All employees within an organisation must be required to sign a restraint of trade agreement.²

Chapter 2 contains the common law contract principles. Chapter 3 contains a detailed explanation of contracts in restraint of trade. Chapter 4 details the South African perspective on restraining employment with reference to relevant case law. Chapter 5 details the enforcement of restraints of trade. Chapter 6 makes brief reference to income tax considerations. The discussion is concluded in Chapter 7.

¹ Constitution of the Republic of South Africa Act 106 of 1996.

² Deloitte & Touche Legal *Common Misconceptions About Restraint of Trade* (2004).

CHAPTER 2

COMMON LAW CONTRACT PRINCIPLES

2.1 REQUIREMENTS FOR A VALID CONTRACT

At common law, a contract is entered into between two or more natural or juristic persons. The contract is a common law instrument.

The requirements for a valid contract are:³

- Consensus between the parties at the time of contracting.
- Legal capacity to perform the act giving rise to the formation of the contract.
- Rights and duties assumed must be possible to perform.
- Rights created and duties assumed must be permitted by law.
- If formalities are prescribed for the formation of the contract, they must be observed.

All South African law, including our common law, is subject to the Constitution⁴ and the Bill of Rights.⁵

The mechanism by which the common law will be adapted to conform to constitutional values is likely to entail the refashioning of the so-called “open norms” of the common law.⁶

³ Grogan *Workplace Law* 8th ed (2004) 31.

⁴ Constitution of the Republic of South Africa Act 108 of 1996.

⁵ Constitution of the Republic of South Africa Act 108 of 1996 Ch 2.

⁶ Constitutional update No 7; January 2004.

- Contracts may not contain clauses that are contrary to “public policy” particularly public policy as articulated in the Constitution.⁷ Such clauses will be struck down. An example from pre-constitutional case law would be an unreasonable restraint of trade clause.
- Delictual unlawfulness is based on the “legal convictions of the community” and the Constitution⁸ will now affect this analysis.
- Delictual negligence is measured by asking what the notional “reasonable person” would have done in the circumstances. The reasonable person must be a follower of constitutional norms.

South African common law, of Roman Dutch origin, knows no provision in terms of which an agreement in restraint of trade is invalid or unenforceable.

However, it is a principle of South African law that a contract which is contrary to public policy is not enforceable. Such an agreement would be void.⁹

Accordingly, and dependant upon circumstances, an agreement which limits someone’s freedom to trade would be contrary to public interest, and typically unenforceable.

2.2 THE EMPLOYMENT CONTRACT

From a common law perspective, the employment contract is a contract concluded between two equal parties to their mutual benefit. Here, the employer and employee voluntarily negotiate a contract that regulates their relationship, and this contract sets out their respective rights and duties.

⁷ Constitution of the Republic of South Africa Act 108 of 1996.

⁸ *Ibid.*

⁹ *Saner Agreements in Restraint of Trade in South African Law* Issue 7 (2005) 2-3.

The common law does not concern itself with the unequal bargaining power of the parties.¹⁰

The role of common law, effectively remote and residual, and the contract of service is becoming smaller, largely as a consequence of the employment relationship now being regulated by statute and collective agreements.

2.3 OBLIGATIONS EMANATING FROM THE EMPLOYMENT CONTRACT

2.3.1 THE CONTRACTUAL DUTIES OF THE EMPLOYEE¹¹

- **To tender his or her services**

A primary duty of the employee is to tender his or her services to the employer as and when required by the employment contract. Fulfilling this action will typically warrant the payment of remuneration the employee is entitled to.

- **To work competently and diligently**

The employee concluding an employment contract implicitly assures that he or she is capable of performing the required work activities. The employee is thus obliged to perform such required work activities in a competent manner, maintaining reasonable efficiency and without negligence. The employee has a duty to exercise due care and diligence when conducting the work activities as agreed to in the contract of employment.

- **To obey lawful and reasonable instructions of the employer**

This duty to obey lawful and reasonable instructions of the employer and to be respectful and obedient is typically an implied duty flowing from the employment contract which allows for the employee to be subjected to the control of the employer. This provides a right for the employer to control the manner in which the employee performs work activities, the place at which such work activities take place and related aspects of work arrangements.

¹⁰ Basson, Christianson, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* 4th ed (2005) 44.

¹¹ Basson *et al* *Essential Labour Law* 39-40.

- **To serve the employer's interests and act in good faith**

The notions of trust and confidence form a core component of the employment relationship. The employee owes his or her employer the fiduciary duty of not working contrary to the interest of the employer.

Serving the interests of the employer means not only promoting the employer's business, but also avoiding conflicts of interest.¹²

The employee also has a duty to act in good faith and to refrain from misconduct generally. Dishonesty on the part of an employee constitutes a serious breach of good faith and typically leads to an employer summarily dismissing an employee.

The Appellate Division, in the matter of *Council for Scientific & Industrial Research v Fijen*¹³ stated the following:

"It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitled the 'innocent party' to cancel the agreement. It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from *naturalia contractus*."

In the more recent case of *Ganes v Telecom Namibia Ltd*¹⁴ the Supreme Court of Appeal held that:

"[a]s an employee of the respondent and in the absence of an agreement to the contrary, the first appellant (employee) owed the respondent (employer) a duty of good faith. This duty entailed that he was obliged not to work against the respondent's interests, not to place himself in a position where his interests conflicted with those of the respondent."

The common law fiduciary duty may persist beyond the termination of an appointment. The most typical example being that of a director where, if necessary, an employer could protect itself against a breach of a fiduciary duty by a director by applying for an interdict.

¹² Basson *et al Essential Labour Law* 41.

¹³ (1996) 17 *ILJ* 18 (A) 26D-E.

¹⁴ (2004) 25 *ILJ* 995 (SCA) 1003.

This can also apply to a past employee where the erstwhile employer can approach the court to interdict the unlawful conduct of the past employee.¹⁵

A common method of applying limitations against past employees is through invoking restraint of trade agreements.

The failure by an employee to comply with the afore detailed obligations amounts to a breach of contract on the part of the employee, and this breach of contract, should it be sufficiently serious, would entitle the employer to terminate the employment contract.

2.3.2 THE CONTRACTUAL DUTIES OF THE EMPLOYER¹⁶

- **To receive the employee into service**

The corollary of the employee's duty to tender his or her services is the employer's obligation to receive the employee into service. Generally, there is no duty placed upon the employer to provide the employee with work, unless the nature the employment agreement requires this arrangement as would typically be found in Learnership Agreements and where the employee is being remunerated on a commission basis.

- **To remunerate the employee**

The timeous payment of remuneration to employees in return for performance by employees of their duties is a primary obligation of the employer. This obligation is so fundamental to the employment relationship that if no provision is made for payment between these contracting parties, and there is no method for calculating remuneration, a court may hold that there is no contract of employment.

- **To ensure safe working conditions**

Common law obliges employers to provide their employees with a safe and healthy working environment.

¹⁵ Basson *et al Essential Labour Law* 40.

¹⁶ Grogan *Workplace Law* 62-65.

Due to the imprecision of the common law duty to provide safe working conditions, more concrete obligations have been prescribed through the imposition of the Occupational Health & Safety Act.¹⁷

The Occupational Health and Safety Act provides, *inter alia* a general duty on employers to provide and maintain, as far as practicable, a working environment that is safe and without risk to the health of its employees.¹⁸

The failure by an employer to comply with the afore detailed obligations amounts to a breach of contract on the part of the employer, and this breach of contract, should it be sufficiently serious, would entitle the employee to terminate the employment contract and to seek payment for damages.

¹⁷ Occupational Health and Safety Act 85 of 1993.

¹⁸ Occupational Health and Safety Act 85 of 1993 s 8.

CHAPTER 3

CONTRACTS IN RESTRAINT OF TRADE

3.1 DEFINITION

By way of explanation, the following definitions are presented:

- 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.¹⁹
- A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his or her liberty in the future to carry on trade with other persons not party to the contract in such manner as he or she chooses.²⁰
- 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.²¹

3.2 FORMS OF RESTRAINT

Two distinctly different forms of contracts in restraint of trade are effected, namely:

- In the employment contract sphere and
- in the competition law sphere.

¹⁹ Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract General Principles* (2003) 195.

²⁰ *Petrofina (Great Britain) Ltd v Martin* 1996 Ch 146.

²¹ *Basson et al Essential Labour Law* 46.

The latter deals with instances typically associated with the sale of a business where the buyer and the seller enter a voluntary contractual arrangement, typically restraining the seller from operating a defined commercial activity within a confined geographical area, for a fixed period of time.

The focus of this study is limited to the former, being restraint of trade in the context of formal employment.

3.3 OBJECTIVES OF RESTRAINTS OF TRADE

A restraint of trade, either as an inclusion to the contract of employment or supplementary thereto, governs the right of a former employee to compete with their former employer's business after the termination of the employment relationship. The objective of such a restrictive provision in the contract of employment is to limit the freedom employees would otherwise have, to leave their employment and start a business or work for another employer in competition with a former employer.

The Appellate Division has described the objects and purpose of a restraint of trade clause as follows:

“The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer.”²²

3.4 PARTIES TO A RESTRAINT AGREEMENT

An employer is at liberty to enter into a contract in restraint of trade, in a fair manner, with any employee. Restraints on employees in contracts with their employers have usually been distinguished from all other forms of contracts. Contracts between employers and employees have been approached more critically and condemned more readily by our courts than any other type of restraint.²³

²² *Reeves v Marfield Insurance Brokers* CC 1996 (3) SA 766 (A) 772.

²³ *Saner Agreements in Restraint of Trade in South African Law* 10-4.

The cases, both English and South African, support the proposition that covenants entered into by an employee are regarded more strictly by a restraint of trade doctrine than covenants given by a vendor on the sale of a business where transfer of goodwill is given as one of the assets purchased.²⁴

Whilst frequently it may be considered that individual employees are in a weaker bargaining position than their employers, such bargaining inequality of employees is not necessarily the case, in view of envisaged protection. There is also no general rule that an employee is necessarily in an inferior bargaining position. However, once it is evident that the covenantor was the party in an inferior position during the negotiations, the court will obviously be aware of the possibility that the employee's impotence might have been exploited such that he was perhaps induced to agree to terms in the contract he would not otherwise have assented to and that he was prevailed upon to accept publicly as fair, what he might have otherwise rejected as being too oppressive.²⁵

Whether the employee was at a disadvantage during contractual negotiations and whether such disadvantage flowed through to the provisions of the contract must rest on the facts of each case, when considering its merits. Accordingly, the inequality of bargaining power is a question of fact. The general position is that the employee is most often in a much weaker negotiating position than the employer.

3.5 SCOPE OF RESTRAINT OF TRADE

Although restraint of trade within the employment context is completely lawful, the courts require that the extent of the limitation they impose be reasonable. Each agreement should be examined with regard to its own circumstances in order to establish whether its enforceability would be contrary to public policy.

²⁴ *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) 499E-F.

²⁵ *Roffey v Catterall, Edwards & Goudré (Pty) Ltd supra* 499H.

In *J Louw and Co (Pty) Ltd v Richter*,²⁶ Didcott J stated that:

“covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenanter’s freedom to trade or to work. Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.”²⁷

3.6 PROTECTABLE INTERESTS

3.6.1 GENERAL EMPLOYEE OBLIGATIONS RELATED TO PROTECTABLE INTERESTS

The inherent obligation of the employee, implied in every employment contract, protects confidential information and trade secrets. There is essentially no restraint of trade clause necessary to protect these interests as trust and confidence are essential components of building and maintaining the employment relationship and are a natural consequence of concluding an employment contract, even in the absence of specific reference to such concepts in the employment contract.

Not only does the employee have a duty to serve the interests of the employer’s business, but also has a duty to avoid conflicts of interest.²⁸

At common law, conduct by the employee clearly inconsistent with serving and protecting the employer’s best interests would be considered serious misconduct and consequently a breach of the employment contract.

Of particular concern to most employers is the promotion of their ability to effectively retain the protection of their business interests deserving protection, even after the termination of an employee’s services, for whatsoever reason.

²⁶ 1987 (2) SA 237 (N).

²⁷ *J Louw and Co (Pty) Ltd v Richter supra* 243B-D.

²⁸ Basson *et al Essential Labour Law* 40-41.

Accordingly, in order to ensure the effective protection of confidential information and trade secrets, employers do not rely on the limited common law provisions as they do not provide sufficient protection to an employer to protect its business interests.

Employers enter into varied forms of restraint agreements with their employees, aimed at protecting the following:

3.6.2 CONFIDENTIAL INFORMATION AND TRADE SECRETS

Ordinary general information about a business is not confidential simply because the proprietor defines it as such. The confidentiality status of information is a factual question and will be dependent upon the relevant circumstances.

In order to qualify as confidential information, such information must comply with the following three requirements:

- (a) It must involve and be capable of application in trade or industry; that is it must be useful.
- (b) It must not be public knowledge and public property, that is objectively determined, it must be known only to a restricted number of people or to a closed circle of persons.
- (c) The information objectively determined must be of economic value to the person seeking to protect it.²⁹

The nature of the information is essentially irrelevant if it does not comply with afore stated three requirements. The mere fact that a trader chooses to categorise something secret or confidential does not *per se* make it so.

²⁹ *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W) 632f-624a.

To be confidential, the information concerned must have the necessary quality of confidence about it, namely it must not be something which is public property or public knowledge.³⁰

Employees may use general knowledge and skills acquired during employment with a particular employer once they leave its employment, even if their new employers benefit from such knowledge and skills.

A distinction must be made between the senior management of an organisation and the ordinary employees as far as respect for trade secrets are concerned. Senior management typically have a stricter duty of compliance to confidentiality.

It is an implied term of every contract of service that an employee will not use confidential information acquired during his or her period of service for his or her own benefit or for the detriment of his or her employer and such terms binds the employee even after he or she has left the services of the employer. This term applies to all confidential information, whether acquired honestly or dishonestly.³¹

Confidential information in the context of covenants in restraint of trade and unfair competition may be categorised as follows:

- (a) Customer lists.
- (b) Information received by an employee about business opportunities available to an employer.
- (c) Information received in confidence.
- (d) Information contained in stolen documents.
- (e) Information gathered through time, skill and labour.

³⁰ *Telefund Raisers CC v Isaacs* 1998 (1) SA 521 (C) 528E.

³¹ *Alum-Phos (Pty) Ltd v Spatz supra* 623c-d.

- (f) Confidential information relating to proposals for the name, design, packaging and marketing of a new product.
- (g) Information relating to specifications of a product or process of manufacture which has been kept confidential.
- (h) Confidential information which has been used under licence.
- (i) Information relating to tender prices.³²

The more complex confidential category relates to the distinction between what is classified as confidential information and what is classified as employee's general stock of knowledge.

An employee, upon the termination of his or her services can never be prevented from using his or her general stock of knowledge in exercising his or her profession.

The suggested distinction between general and specific knowledge is stated as moral and economic, yet is an issue that can only be resolved by balancing the conflicting social and economic interests of two goals, both of which the law upholds and protects. On the one hand, the law encourages competition and supports an individual's right to exploit his or her own skill and knowledge; on the other, the law grants established business reasonable protection against unfair practices and the disclosure of confidential information.³³

A further distinction has been drawn between information which forms part of the employees' stock of general knowledge, skill and experience, and that which should fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary intelligence and honesty would regard as the property of the former employer.³⁴

³² *Saner Agreements in Restraint of Trade in South African Law* 7-14 to 7-21.

³³ *Bonnet v Schofield* 1989 (2) SA 156 (D) 159A-C.

³⁴ *Ansell Rubber Co (Pty) Ltd v Allied Rubber Industries (Pty) Ltd* 1972 RPC 811 (Vict) 815.

While it may be difficult to distinguish when the use of an employee's knowledge and skills breaches a former employer's right, the courts are aware of the perils of industrial espionage and have shown sympathy to employers' rights to their trade secrets.

An employee may use the general skills, knowledge and experience gained whilst in employment. Complexity is presented when a distinction is attempted between what knowledge the employee may use and what constitutes protected confidential information belonging to the employer. In the matter *Northern Office Micro Computers (Pty) Ltd v Rosenstein*³⁵ the High Court held as follows, drawing this distinction:

“The dividing line between the use by an employee of his own skill, knowledge and experience, and the use by him of his employer's trade secrets may be no more than the result of the application by an employee of his own skill, knowledge and experience. But, if the employee was engaged to evolve the secret, it remains the employer's trade secret for all that.

The employee may not simply copy it if, by copy, one means that literally. For example, if he has conducted a confidential market survey for his erstwhile employer to establish what demand, if any, exists in a particular area for a particular type of product, he cannot simply copy the survey and hand it to his new employer. But, that does not mean that the employee may never again set out to establish the market demand for a particular type of product in the same area. Generally speaking, he cannot be prevented from using his own skill and experience to attain a particular result, merely because it is the result which he has achieved before for a previous employer.”

In essence, the determination centres on the fact that there must be an interest of the employer which is deserving of protection, and were such interest to come into the hands of a competitor, this would give the competitor an unfair advantage over the employer.

Information sought to be protected that does not qualify as a trade secret can only serve one purpose, that being the elimination of competitors. Our law is now explicit in that a restraint of trade agreement cannot be imposed solely for the purpose of eliminating competitors.³⁶

³⁵ 1981 (4) SA 123 (C).

³⁶ *Basson v Chilwan* 1993 (3) SA 742 (A) 767D.

3.6.3 CUSTOMER AND TRADE CONNECTIONS

The need for an employer to protect his trade connections arises where the employee has access to his customer base and is in a position to build up a particular relationship with those customers, so that when he or she leaves the employer's service, he or she would be better placed to induce the customers to follow him or her to a new business.

An employee, who by virtue of his or her employment, would be in a position to exploit, on his or her own behalf, his or her employer's customer connections, is free on leaving his or her employment, subject to the limitations already discussed, to compete with his or her erstwhile employer for the business of the latter's customers unless restrained by contract from doing so.³⁷

A protectable interest in the form of customer connections does not come into being by simply having contact with an employer's customers.

The existence or otherwise of such relationships is a question of fact and depends on the nature of the employees' duties; the frequency and duration of the contact with customers; where such contact takes place; what knowledge he or she gains of their requirements and business; the general nature of their relationship; how competitive the rival businesses are; in the case of a salesman, the type of products being sold; and whether there is evidence that customers were lost after the employee left.³⁸

In the matter of *Rawlins v Caravantruck (Pty) Ltd*³⁹ the court held that:

“[e]ven though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense ‘his customers’, he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call customer goodwill which is created or enhanced is at least part an asset of the employer.

³⁷ *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T) 502D 503C.

³⁸ *Lifeguards Africa (Pty) Ltd v Raubenheimer* (2006) 15 HC 8.34.1 para 41.

³⁹ 1993 (1) SA 537 (A).

As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause".⁴⁰

Customer connections will be capable of protection by means of a covenant in restraint of trade only if the attachment or influence that would enable the employee to induce customers to follow him or her to a new business did not exist before, but came into being only during his or her employment with that particular employer.⁴¹

3.6.4 GOODWILL

Goodwill is property that is established, enhanced, bought and sold and as such, is typically protected. Where a person also buys a business, he or she buys more than just the material assets, namely also the goodwill of the business. In a service related enterprise, the goodwill thereof may well represent the majority of the purchase.

Various definitions of goodwill can be presented.

An early South African definition describes goodwill as the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force that brings in custom. It is the one thing which distinguishes old-established business from a new business at its first start.⁴²

A further definition details that the goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has the power of attraction sufficient to bring customers home to the source from which it emanates.⁴³

Goodwill has also been defined as an intangible asset pertaining to an established and profitable business, for which a purchaser of the business may be expected to pay, because it is an asset that generates turnover and consequently profits.⁴⁴

⁴⁰ *Rawlins v Caravantruck (Pty) Ltd supra* 542G.

⁴¹ *Walter McNaughtan (Pty) Ltd v Schwartz* [2003] 1 All SA 770 (C) 7791-780a.

⁴² *CIR v Moller & Co's Margarine (Pty) Ltd* (1909) AC 217 (HL) 234-235.

⁴³ *Commissioner of Inland Revenue v Moller and Co's Margarine Ltd* 1901 AC 217 (HL) 223-4.

⁴⁴ *Rosenbach & Co (Pty) Ltd v Dalmonte* 1964 (2) SA 195 (N) 209-210.

If the purchaser does not impose a restraint on the seller, the seller may well enter into competition with him and in doing so, eroding the goodwill for which he has been paid.

Of particular interest in this study is the ability to enforce restraint against employees where they have been designed to protect goodwill or an investment after the termination of the employee's service contract.

This has proved to be problematic, especially in instances where the affected individual receives no compensation in lieu of the restraint to earn a living.

In *Basson v Chilwan*⁴⁵ the court held that the five year restraint against Basson, an expert coach builder, and who contributed his knowledge and expertise to the establishment of a successful bus body business from its inception, was actually designed solely to protect the capital investment in the bus body building business by preventing Basson from exercising his expertise should he join a competitor. This restraint was viewed as by the court as unfair as the interest Chilwan was attempting to protect far outweighed the prejudice Basson would suffer by not being able to exercise his chosen profession for the defined period.

The effect of restraint of trade in the employment context on the transfer of a business also requires consideration.

In *Securicor (SA) (Pty) Ltd v Lotter*,⁴⁶ the court, per Froneman J, held that under both the common law and section 197⁴⁷ of the Labour Relations Act,⁴⁸ (hereinafter referred to as the LRA), whether a restraint of trade agreement is transferred as part of the goodwill of a business or as part of a going concern under the LRA⁴⁹ involves basically the same inquiry.

⁴⁵ *Supra*.

⁴⁶ [2005] 10 BLLR 1032 (E).

⁴⁷ Provisions for the transfer of the contract of employment.

⁴⁸ Act 66 of 1995.

⁴⁹ *Ibid*.

On the facts in *Botha v Carapax Shadeports (Pty) Ltd*⁵⁰ the restraint was enforced against employees who terminated their employment after the transfer of a business to a new owner.

“To determine what is comprised in the sale of goodwill of a business and whether it includes the right to enforce a restraint is however a question of fact. There is no fixed or invariable rule by which the benefit of an agreement in restraint of trade passes to the purchaser of the goodwill of a business. The benefit of the restraint may not form part of the goodwill of the business passed to the new owner where either the restraint conferred a purely personal benefit to the old owner, or where it would make a material difference to the honour the restraint against a new owner and not against the previous owner.”⁵¹

In *NEHAWU v University of Cape Town*,⁵² Ngcobo J held that the transfer of assets or otherwise is a factor relevant to the enquiry.

“What needs to be transferred is a business in operation so that the business remains the same but in different hands. Whether this has happened is a matter of fact to be determined objectively in the light of the circumstances of each transaction.”⁵³

Ngcobo J held further that:

“the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment; that the rights and obligations between the old employer and the worker are transferred to the new owner; that the transfer does not interrupt the continuity of employment; and that the employment contract continues with the new employer as if with the old employer”.⁵⁴

The content of rights and obligations remain the same after the cession and delegation, but they are now enforced by, and owed to, another.⁵⁵

Accordingly, whether a restraint of trade agreement survives the transfer of a business depends on whether the restraint formed part of the goodwill of the transferred business and is determined by the facts of the particular case.

⁵⁰ 1992 (1) SA 202 (A).

⁵¹ *Botha v Carapax Shadeports (Pty) Ltd supra* 213B.

⁵² 2003 (2) BCLR 154 (CC).

⁵³ *NEHAWU v University of Cape Town supra* note 6, para 56.

⁵⁴ *NEHAWU v University of Cape Town supra* note 6, para 67.

⁵⁵ *Securicor (SA) (Pty) Ltd v Lotter supra* 1038.

Froneman J⁵⁶ briefly responded to one of the aspects raised in the opposing papers, that of the unreasonableness of restraints resulting from the transfer of a relatively small existing business of the old employer to a new employer forming a part of a global group, may either justify a factual finding that at the time of the transfers of the restraints, were personal to the existing old employer-employee relationship, or a finding that the enforcement of the restraints at the behest of the new employers would be unreasonable.

Unfortunately the learned Judge did not express a view as the issue did not arise on the facts upon which the matter was decided in the court *a quo* and before him on appeal.

⁵⁶ *Securicor (SA) (Pty) Ltd v Lotter supra* 1040.

CHAPTER 4

THE SOUTH AFRICAN PERSPECTIVE ON RESTRAINING EMPLOYMENT

4.1 CONFLICTING PRINCIPLES

Two conflicting fundamental principles of South African law and society flow from the doctrine of restraint of trade. The one is the principle of freedom of trade, and the other is the principle of freedom of contract.

The principle of freedom of trade emphasises the right to work and therefore contracts that restrict a person's right to exercise his or her chosen vocation are unreasonable. On the other hand, the principle of freedom of contract emphasises the right that parties should be free to enter into contracts that should be binding in accordance with the *pacta servanda sunt* principle in order that society may function properly.

Our law has pivoted between these two conflicting principles.

Whilst the terms of a contract may well be of primary concern to the contracting parties, society as a whole is also concerned with the effect of restraints of trade. Our courts have consequently taken into account these societal concerns when considering the validity and effect of covenants in restraint of trade. Such societal concerns are expressed as "Public Interest" or "Public Policy".

Public interest demands that the productive efforts of individuals should not be sterilised to no purpose. Our courts have therefore often held that to curtail the freedom of an individual to do work for which he is qualified, affects the public interest. However, our courts have also consistently held that the sanctity of contracts should be honoured to ensure a secure environment for liability in terms of contract.

4.2 EARLY APPROACHES

Prior to 1984, South African law followed two principled approaches when assessing the enforceability of covenants in restraint of trade in the employment context.

The so-called traditional approach followed the English law doctrine which favoured the principle of freedom of trade above the principle of freedom of contract. This approach, mostly adopted prior to 1997, held that all covenants in restraint of trade were viewed as contrary to public policy and therefore, as a point of departure, *prima facie* void and accordingly, unenforceable. However, if the person wishing to enforce the restraint could prove that it was reasonably necessary to protect specified interests, the court could rule the restraint to be enforceable. The onus was placed on the person who wishes to enforce the restraint to prove that it is reasonable, *inter partes*. Similarly, the party wishing to avoid the restraint will have to prove that such a restraint is *contra bonos mores*.⁵⁷

The alternate approach followed Roman Dutch law, which is more in accordance with the primary source of South African law, favoured the converse doctrine, namely the principle of freedom of contract above the principle of freedom of trade.

This approach, largely adopted from 1997, promoted the consequence of the freedom of contract, *pacta sunt servanda*, and held that all covenants in restraint of trade were *prima facie* valid and accordingly enforceable. However, the person wishing to escape the restraint will have the onus of proving that it was unreasonable, and if successful, the court would rule the restraint unenforceable.⁵⁸

4.3 MAGNA ALLOYS AND RESEARCH (SA) (PTY) LTD v ELLIS

In 1984, the Appellate Division, in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁵⁹ favoured the Roman Dutch approach by coming to the conclusion that our law differed from the English law.

⁵⁷ *Saner Agreements in Restraint of Trade in South African Law* 2-6.

⁵⁸ *Ibid.*

⁵⁹ 1984 (4) SA 874 (A).

The court held that restraint of trade agreements should not be treated differently from other contractual agreements. Preference was accordingly granted to the principles of freedom of contract above the principles of freedom of trade.

The watershed *Magna Alloys*⁶⁰ case held that once it is established that there is a restraint of trade agreement in effect, the contractual agreement must be enforced, unless the party seeking to enforce the restraint has no protectable interest, which protectable interest may take the form of trade secrets or confidential information, or goodwill or trade connections.

Accordingly, the earlier approaches followed by South African courts, that covenants in restraints of trade are *prima facie* invalid and unenforceable were declared wrong.

The legal position⁶¹ set out by Rabie CJ in the *Magna Alloys*⁶² case can be summarised as follows:

- (1) There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.
- (2) The view taken in numerous South African judgments that a restraint of trade is *prima facie* invalid or unenforceable, was taken over from English law.
- (3) In English law, restraints of trade are *prima facie* unenforceable and the party seeking to enforce the restraint must prove that it is reasonable *inter partes*. The further rule is that the party alleging the restraint to be against the public interest must prove this.
- (4) It is a principle of our law that agreements which are contrary to the public interest are unenforceable.

⁶⁰ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra*.

⁶¹ This translation of the relevant passage of the Afrikaans in "Agreements in Restraint of Trade: The Appellate Division Confirms New Principles" (1985) *THRHR* 127.

⁶² *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra*.

It may therefore be said that a restraint of trade is unenforceable if the circumstances of the particular case are such, in the courts view, as to render enforcement of the restraint prejudicial to the public interest.

- (5) It is in the public interest that agreements entered into freely should be honoured. It is also, generally speaking, in the public interest that everyone should, as far as possible, be able to operate freely in the commercial and professional world. It may be accepted that a restraint of trade which is unreasonable would probably also prejudice the public interest, were the person concerned to be held to it.
- (6) In our law, the enforceability of a restraint should be determined by asking whether enforcement would prejudice the public interest.
- (7) Acceptance of the views set out in (6) above entails certain consequences, *inter alia* that when someone alleges he is not bound by a restraint to which he had assented in a contract –
 - (a) he bears the onus of proving that enforcement of the restraint is contrary to the public interest;
 - (b) the court should have recourse to the circumstances existing at the time enforcement is being sought;
 - (c) the court is not constrained to hold that the restraint as a whole is enforceable or unenforceable, but is also empowered to rule that a part of the restraint is enforceable or unenforceable.

4.4 APPROACHES POST MAGNA ALLOYS

The Appellate Division case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁶³ settled the basic law pertaining to restraints of trade in South Africa.

⁶³ *Supra.*

All subsequent similar cases were decided upon with reference to the principles established in the decision of the said case. These principles have been used to extend common law regarding agreements in restraint of trade in order to ensure that it is soundly based on the Roman-Dutch and South African approaches to the potential invalidity, and therefore unenforceability, of contracts which are contrary to public policy.⁶⁴

In the matter of *J Louw and Co (Pty) Ltd v Richter*,⁶⁵ Didcott J stated that:

“Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy.

It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenanter’s freedom to trade or to work. Insofar that it has that effect, the covenant will therefore not be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.”⁶⁶

The reasoning of Didcott J is in keeping with the oft-quoted decision of *Magna Alloys*.⁶⁷

Following the decision in *Magna Alloys*,⁶⁸ in *Bridgestone Firestone Maxiprest Ltd v Taylor*⁶⁹ it was accepted that:

“[o]nce it is established that there is an agreement, the contract must be enforced, unless the party sought to be restrained shows that the party seeking to enforce the restraint has no protectable interest, which protectable interest may take the form of trade secrets or confidential information, or goodwill or trade connections, i.e. he must discharge onus of proving that at the time the enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee’s protectable interests, being his goodwill in the form of trade connections and his trade secrets“.⁷⁰

⁶⁴ *Saner Agreements in Restraint of Trade in South African Law* 2-3.

⁶⁵ *Supra*.

⁶⁶ *J Louw and Co (Pty) Ltd v Richter supra* 243B-D.

⁶⁷ *Supra*.

⁶⁸ *Ibid*.

⁶⁹ [2003] 1 All SA 299 (N).

⁷⁰ *Bridgestone Firestone Maxiprest Ltd v Taylor supra* 302j-303b.

The *Magna Alloys* case is still considered to be the *locus classicus* which directs jurisprudence in restraint of trade findings.

4.5 THE CONSTITUTIONAL ERA

4.5.1 CONSTITUTIONAL CONSIDERATIONS

The Constitution of the Republic of South Africa⁷¹ provides a Bill of Rights⁷² as a cornerstone of democracy in South Africa. All law, including the common law, is subject to the Constitution and the Bill of Rights.

The Constitution enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. The Bill of Rights provides for vocational rights for every citizen.⁷³

The right in the Bill of Rights are subject to limitations.⁷⁴

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

When applying a provision of the Bill of Rights to a natural or juristic person, a court:

⁷¹ Act 108 of 1996.

⁷² Constitution of the Republic of South Africa, Ch 2.

⁷³ S 22 of the Constitution provides that

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

⁷⁴ S 36(1) of the Constitution provides that this right can be:

“Limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

- in order to give effect to a right in the Bill, must apply, or if necessary, develop the common law to the extent that legislation does not give effect to that right; and
- may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).⁷⁵

4.5.2 THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

The Bill of Rights accords everyone the right to fair labour practices.⁷⁶ However, the codification of particular unfair practices raises the question whether there remains a generic species of ‘unlisted’ unfair labour practices. The very specific language adopted by the legislature in delineating unfair labour practices excludes the victims of other forms of unfair treatment such as those involving remuneration from seeking redress under the LRA.⁷⁷

The LRA promotes the intention of the Bill of Rights by according every employee the right not to be unfairly dismissed nor subjected to an unfair labour practice.

In recent times, the courts have had the opportunity to pronounce on the influence of the Constitution⁷⁸ on agreements in restraint of trade.

The right of an individual to free economic activity is entrenched in the Constitution as a fundamental right.⁷⁹

In *Fidelity Guards Holdings (Pty) Ltd v Pearmain*,⁸⁰ Liebenberg J held that:

⁷⁵ Constitution of the Republic of South Africa, Ch 2, s 8.

⁷⁶ Constitution of the Republic of South Africa, Ch 2, s 23(1).

⁷⁷ Labour Relations Act 66 of 1995, s 185.

⁷⁸ Constitution of the Republic of South Africa Act 108 of 1996.

⁷⁹ Constitution of the Republic of South Africa, Ch 2, s 22:

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

⁸⁰ [1998] 3 BLLR 335 (SE) 343E.

“In so far as a restraint is limitation of the rights entrenched in section 22, the common law as developed by the courts in my view complies with the requirements laid down by the limitation provisions contained in section 36(1) of the Constitution.⁸¹ Any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the agreement and the common law in this regard is therefore of general application. In terms of the common law, restraint clauses are only enforceable if they are not in conflict with public policy.”

The Constitution may have an influence on the question of onus in restraint of trade disputes. Since the right to free economic activity is regarded as a fundamental right, it is submitted that the onus should revert to the person seeking to enforce the restraint as was the case before the *Magna Alloys*⁸² decision. It should be up to the person seeking to enforce the restraint to indicate why the infringement of a fundamental right is reasonable in the circumstances.

Our courts have not finally decided this issue.⁸³

In the recent High Court matter of *Lifeguards Africa (Pty) Ltd v Raubenheimer*,⁸⁴ Tshabalala JP held that:

“There is an apparent conflict of judicial opinion as to the appropriate approach on the question of onus in the light of section 22 of the Constitution of the Republic of South Africa”.⁸⁵

In *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,⁸⁶ Kondile J said that:

“Prior to the Constitution becoming the supreme law in this country, the *Magna Alloys* decision was binding on every South African court.

⁸¹ Deneys Reitz Attorneys (September 2001) *Commercial Update No. 9*.

⁸² *Supra*.

⁸³ Deneys Reitz Attorneys *Commercial Update No.9 supra*.

⁸⁴ (2006) 15 HC 8.34.1, para 29.

⁸⁵ S 22: Freedom of trade, occupation and profession:

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

⁸⁶ 2004 (1) BCLR 39 (N).

However the duty of every South African court now is to take into account the provisions of the Constitution, particularly the Bill of Rights. S 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The restraint of trade clause in the contract constitutes a limitation on first respondent's fundamental right to freedom of trade, occupation and profession. It is inconsistent with the Constitution to impose the onus to prove a constitutional protection on the first respondent."⁸⁷

Note that the judgment of Kondile J in *Canon KwaZulu-Natal* case, detailed that:

"Although reported in January 2004, was handed down on 27 March 2000. This is to prevent the misunderstanding that might occur as the *Bridgestone*⁸⁸ case, is the Full Bench decision. The elimination of contradiction leads to the understanding that the date to be taken into consideration is the date of the judgment lest one concludes that the 2004 judgment disregarded the 2003 Full Bench decision."⁸⁹

The conclusion from the *Canon KwaZulu-Natal*⁹⁰ case seems to derive support, albeit under different considerations, from *Holomisa v Argus Newspapers Ltd*.⁹¹

The court, in the *Holomisa* matter, dealt with the constitutional right to dignity and free speech and expression under the law of defamation. It was decided that these rights, as all rights in the Bill of Rights, are given special protection in the limitation clause.⁹² Cameron J decided in the *Holomisa* matter, that a limitation of the rights so described, to be permissible, must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁹³

As already referred to above, restraint of trade limits the constitutional right to freedom of trade occupation and profession. Therefore, the same reasoning applied in the *Holomisa* matter should be applied in cases of this nature.

⁸⁷ *Canon KwaZulu-Natal (Pty) Ltd t/a Cannon Office Automation v Booth supra* 42C-E.

⁸⁸ *Bridgestone Firestone Maxiprest Ltd v Taylor supra*.

⁸⁹ *Canon KwaZulu-Natal (Pty) Ltd t/a Cannon Office Automation v Booth supra*.

⁹⁰ *Ibid*.

⁹¹ 1996 (2) SA 588 (W).

⁹² Constitution of the Republic of South Africa, Ch 2, s 36(1).

⁹³ *Holomisa v Argus Newspapers Ltd supra* 606I–J.

The covenantee needs to prove that the restraint is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.

The decision of Kondile J and reference therein to the change in incidence of onus was *obiter*.

In his judgment, Kondile J stated further that:

“On these facts, even assuming that the applicant has shown some interest deserving of protection and even assuming that the onus is still on the covenantor, the first respondent has proved on a preponderance of probability that in all the circumstances of this particular case, the applicant’s interest is eclipsed by the first respondent’s interest not to be restrained”.⁹⁴

The impact of the interim Constitution⁹⁵ and the Constitution⁹⁶ on covenants in restraint of trade has in the past been met with judicial restraint.⁹⁷

In the matter of *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*,⁹⁸ Liebenberg J said that:

“In terms of the *Magna Alloys*⁹⁹ case, the onus in mailers of this nature is on the party wishing to show that the restraint should not be enforced. It seems that the position in terms of the Constitution may now be that the onus will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution.”

Regrettably, the learned judge stated further that:

“For purposes of this judgment, I do not find it necessary to determine this question as I approach the matter on the basis that the onus is on the applicant.”

In *Coetzee v Comitis*,¹⁰⁰ the applicant wanted to move to another team after being informed by Ajax Football Club that there were no prospects for him playing for the

⁹⁴ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth supra* 46B.

⁹⁵ Constitution of the Republic of South Africa Act 200 of 1993.

⁹⁶ Constitution of the Republic of South Africa Act 108 of 1996.

⁹⁷ *Waltons Stationery Co (Pty) Ltd v Fourie* 1994 (4) SA 507 (O).

⁹⁸ 2001 (2) SA 853 (SECLD) 862F–H.

⁹⁹ *Supra* 898C–D.

¹⁰⁰ 2001 (1) SA 1254 (C).

team after his recovery from physical injuries. According to the rules of the third respondent, the National Soccer League, for transfer to be effected he has to apply to his team for clearance. This he did, but his team refused because in terms of the National Soccer League rules it was entitled to compensation if he joined the new team. This entitlement ceases only if a player did not participate in competitive football for thirty months after the expiry of his contract. The court's decision that the rules of compensation regime constituted an unreasonable restraint of trade which is antithetical to the provisions of the Constitution was premised on the basis that the onus is on the covenantee.¹⁰¹

The court, per Traverso J (with whom Ngwenya J concurred) held that:

"The onus lies with the National Soccer League to satisfy this Court that the compensation regime is a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."¹⁰²

Tshabalala JP¹⁰³ stated the following:

"I agree with the approach of Traverso J and am of the opinion that in our constitutional dispensation it is adversative to the spirit, object and purport of the Constitution which gives due regard to an open society based on human dignity, equality and freedom, that the covenantor can be saddled with onus to prove a limitation to his or her constitutional right.

However, for the purposes of this judgment it is not necessary to decide the issue of onus¹⁰⁴ because I am bound by *Bridgestone Firestone Maxiprest Ltd v Taylor*¹⁰⁵ and *Magna Alloys*.¹⁰⁶ Accordingly, I proceed on the basis that the onus is on the defendant to prove that the restraint is unreasonable."¹⁰⁷

¹⁰¹ *Coetzee v Comitis supra* 1273H.

¹⁰² *Coetzee v Comitis supra* 1273E–F.

¹⁰³ *Lifeguards Africa (Pty) Ltd v Raubenheimer supra*

¹⁰⁴ The doctrine of *stare decisis* in our constitutional dispensation was succinctly clarified in *Ex parte Minister of Safety and Security: In Re: S v Walters* 2002 (7) BCLR 663 (CC) 693F–G per Kriegler J thus: "High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue".

¹⁰⁵ *Supra*.

¹⁰⁶ *Supra*.

¹⁰⁷ *Lifeguards Africa (Pty) Ltd v Raubenheimer supra* paras 29-34.

The court¹⁰⁸ held that the undertaking constituted a restraint of trade covenant.

Although there has been debate about whether the Constitution¹⁰⁹ has placed the onus on the party relying upon the covenant, rather than the defendant, the court accepted that the onus remains on the covenantor to prove that the restraint was unreasonable.

4.6 CONFIRMATION OF CORE ASPECTS

4.6.1 PUBLIC POLICY

For a restraint of trade to be enforceable, it has to be reasonable. A restraint of trade cannot be deemed to be reasonable if it is contrary to public interest. Accordingly, the court will only intervene when the unreasonable restraint is placed on an individual's freedom to trade.¹¹⁰

In the *Roffey*¹¹¹ case, Didcott J refers to the *dictum* of Jessel MR in *Printing and Numerical Registering Co v Sampson*¹¹² where the learned judge said that:

“If there is one thing that more than another public policy requires, it is an understanding that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount policy to consider – that you are not lightly to interfere with this freedom of contract.”

A value judgment is made *ex post facto* in order to ascertain whether or not the contract is in the public interest. What is in the public interest is determined with reference to criteria, at times vague, such as *boni mores*, public policy and the principles embodied in statute such as the Bill of Rights in the Constitution.¹¹³

¹⁰⁸ *Lifeguards Africa (Pty) Ltd v Raubenheimer supra*.

¹⁰⁹ Constitution of the Republic of South Africa Act 108 of 1996.

¹¹⁰ *Sunshine Records (Pty) Ltd v Frohling* 1990 (4) SA 782 (A).

¹¹¹ *Roffey v Catterall, Edwards & Goudré (Pty) Ltd supra* 506G.

¹¹² 1875 LR 19 Eq 465.

¹¹³ Constitution of the Republic of South Africa Act 108 of 1996.

In the Appellate Division matter of *Basson v Chilwan*,¹¹⁴ Nienaber JA, Botha JA and Milne JA concurred that:

“An agreement is assailable, either in its entirety or partially if it damages the public interest and is therefore in conflict with public policy. A provision of this nature which attempts to restrain an employee or partner after termination of the contact is in conflict with the public policy if the effect of the restraint would be unreasonable. The reasonableness or otherwise of the restraint is judged on the basis of the broad interests of the community, on the one hand, and of the interests of the contracting parties themselves, on the other hand. As far as broad interests of the community are concerned, there are two conflicting considerations: agreements should be abided by; and unproductivity should be discouraged.

As far as parties themselves are concerned, a restraint is unreasonable if it prevents one party, after the termination of their contractual relationship, from participating freely in the commercial and professional world without a protectable interest of the other party being properly served thereby. Such a restraint is as such contrary to public policy. Moreover, a restraint which is reasonable *inter partes* might nevertheless, for reason not peculiar to the parties, damage the public interest; and possibly also vice versa.

In this connection, the following four questions should be asked:

- (a) Is there any interest of one party which is deserving of protection at the termination of the agreement?
- (b) Is such interest being prejudiced by the other party?
- (c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?
- (d) Is there another factor of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?

In so far as interest in (c) surpasses the interest in (d), the restraint would as a rule be unreasonable and accordingly unenforceable. It is a matter of judgment which can vary from case to case.

The parties' own views, as reflected in the agreement, as to what is reasonable can never be decisive. Firstly, the reasonableness of the restraint is judged only after consideration by a court on the basis of factors which might not necessarily have been present to the minds of the parties.

¹¹⁴ *Supra*.

Secondly, the content of the agreement cannot be the exclusive measure of what is reasonable because that would result in the propriety of the agreement being tested against itself.

That the parties in concluding the agreement seriously considered such a restraint to be necessary, that they identified and evaluated the disputed interests and described the restraint itself as most reasonable cannot therefore be decisive. It can at most be said that it is a factor to be considered in determining what is deserving of protection and of what is reasonable.

The same applies to the consideration that the parties at the time of the conclusion of the contract were not acting on an equal footing. This is also one of the factors that can play a role in the determination of the reasonableness of the restraint. If the restraint, at the time of the adjudication thereof, is considered by the Court to be unreasonable, it is not enforceable, regardless of the parity or otherwise of the parties to one another and however they may have regarded and described the provision at the time of the conclusion of the contract. No agreement, however carefully worded, can entrench an otherwise unreasonable provision.

It has long been accepted that the mere elimination of competition as such is not the kind of interest which can be protected by a restriction of freedom of trade after the termination of a contract; that is, that it does not weigh up against the prejudice which the other party will suffer if he cannot freely exercise his calling. The position does not change because the restraint was not arbitrarily stipulated, but was contracted for in order to protect an investment, irrespective of whether in was an investment of capital or whether it was an investment in time and capital devoted to an employee.

That does not mean that an investment of this kind is not deserving of protection; it only means that it cannot normally be protected by means of a provision which attempts to restrict freedom of trade after termination of the agreement.”¹¹⁵

4.6.2 ONUS

4.6.2.1 THE INCIDENCE OF THE ONUS PRIOR TO *MAGNA ALLOYS*

In the early part of the twentieth century, the South African courts followed English case law regarding the enforceability or otherwise of contracts in restraint of trade.

In the matter of *Weinberg v Mervis*, it was held that the onus of proving that the restraint was inimical to the public interest lay upon the party so averring.¹¹⁶

¹¹⁵ *Ibid.*

¹¹⁶ *Weinberg v Mervis* 1953 (3) SA 863 (C) 865G-866A.

As a general rule, agreements in restraint of trade were regarded by the courts as *prima facie* void and unenforceable. The onus was therefore on the party seeking to enforce the agreement (the covenantee) to show that it was reasonable and therefore in the public interest to enforce it.¹¹⁷

Despite some doubts having been expressed as to the origins of the law which was then being applied as regards the onus in restraint of trade cases, the provincial and local divisions of the then Supreme Court followed the dictates of the English law.¹¹⁸

It was consequently regarded as settled law that: “Restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void, and that it is against the policy of the law to enforce them, except where there are special circumstances to justify them, and that the onus of proving such circumstances rests on the party alleging them.”¹¹⁹

4.6.2.2 THE CHANGING INCIDENCE OF THE ONUS

Towards the end of the third quarter of the twentieth century, judicial doubt began to be expressed as to the correctness of the English law principles regarding agreements in restraint of trade when viewed against the Roman Dutch background of South African Law.

An early case which went against the trend was that of *Empire Theatres Co Ltd v Lamor*,¹²⁰ where it was held that the onus of proving that a covenant in restraint of trade was unreasonable rested upon the person seeking to avoid the restraint.

¹¹⁷ *Super Safes (Pty) Ltd v Voulgarides* 1975 (2) SA 783 (W) 785D-F.

¹¹⁸ *Recycling Industries (Pty) Ltd v Mohammed* 1981 (3) SA 250 (SEC) 254H, Eksteen J held that:
“In considering agreements in restraint of trade, as the undertakings in the present case undoubtedly are, our Courts have held that there is no difference in principle on the question on the enforceability of such agreements between the English law and our own, and the English cases reflecting the development of this branch of the law have, until very recently, been consistently followed by our Courts.”

¹¹⁹ *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T) 1101H.

¹²⁰ 1910 WLD 289 291.

In his judgment, Ward J, quoted the *Nordenfelt* case¹²¹ which he viewed to be the authoritative English law on the topic.

“It is for the Court to decide in the circumstances of each case, taking into consideration the contract, the nature and extent of the business to be protected, whether the restraint imposed in each case is reasonable or not, and the onus of proving that the covenant in restraint of trade is unreasonable lies upon the respondent.”

The application of the English law approach was challenged in *SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd*,¹²² where the following was expressed in the judgement:

“I am not by any means certain that the South African cases have been right in adopting the English view relating to onus.

If it is correct to say that the doctrine of restraint of trade is applied in our law because of public policy, then it becomes relevant to enquire what that public policy is. What I think is contrary to public policy is a contract in unreasonable restraint of trade. If such view be to correct then, applying the ordinary principles of onus relating to pleadings, it would seem that the onus would lie upon the party alleging to show that the contract in question is in unreasonable restraint of trade.”¹²³

Leon J, in his judgment stated further that:

“In the circumstances of this case it is unnecessary for me to express any final view on the question of onus, suffice to say that I think that the approach of our courts to the question of onus might possibly have to be reconsidered.”¹²⁴

Didcott J in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd*¹²⁵ was certain that the English law perspective on restraint of trade agreements had little future application to South African law. In his judgment he stated:

“I have come to the conclusion that public policy in South Africa does not generally condemn covenants in restraint of trade and that, according to our law, they are not *prima facie* void.

¹²¹ *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* 1894 AC 535-565.

¹²² 1968 (2) SA 777 (D).

¹²³ *SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd supra* 787G-H.

¹²⁴ *SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd supra* 788C.

¹²⁵ *Supra*.

If any at all are contrary to public policy and unenforceable on that account, they are confined, in my opinion, to those which have been proved to be unreasonable.”¹²⁶

Accordingly, the Natal Full Bench decided that the onus in restraint of trade cases is on the promisor, *ie* the onus was placed on the party wishing to escape from the restrictions of the contract.

The Transvaal Full Bench in *National Chemsearch (SA) (Pty) Ltd v Borrowman*¹²⁷ however declined to follow the *Roffey*¹²⁸ case and has held, largely on the grounds of *stare decisis*, that the onus lies on the promisee, *ie* the onus was placed on the party wishing to enforce the provisions of the restraint agreement to prove that it is reasonable to enforce such provisions.

The question of onus in *Drewtons (Pty) Ltd v Carlie*,¹²⁹ Van den Heever J confirmed her support of the earlier approach adopted by Didcott J in the *Roffey*¹³⁰ matter, where she suggested that: “although there is a long line of decisions of single Judges in this Division in which it has been held that the onus lies on the promisee, *ie* the person seeking enforcement of a restraint clause, to establish its reasonableness, *stare decisis* should not prevent this Court, should it consider it to be the true legal position under Roman-Dutch law, from deciding that the onus rests upon the promisor, i.e. the person resisting its enforcement”.

4.6.2.3 THE CURRENT INCIDENCE OF THE ONUS

The current incidence of the onus continues to rely on the most important aspect of the *Magna Alloys*¹³¹ matter.

¹²⁶ *Roffey v Catterall, Edwards & Goudré (Pty) Ltd supra* 505H.

¹²⁷ 1979 (3) SA 1092 (T).

¹²⁸ *Roffey v Catterall, Edwards & Goudré (Pty) Ltd supra*.

¹²⁹ 1981 (4) SA 305 (C) 313B-C.

¹³⁰ *Roffey v Catterall, Edwards & Goudré (Pty) Ltd supra*.

¹³¹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra*.

In the said matter, the court held that one of the consequences of judging the enforceability or otherwise of agreements in restraint of trade by their impact on the interests of the public is that, when a party to such an agreement seeks to avoid its consequences, the party concerned must bear the onus of showing that an enforcement of the agreement would harm public interest.

It is held *obiter dictum* that the incidence of onus in covenants in restraint of trade is on the party who wishes to escape the restraint to prove that the restraint ought not to be enforced.

The corollary of this argument is that no onus rests upon a person seeking to enforce an agreement in restraint of trade to show that it is reasonable or in the public interest.¹³²

In the *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*¹³³ matter heard in the local division of the South Eastern Cape Local Division, Liebenberg J held that:

“In terms of the *Magna Alloys* case, the onus in matters of this nature is on the party wishing to show that the restraint should not be enforced. It seems that the position in terms of the Constitution may now be that the *onus* will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution. For purposes of this judgment I do not find it necessary to determine this question as I approach the matter on the basis that the onus is on the applicant.”

Nevertheless, until a court of higher status amends the principles established in the Appellate Division *Magna Alloys*¹³⁴ case, the incidence of onus in covenants in restraint of trade will continue to be placed on the party wishing to escape the restraint to prove that the restraint ought not to be enforced.

¹³² *Saner Agreements in Restraint of Trade in South African Law* 3-12.

¹³³ *Supra* 863.

¹³⁴ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra*.

An opinion proffered by John Saner¹³⁵ suggests the following:

“With respect to Liebenberg J,¹³⁶ it is submitted that he was incorrect even to speculate that, in terms of the final constitution, the onus might now be on the person seeking to enforce a restraint to show that it complies with the provisions of the constitution. Having reached the conclusion that the agreements in restraint of trade are not *per se* repugnant to the constitution, it should follow that a party seeking to enforce a restraint bears no constitutionally imposed onus whatsoever. On the contrary, any party alleging, in a special case, that the constitution does affect such a restraint, should have to prove that fact.

The incidence of the onus, as set out in *Magna Alloys*, must consequently remain on the party seeking to escape the effect of a restraint, whether such party alleges it is unreasonable or contrary to the constitution.”

4.6.3 DURATION

Employers must ensure that the duration of the restraint of trade is not excessively long and must have some connection with the period of the employee’s employment. The absence of a stipulated period does not invalidate an agreement in restraint of trade, yet will require that the issue be raised pertinently so that it can be dealt with properly in evidence and argument.¹³⁷

In *National Chemsearch (SA) (Pty) Ltd v Borrowman*¹³⁸ the court held that “the answer to the question in regard to the enforceability of the clause is whether its duration is unreasonably long depends upon a value judgment taking into account how soon the hold of the old employee over customers will weaken”.

4.6.4 GEOGRAPHICAL DEMARCATION

The geographical demarcation must be reasonable and should have some connection with the area in which the employee will be operational.

¹³⁵ Saner *Agreements in Restraint of Trade in South African Law* 14-12.

¹³⁶ *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain supra.*

¹³⁷ *Sunshine Records (Pty) Ltd v Frohling supra.*

¹³⁸ *Supra* 1105C.

The absence of a defined geographic area does not invalidate an agreement in restraint of trade, yet will require that the issue be raised pertinently so that it can be dealt with properly in evidence and argument.¹³⁹

In the High Court matter of *Forwarding African Transport Service CC t/a Fats v Manica Africa (Pty) Ltd*,¹⁴⁰ the respondent having signed a restraint of trade agreement in terms of which he agreed not to work for any employer other than the applicant for one year, when he resigned, the applicant sought an order enforcing the agreement. The Court held that the individual's right to pursue his or her chosen calling must be weighed against the sanctity of contractual obligations voluntarily assumed. Pillay J held that the restraint to be unreasonably wide, contrary to public interest and accordingly unenforceable.

The effect of granting the interdict would be to prevent the respondent from doing any work anywhere for first respondent for a year. The court found the contract to be unenforceable and that the applicant had not shown that it is entitled to such a drastic remedy as an interdict.

4.6.5 COMPENSATION

The fact that an employee has not received a restraint payment does not by itself make the restraint unenforceable. The existence of a restraint payment is merely one of several factors which the court will take into consideration in determining whether the restraint is enforceable or not.

¹³⁹ *Sunshine Records (Pty) Ltd v Frohling supra.*

¹⁴⁰ *Forwarding African Transport Service CC t/a Fats v Manica Africa (Pty) Ltd* (2004) 13 HC 11.1.1.

CHAPTER 5

ENFORCING RESTRAINTS OF TRADE

5.1 INTRODUCING RESTRAINT OF TRADE

An employer who runs the economic and financial risk that an employee or former employee may prejudice his or her business enterprise should consider inserting a restraint of trade clause, including confidentiality aspects in the contract of employment, or a separate agreement as supplementary to the contract of employment, when recruiting new personnel.

Should current employees not be subjected to such restraint, it would be prudent for an employer envisaging such economic and financial risk to enter into restraint agreements as amendments to their employment contracts. It may however be necessary to give some benefit or reward for entering into such amendments in order to induce them to agree.

Employers may not compel employees to sign restraint of trade agreements after they have entered service, nor may an employer rely on all provisions of such agreements, if the employer has terminated the contract unlawfully.

The practice of requiring all employees to enter into restraint of trade agreements is inappropriate. Not all employees have access to, or are involved in areas of the employer's business which require protection by way of a restraint of trade. Employers should be selective when it comes to deciding which employees will be required to sign restraints of trade.

Restraints of trade agreements should also be worded in such a way that any unenforceable part of the restraint does not affect the validity and the enforceability of other reasonable limitations of the agreement.

While our law recognises that an employer may have a protectable interest when it comes to restraint of trade, caution and prudence is called for, as over-eager drafting may well end up unenforceable altogether.

5.2 PARTIAL ENFORCEMENT OF A RESTRAINT OF TRADE AGREEMENT

A party seeking to enforce something less than the whole contract in restraint of trade is obliged to raise the issue pertinently so that it can be dealt with properly in evidence and argument.¹⁴¹ A court may declare the agreement enforceable, partially enforceable¹⁴² or unenforceable.

5.3 UNLAWFUL TERMINATION OF EMPLOYMENT AND THE VALIDITY OF A RESTRAINT

It remains an open question in our law as to whether the unlawful and unfair termination of employment will also negate the validity of the restraint of trade. At best it can at present be stated that the unlawful and unfair termination of employment is one of the numerous factors which will be considered by the court in determining whether to enforce a restraint of trade or not.¹⁴³

In the *Reeves v Marfield Insurance Brokers CC*¹⁴⁴ matter, the Appellate Division held a stronger view in that

“The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer.”

¹⁴¹ *Bridgestone Firestone Maxiprest Ltd v Taylor supra* 306d.

¹⁴² *Sunshine Records (Pty) Ltd v Frohling supra* where the court held that:

“Although a court may, when the public interest requires it, order that an agreement in restraint of trade be only partially enforced, while having regard, *inter alia*, to matters such as whether the restraint clause was designed to be unduly oppressive or to act *in terrorem* and whether partial enforcement would not operate harshly or unfairly towards the person(s) bound by the restraint, such power was not unrestricted, and the amendments suggested should not be so far-reaching as to materially alter the contract.”

¹⁴³ Deloitte & Touche Legal *Common Misconceptions About Restraint of Trade supra*.

¹⁴⁴ *Supra*.

5.4 TERMINATION BY NEW EMPLOYER BECAUSE OF RESTRAINT OF TRADE

The termination of an employee's services by the employee's new employer on the ground that the employee is bound by an agreement in restraint of trade which he or she did not disclose when entering into employment with the new employer, is permissible under the common law and would typically not constitute an unfair dismissal.

In the matter of *Mills v Drake International SA (Pty) Ltd*¹⁴⁵ the employer argued that the employment offer made to the applicant employee was at all times conditional and subject to the suspensive condition of her obtaining a release from the restraint of trade she had signed with her present employer. The employer's argument was further, that the condition had failed and that its contractual obligation had fallen away as the applicant employee had not secured her release from her restraint of trade, and her present employer had in fact threatened to enforce the restraint.

It is submitted that had the arbitrator found that the offer of employment, as signed and accepted by the applicant employee, was subjected to this suspensive condition, confirmation of a fair dismissal should have been realised.

5.5 JURISTIC RELIEF

Typically when litigation about the enforcement or otherwise of a restraint of trade ensues, the covenantee almost always wishes to enforce the restraint by means of an urgent interdict through civil court proceedings shortly after the alleged breach of agreement has been discovered.

¹⁴⁵ (2004) 6 BALR 718 (CCMA).

Due to the nature of these proceedings, where they seldom reach the upper echelons of the civil court structures, or if they do, not in such form that they merit definitive pronouncement on the applicable law amounting to anything more than *obiter dicta*.¹⁴⁶

5.6 ALTERNATIVE CONSIDERATIONS

An effective manner of protecting interests remains in binding the other party contractually in employment for a stipulated term, in which case the employee would receive his agreed remuneration and not be unproductive, while the employer would have the usual common-law remedies at his disposal should the employee leave before the expiry of the agreed term and take up employment with a competitor.¹⁴⁷

¹⁴⁶ *Saner Agreements in Restraint of Trade in South African Law* 3-3.

¹⁴⁷ *Basson v Chilwan supra* 744E.

CHAPTER 6

INCOME TAX CONSIDERATIONS

For several years prior to 2001, restraints of trade were a popular instrument used to provide senior executives with additional non-taxable remuneration. In many of these instances employers did not ever intend to enforce the restraint of trade, and they were merely utilised to pay executives lump sum payments which were not taxed.

The Minister of Finance and the South African Revenue Services having become aware of non-taxable restraint of trade payments and other similar practices such as non-taxable employee share issues, sought to close fringe benefit tax loopholes.

Following amendments to the Income Tax Act,¹⁴⁸ restraint of trade payments, from 2001, are taxed as normal remuneration. The result has been a decline in the popularity of restraint of trade agreements from a remuneration structuring perspective.¹⁴⁹

¹⁴⁸ Act 28 of 1997.

¹⁴⁹ Deloitte & Touche Legal *Common Misconceptions About Restraint of Trade supra*.

CHAPTER 7

CONCLUSION

Restraints of trade agreements remain a valuable mechanism utilised by employers to protect their genuine business interests. The provisions of such agreements are enforceable against employees.

The decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* provided an improved basis for the approach to covenants in restraint of trade. Notwithstanding the influence of the decision in the afore stated matter, all relevant aspects must still be taken into account when considering the enforceability of a restraint, including the reasonable protection of individual interests.

Reasonableness therefore still plays a role, despite the *Magna Alloys* decision which favours public policy as the basic standard to measure the enforceability of restraints.

Reference is made to the Constitution, the Bill of Rights in the Constitution and harmonising the conflicting principles of freedom to contract and the 'right to earn a living' through freedom of trade, when dealing with restraints of trade.

All legislation now enforced in South Africa and applied by the courts derives authority from the Constitution. All law is accordingly subject to constitutional control and conversely, all law inconsistent with the Constitution is invalid. This includes the common law of contract.

The Bill of Rights contained in the Constitution applies to all law, and binds the legislature, the executive, all organs of state, and also the judiciary. In addition, the Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights.

Our courts have established certain circumstances where a contract will not be enforced because its objective is contrary to public policy. Therefore public policy can be said to nullify agreements offensive in themselves.

Public policy is now enshrined in our Constitution and its fundamental values. These include human dignity, equality, human rights and freedoms, non-racialism and non-sexism. However the Constitution does not give the courts a general jurisdiction to invalidate contracts or to determine their enforceability.

On the contrary, the Constitution's values of dignity, equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perspective restraint. This is so because contractual autonomy is perceived as part of freedom. If contractual autonomy is considered objectively, it is based on the constitutional value of dignity. The Constitution requires that its values be applied to achieve a careful balance between contractual freedom and the ability to contract, so that self-respect and dignity is protected. This balance must therefore also be achieved in the application of our law on covenants in restraint of trade.

It is submitted that our courts should continue to strive to harmonise the conflicting principles of freedom of contract and freedom of trade, when ruling on restraint of trade in the employment context.

The fact that our courts have emphasised the importance of the sanctity of contract has ensured a secure contractual environment which must positively serve public interest. Enshrined in the Constitution is the provision that every citizen may freely choose their trade, occupation or profession which also positively serves public interest. However, the progressive importance given to the notion of the right to work should in future lead our courts to expand the concept of public interest so as to also ensure a free and fair contractual environment.

Whilst it is acknowledged that the nature of these restraint of trade proceedings seldom reach the upper echelons of the civil court structures, or if they do, not in such form that they merit definitive pronouncement on the applicable law, in view of the 2001 High Court pronouncement in *Fidelity Guards v Pearmain* and the more recent 2006 High Court pronouncement in *Lifeguards Africa (Pty) Ltd v Raubenheimer*, it is anticipated that the 1984 Appellate Division matter of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* may lose its *locus classicus* status to a

Constitutional Court challenge focused on the freedom of trade, occupation and profession as well as changes to the incidence of the onus.

The covenantor is currently being encumbered with the onus of proving a limitation to his or her constitutional right which is adversative to the spirit, object and purport of the Constitution which gives due regard to an open society based on human dignity, equality and freedom.

Accordingly, these aspects still need clarification and development, such as the resolving the current debate about whether the Constitution has placed the onus on the party relying upon the covenant, rather than the defendant.

In this regard, the question of the further development of public policy with respect to restraint of trade in the employment context, in the light of the Constitution remains.

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