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Abstract

This dissertation seeks to critically examine the restraint of trade doctrine in South African law. Section 22 of the Constitution, 1996 guarantees every citizen the right to not only choose a trade, profession, or occupation, but also to practise them. However, in terms of section 36 of the Constitution, the rights in the Bill of Rights are not absolute. Restraint of trade provisions are incorporated into an employee's employment contract by the employer, and has the effect of limiting the employee's free exercise of his/her chosen trade, or profession. An employee who is bound by a restraint of trade cannot compete with his/her employer during the employment relationship and after its termination. The dissertation will explore the enforceability of restraint of provisions in South African law by tracing its history of enforceability in South African law, defining a restraint of trade provision and discovering the reason why such a provision exists, the implications of its incorporation, its status in employment law, as well as contentious issues which arise in respect of such a provision. The dissertation also articulates the requirements which must be met in order for a restraint of trade provision to be upheld by the courts, and the current law on restraint of trade. Garden leave clauses have not been considered by South African courts before February 2016. Garden leave primarily originated from English law and employers, especially in the financial sector have been incorporating them into their employees' employment contracts. This dissertation will investigate the new concept of garden leave in South African law, by considering its origins, definition, and its applicability in South African law.

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1 CHAPTER ONE

1 INTRODUCTION

A contract is an agreement that gives rise to obligations which are enforced or recognised by law.¹ A valid contract comes into existence upon agreement of the contractual terms by the contracting parties,² and results in the protection of the incorporated contractual terms.³ It is generally accepted that the agreed upon contractual terms should be honoured, unless they are contrary to the law, morality, public policy or public interest.⁴ Public policy requires that contracts which are voluntarily entered into by persons in possession of the requisite capacity and understanding be held sacred, and that those persons have the utmost liberty of contracting.⁵ The obligation to respect confidential information which is imparted or received in confidence arises when a fiduciary relationship is based on a contract, and is implied by law as a term of a contract.⁶

Mankind is a social species with an instinct for meaningful association, and their self-esteem and self-worth is bound with being accepted as socially useful.⁷ 'Everyone has inherent dignity and the right to have their dignity respected and protected.'⁸ This is a constitutionally guaranteed right that is afforded to all persons. Human dignity comprises of the freedom to choose a vocation, and the freedom to work even when it is not required for survival.⁹ An individual's work forms part of his/her identity, and constitutes his/her dignity.¹⁰ Every person has the right to engage in any activity which he believes can be undertaken as a profession, and to make that activity the very essence of his/her life.¹¹ The foundation of a

¹M van Jaarsveld 'The validity of a restraint of trade clause in an employment contract' (2003) 15(3) *SA Merc LJ* 327.

²*Ibid* 326.

³*Ibid* (note 1 above).

⁴*Ibid* (note 2 above).

⁵*Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.

⁶*Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) 426H-I.

⁷*Minister of Home Affairs v Watchenuka* 2004 (2) BCLR 120 (SCA) para 27.

⁸Section 10 of the Constitution of the Republic of South Africa, 1996.

⁹*Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 59. See also *Minister of Home Affairs* (note 7 above).

¹⁰*Affordable Medicines* (note 9 above).

¹¹ *Ibid*.

person's existence comprises of work and human personality.¹² A relationship exists between the two, and it shapes and completes a person over a lifetime of dedicated activity.¹³

The Constitution¹⁴ guarantees every South African citizen the right to trade freely. Section 22 of the Constitution provides that 'every citizen has the right to choose their trade, occupation or profession freely.' The section comprises of not only the right to choose a trade, occupation or profession, but also the right to practise the chosen trade, occupation or profession freely.¹⁵ The essence of the right is the freedom to earn a living by engaging in a trade, occupation or profession,¹⁶ and emphasis is placed on the freedom to work.¹⁷

Section 26 of the interim Constitution¹⁸ provided that every person had the right to engage in economic activity and pursue a livelihood. The wording of section 22 is narrower than that of section 26, because section 22 provides the right to every citizen, whilst section 26 provided the right to every person. The reason for this difference is that the final Constitution seeks to address past discriminatory practices which restricted the rights of some individuals to choose their livelihoods.¹⁹

As a result of section 22 of the Constitution, every citizen is entitled to freely exercise his/her trade, profession or calling in competition with others. However, the rights contained in the Constitution are not absolute, as they are subject to limitations in terms of section 36 of the Constitution, and consequently have to be balanced with other protected rights and interests.²⁰ This is because the exercise of an individual's right may be limited by another person's exercise of his own fundamental right.²¹ Therefore, although every citizen is constitutionally entitled to freely exercise his/her trade, profession or calling in competition with others, this right is not unfettered.²² It must be exercised in a way which does not trespass upon the rights of others,²³ and a balance must be struck between the parties' obligation to honour the

¹² Ibid.

¹³ Ibid.

¹⁴ The Constitution of the Republic of South Africa 1996.

¹⁵ J Neethling 'The constitutional impact on the burden of proof in restraint of trade covenants-a need for exercising restraint' (2008) 20(1) *SA Merc LJ* 91.

¹⁶ K Calitz 'Restraint of trade agreements in employment contracts: time for pacta sunt servanda to bow out?' (2011) 22(1) *Stellenbosch LR* 63.

¹⁷ Ibid.

¹⁸ Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁹ T Dooka 'The restraint of trade clause' (1999) 7(4) *JBL* 137.

²⁰ Ibid.

²¹ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 12.

²² *Document Warehouse (Pty) Limited v Truebody and Another* (2010 /26977) [2010] ZAGPJHC 92 (13 October 2010) para 18.

²³ *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) 570G.

agreements entered into between them and the right of the individual to trade and to practice his chosen profession freely.²⁴ The individual should be held to the terms of a fair, enforceable and reasonable restraint agreement which he had voluntarily entered into.²⁵ In determining whether there has been an unconstitutional limitation of a right, the purpose of the limitation has to be considered together with all the factors listed in s 36(1).²⁶ This may occur when the enforceability of restraint of trade agreements and the balancing or reconciling of public and private interest are considered.²⁷

The following sections of the Constitution should be taken into consideration when section 22 is interpreted: section 10(the right to human dignity); section 13(the right to not be subjected to forced labour); section 18(the right to freedom of association); section 21(the right to freedom of movement); and section 23(the right to fair labour practices).

As a result of section 22 of the Constitution, every citizen is entitled to freely exercise his/her trade, profession or calling in competition with others. However, the rights contained in the Constitution are not absolute, as they are subject to limitations in terms of section 36 of the Constitution, and consequently have to be balanced with other protected rights and interests.²⁸ This is because the exercise of an individual's right may be limited by another person's exercise of his/her own fundamental right.²⁹ Therefore, although every citizen is constitutionally entitled to freely exercise his/her trade, profession or calling in competition with others, this right is not unfettered.³⁰ It must be exercised in a way which does not trespass upon the rights of others,³¹ and a balance must be struck between the parties' obligation to honour the agreements entered into between them and the right of the individual to trade and to practice his/her chosen profession freely.³² The individual should be held to the terms of a fair, enforceable and reasonable restraint agreement which he/she had voluntarily entered into.³³ In determining whether there has been an unconstitutional

²⁴*Document Warehouse* (note 22 above).

²⁵*Ibid* para 54.

²⁶*Reddy* (note 21 above).

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰*Document Warehouse* (note 24 above).

³¹*Waste Products Utilisation* (note 23 above).

³²*Document Warehouse* (note 30 above).

³³*Ibid* (note 25 above).

limitation of a right, the purpose of the limitation has to be considered together with all the factors listed in s 36(1).³⁴

2 BACKGROUND

In the field of individual labour law, the parties to an employment contract are the employer and employee.³⁵ An employment contract creates the relationship between the employer and employee,³⁶ states the employee's obligations,³⁷ and gives rise to a fiduciary relationship between the two parties.³⁸ This relationship of trust signifies that an employee cannot disclose trade secrets or confidential information which belongs to the employer to outsiders or competitors.³⁹ An employer is entitled to dismiss the employee for breach of this duty.⁴⁰ An employee who assists a former employee, in obtaining trade secrets so that both parties can operate in competition with their common employer to obtain business is a serious violation of the employee's obligations to his employer, and warrants dismissal.⁴¹

In the absence of an agreement to the contrary, an employee owes the employer a duty of good faith.⁴² This duty entails that the employee must devote his energy, skills and normal working hours to further and enhance his employer's business interests.⁴³ Consequently, an employee is obliged to not:

- i. work against the employer's interests;⁴⁴
- ii. without the knowledge of his employer acquire any interests or benefits through his employment;⁴⁵
- iii. place himself in a position where his interests will conflict with those of the employer; that is not to involve himself in undertakings which are in competition with his employer;⁴⁶
- iv. make a secret profit at the employer's expense;⁴⁷ and

³⁴Reddy (note 26 above).

³⁵T Dooka (note 19 above) 135.

³⁶M van Jaarsveld (note 4 above).

³⁷Waste Products Utilisation (note 23 above) 571J.

³⁸Ibid 572F. See also J Grogan *Workplace Law* 10 ed (2009) 49.

³⁹S R van Jaarsveld, J D Fourie & M P Olivier in W A Joubert (founding ed) *The Law of South Africa* vol 13(1) First Reissue (2001) para 219.

⁴⁰Ibid.

⁴¹*National Union of Metalworkers of SA on behalf of Adams and Peter Bresler & Associates t/a Magnador* 2011 (32) ILJ 514 (BCA) para 16.

⁴²*Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para 25.

⁴³J Grogan (note 38 above). See also *Wespro (Cape Town) v Stephenson* 1995(4) BLLR 86 (IC) 90.

⁴⁴*Ganes* (note 42 above).

⁴⁵J Grogan (note 43 above).

⁴⁶Ibid. See also *Wespro* (note 43 above); *Ganes* (note 42 above).

- v. receive from a third party a bribe, secret profit or commission in the course of or by means of his position as an employee.⁴⁸

The employee's duty to act in good faith borders on a fiduciary duty.⁴⁹ When an employee secretly competes with his employer's business for his own account, he breaches his fiduciary duty.⁵⁰

The employer can claim from the employee any bribe, secret profit or commission received by him from a third party without the consent of his employer in the course of his employment or by means of his position as an employee.⁵¹ Bribes or secret commissions which are received by an employee in the course of his employment or by means of his employment in breach of his fiduciary duty to the employer are deemed to have been received for his employer.⁵²

An employee may not work for another employer, if the latter's business interests' conflict with those of the employee's principal employer.⁵³ However, in the absence of a contrary provision in the employment contract, an employee may work two compatible jobs, provided that the second job is not conducted during the working hours that the employee is obliged to work for the principal employer.⁵⁴ Furthermore, in the absence of a special legal restriction, an employee is entitled to the free exercise of his trade, profession or calling unless he has bound himself to the contrary.⁵⁵ Therefore, an employee can freely compete with his former employer upon his resignation, provided that he is not subject to a restraint of trade agreement.⁵⁶

In the absence of any express terms in the employment contract, the employee's obligations with respect to the use and disclosure of information are subject to implied terms.⁵⁷ Implied terms arise out of the common law, statute or trade usage, and are used to describe an unexpressed provision of the contract which the law introduces without reference to the

⁴⁷*Ganes* (note 46 above).

⁴⁸ *Ibid.*

⁴⁹ *Wespro* (note 43 above) 93.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ganes* (note 42 above) para 29.

⁵³ J Grogan (note 45 above).

⁵⁴ *Ibid.* 50.

⁵⁵ *Waste Products* (note 23 above) 570H.

⁵⁶ J Grogan (note 54 above).

⁵⁷ *Waste Products* (note 23 above) 572A.

parties' actual intention.⁵⁸ An implied term is introduced into a written contract as a matter of law, and is a part of the naturalia of the contract.⁵⁹ An employee, who is, by virtue of his employment able to exploit for his own benefit his employer's customer connections is free on leaving his employment, subject to certain limitations to compete with his former employer for the latter's business customers except where he is restrained by contract from doing so.⁶⁰

When a fiduciary relationship is based on an employment contract, the obligation to respect the confidentiality of information imparted or received in confidence is, whether expressly provided for or not, an inherent requirement⁶¹ and generally regarded as a term of the contract implied by law.⁶² This implied term is subject to any different provisions agreed upon by the parties, and content of which must be determined in light of the contract as a whole.⁶³ Section 22 of the Constitution provides that 'the practice of a trade, occupation or profession may be regulated by law.' It has been held by the courts that an employee may not make use of nor disclose trade secrets or confidential information which was gained in the course of his employment, and which belongs to the employer to outsiders or competitors in any way which is inconsistent with the employer's business interests.⁶⁴ The employer is entitled to dismiss an employee for breach of this duty.⁶⁵ One of the forms of unlawful competition is the misuse of confidential information in order to advance one's own business interests.⁶⁶

Although it is an inevitable consequence of the employment relationship that the employer may disclose confidential information to his employees during the existence of the employment relationship,⁶⁷ an employer may desire to protect his business from competition, and business information, trade secrets or connections from possible exploitation in the event of the termination of the employee's employment contract.⁶⁸ This desire is expressed as a

⁵⁸*Vox Telecommunications (Pty) Ltd v Steyn & another* 2016 (37) ILJ 1255 (LC) para 41.

⁵⁹ Ibid.

⁶⁰*Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) 772D-E.

⁶¹C Todd and T Laubscher *Contracts of Employment* 2ed(2008) 113.

⁶²*Waste Products* (note 38 above).

⁶³Ibid 572G.

⁶⁴*Wespro* (note 43 above).

⁶⁵ S R van Jaarsveld (note 39 above).

⁶⁶*Waste Products* (note 23 above) 571F-G.

⁶⁷C Todd (note 61 above) 112.

⁶⁸M van Jaarsveld (note 1 above) 330.

restraint of trade clause which is incorporated into the employment contract as a contractual term, and is binding after the employment contract has terminated.⁶⁹

In South Africa's growing economy, disputes' surrounding the enforceability of restraint of trade clauses is a fertile ground for litigation, both for employers and employees.⁷⁰ A restraint of trade goes beyond the mere protection of confidential information.⁷¹ It focuses on the employee's right to exercise his chosen trade, occupation or profession freely,⁷² and operates once the employment relationship between the employer and employee has terminated.⁷³ Employers enter into restraint of trade agreements with their employees so that they would not have to place reliance on the employee's honesty in policing the rights which the employer seeks to protect.⁷⁴ Restraint of trade clauses can also restrain both parties to a contract,⁷⁵ and an employee cannot be compelled by his employer to sign a restraint of trade agreement after he has entered service.⁷⁶ A dispute which relates to a restraint of trade is a matter which concerns a contract of employment in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997.⁷⁷

3CONCLUSION

While section 22 of the Constitution provides every citizen with the right to choose and practise their profession, trade or occupation freely, this right is not unfettered as the rights in the Bill of Rights may be limited by section 36 of the Constitution. Furthermore, section 22 further provides that the practice of a trade, profession or occupation may be regulated by law. This law is the law on restraint of trade.

4 RESEARCH QUESTIONS

- i. What is the definition of a restraint of trade?
- ii. Why does such a provision exist?
- iii. What are the implications of such a provision being incorporated into an employment contract?

⁶⁹Ibid (note 4 above).

⁷⁰*Document Warehouse* (note 22 above) para 1

⁷¹C Todd (note 61 above).

⁷²J Neethling (note 15 above).

⁷³T Dooka (note 35 above).

⁷⁴*Document Warehouse* (note 22 above) para 50.

⁷⁵AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 204.

⁷⁶Grogan (note 56 above).

⁷⁷*Singh v Adam* 2006 (27) ILJ 385 (LC) para 16. See also *Labournet Holdings (Pty) Ltd v McDermott & Another* 2003 (24) ILJ 185 (LC) para 27.

- iv. What is the status of such a provision in employment law?
- v. What impact does such a provision have on an unfair dismissal?
- vi. What are the contentious issues that arise in respect of such a provision?
- vii. What is the current position on restraint of trade in South African law?

5 RATIONALE FOR STUDY

The Labour Court recently considered the effect of a garden leave provision on the enforceability of a restraint of trade. Garden leave provisions had not been considered by South African courts before February 2016. The concept of garden leave primarily originates from English law, and forms part of an employee's employment contract. Employers, especially in the financial sector have been increasingly incorporating garden leave clauses into their employees' contracts. In terms of this provision, the employer may elect to pay the employee in lieu of the employee not performing his/her duties for the duration of the notice period; however during this period the employee must remain accessible to the employer.

6 RESEARCH METHODOLOGY

Information for this dissertation has been gathered from case law; legislation; journal articles; and textbooks.

7PURPOSE OF WORK

The recent case of *Vodacom(Pty) Ltd v Motsa and Another*⁷⁸ brought into focus restraint of trade provisions, and introduced a new concept of garden leave provisions into South African labour law. This work will focus on the South African law of restraint of trade, and the new concept of garden leave provisions.

8OVERVIEW OF CHAPTERS

Chapter two will focus on restraint of trade provisions. The definition, nature and impact of restraint of trade clauses will be explored. Additionally, the requirements for the enforceability of these clauses will also be discussed.

⁷⁸ (J 74/16) [2016] ZALCJHB 53 (9 February 2016).

Chapter three will discuss the courts' approach in adjudicating matters relating to restraint of trade prior to the landmark case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,⁷⁹ as well as the judgment which was handed down in *Magna Alloys*.

Chapter four will focus on garden leave provisions, as they are a new aspect of restraint of trade which has not been considered by South African courts prior to February 2016. The recent case of *Vodacom (Pty) Ltd v Motsa and Another*⁸⁰ will also be discussed.

⁷⁹1984 (4) SA 874 (A). Hereafter referred to as *Magna Alloys*.

⁸⁰*Vodacom* (note 78 above).

2 CHAPTER TWO

In this chapter, the definition, nature and impact of restraint of trade clauses will be explored. Additionally, the requirements for the enforceability of these clauses will also be discussed.

1 INTRODUCTION

Restraint of trade agreements are enforceable, except where the court can be convinced as to their unenforceability.⁸¹ This is because the landmark decision of the Appellate Division (as it was known then) in *Magna Alloys* introduced a significant change to the South African courts' approach to restraint of trade agreements.⁸² The court refused to follow earlier decisions which were based in English law that a restraint of trade agreement was prima facie contrary to public policy, and thus invalid and unenforceable.⁸³ The party who sought to enforce the agreement had to show that the restraint was reasonable between the parties, while the onus of proving that it was contrary to public policy rested on the party alleging it.⁸⁴ The court overturned this approach and held that restraint of trade agreements are valid and enforceable, unless they were unreasonable and therefore contrary to public policy.⁸⁵ This finding was the greatest contribution of the case to South African law on restraint of trade.

As a consequence of the restraint agreements' common-law validity, a party who challenges the enforceability of the agreements bears the burden of alleging so and proving that it is unreasonable.⁸⁶ It was also held that the enforceability of a restraint was dependent on whether enforcing it would be contrary to the public interest to do so.⁸⁷ This was to be assessed in light of the circumstances which had prevailed when it was sought to enforce the restraint and involved the weighing up of two main considerations.⁸⁸ The first is that the public interest generally requires that parties should comply with their contractual obligations, even if they are unreasonable or unfair. The second consideration is that all

⁸¹R Marcus 'Contracts in restraint of trade' (1994) 2(1) *JBL* 33. See also *Shoprite Checkers (Pty) Ltd v Jordaan & Another* 2013 (34) *ILJ* 2105 (LC) para 20.

⁸²*Reddy* (note 21 above) para 10.

⁸³*Ibid.* See also *Reeves* (note 60 above) 775H-J; Dd Tladi 'Breathing constitutional values into the law of contract: freedom of contract and the constitution' (2002) 2(35) *De Jure* 313.

⁸⁴*Reddy* (note 83 above).

⁸⁵*Ibid.* See also *Shoprite Checkers* (note 81 above); *Jonsson Workwear (Pty) Ltd v Williamson & Another* 2014 (35) *ILJ* 712 (LC) para 41.

⁸⁶*Reddy* (note 84 above).

⁸⁷*Reeves* (note 60 above) 775I.

⁸⁸*Ibid* 775I-J.

persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions.⁸⁹

All agreements, including restraint of trade agreements are subject to constitutional rights obliging the courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution.⁹⁰ Section 8 of the Constitution is vital.⁹¹ Section 39(2) of the Constitution requires that a court when interpreting and developing the common law to promote the spirit, purport and objects of the Bill of Rights.⁹²

Clauses restraining trade have drawn significant attention from the courts because of the interplay between the principles and objects of labour law and contract law.⁹³ In order to determine if labour law and contract law can be reconciled, especially in instances where the employer has perpetuated an unfair labour practice and then seeks the enforcement of the restraint of trade provision, the constitutional right to fair labour practices and whether the right creates an implied contractual right to fair dealings need to be examined.⁹⁴

Restraint of trade clauses are onerous in nature because they curtail commercial activity and hold grave consequences for the covenantor.⁹⁵ The consequence of such a clause is that a former employee's free exercise of his chosen trade, occupation or profession is restricted.⁹⁶ The legitimate object of the clause is to protect the employer's goodwill, customer connections and trade secrets, and remains effective for a specified period after the employment relationship has ended.⁹⁷ Therefore, the former employee is not only after the termination of his employment contract restrained from using or disclosing confidential information belonging to the employer,⁹⁸ but is also prohibited from exercising his trade,

⁸⁹*Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) 794C-D.

⁹⁰*Reddy* (note 21 above) para 11.

⁹¹ *Ibid.*

Section 8(3) (a)(b) of the Constitution provides that when applying a provision of the Bill of Rights to a natural or juristic person the court must apply or where necessary develop the common law to the extent that the legislation does not give effect to that right and may develop the common law rules to limit the right, provided that the limitation is in accordance with section 36 of the Constitution.

⁹² *Ibid.*

⁹³ P van der Merwe 'When a restraint of trade isn't fair' (2015) 15(10) *Without Prejudice* 18.

⁹⁴ *Ibid.*

⁹⁵ C-J Pretorius 'Covenants in restraint of trade: a synthesis of traditional, common law and constitutional approaches' (2009) 30(1) *Obiter* 154.

⁹⁶ J Neethling (note 72 above).

⁹⁷ *Reeves* (note 60 above) 772F. See also *Bonfiglioli SA (Pty) Ltd v Panaino* 2015 (36) *ILJ* 947 (LAC) para 23.

⁹⁸ K Kemp 'The significance of consideration paid for post-employment restraints in England and Germany' (2005) 16(2) *Stellenbosch LR* 257.

occupation or profession, and engaging in the same business venture as the employer for a specified period in a specified area.⁹⁹

Key or skilled employees particularly, are customarily bound by restraint of trade clauses.¹⁰⁰ These clauses are significant in high-tech industries where it may be difficult to prove that an employee, when working for a competitor is making use of his former employer's trade secrets for the competitor's advantage.¹⁰¹ For employers they are a vital weapon, especially in a post-recession era where there is fierce competition for work, and where competitors can get access to the employer's confidential information.¹⁰²

Additionally, these clauses give effect to the employer's right to protect his business and ensure that the employer's business is protected against an employee or former employee during the subsistence of the employment relationship or after its termination.¹⁰³ An employer's legitimate interests which are not automatically protected under the general law of a country are also safeguarded.¹⁰⁴ The employer is not required to cross its fingers and hope that the employee will not disclose its confidential information to his new employer,¹⁰⁵ and the employer cannot also police the employee's undertaking that he will not disclose confidential information to his new employer.¹⁰⁶ Therefore, the employer 'need not wait until the horse has bolted'¹⁰⁷ to seek a remedy against the employee.¹⁰⁸ Due to the provision's existence, employers are relieved of the burden of proving the actual use or disclosure of confidential information.¹⁰⁹

The use of restraint of trade clauses in employment contracts reduce employee turnover rates, and encourage the investment of valuable information, while minimising society's cost of securing such investment.¹¹⁰ These claims are based on the assumption that the labour market is perfectly competitive, and that employees are perfectly informed about future employment opportunities and their value.¹¹¹ However, employees frequently have insufficient

⁹⁹ M van Jaarsveld (note 68 above).

¹⁰⁰ R Marcus (note 81 above).

¹⁰¹ C Todd (note 61 above) 114.

¹⁰² L Frahm-Arp 'Restraints of trade' (2013) 13(9) *Without Prejudice* 51.

¹⁰³ M van Jaarsveld (note 99 above).

¹⁰⁴ K Kemp (note 98 above) 258.

¹⁰⁵ *Document Warehouse* (note 22 above) para 49.

¹⁰⁶ *Ibid* (note 74 above).

¹⁰⁷ K Kemp (note 98 above).

¹⁰⁸ *Ibid*. See also *Shoprite Checkers* (note 81 above) para 42.

¹⁰⁹ *Ibid* (note 98 above).

¹¹⁰ K Kemp (note 104 above).

¹¹¹ *Ibid*.

information regarding the effect, value, and existence of a restraint of trade clause.¹¹²As a result, an employee who is bound by a restraint of trade provision cannot:

- i. compete with his employer during the employment relationship and after its termination;¹¹³
- ii. be employed by a competing employer during the employment relationship and after its termination;¹¹⁴ and
- iii. entice his former employer's employees away from his former employer;¹¹⁵ and persuade the former employer's clients or suppliers' to stop their business with the former employer, or move their business to a new employer.¹¹⁶

In labour law litigation, it is not uncommon for matters to be heard on an urgent basis despite the effective date having come and gone.¹¹⁷ Courts have heard urgent restraint of trade applications where a significant portion of the restraint period had already lapsed,¹¹⁸ because of the time that it takes to enrol an opposed motion in court.¹¹⁹ Furthermore, if the matter is to be placed on the opposed motion roll in the ordinary course, the restraint of trade sought would have run its entire course.¹²⁰ An alleged breach of a restraint of trade is by its nature urgent.¹²¹ If the breach and reasonableness of the restraint is proved, the harm that is caused by the breach will continue.¹²² If relief is sought in the form of an interim interdict, which would endure for the entire unexpired period of the restraint, it should be treated as a final relief application.¹²³

The requirements for a final order are a:

- i. clear right;
- ii. an injury actually committed or reasonably apprehended; and

¹¹² Ibid.

¹¹³ C Todd (note 71 above).

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Vox (note 58 above) para 10.

¹¹⁸ Ibid.

¹¹⁹ *Pinnacle Technology Shared Management Services (Pty) Limited and Another v Venter and Another* (J1095/15) [2015] ZALCJHB 199 (14 July 2015) para 6.

¹²⁰ Vox (note 58 above) para 11.

¹²¹ Ibid.

¹²² *Pinnacle Technology* (note 119 above).

¹²³ *Arrow Altech Distribution (Pty) Ltd v Byrne & Others* 2008 (29) ILJ 1391 (D) para 2.

iii. absence of any other satisfactory remedy.¹²⁴

Where application is made for a final interdict, the application will be decided on the first respondent's version together with the admitted facts in the applicant's founding affidavit.¹²⁵ The facts that are stated in the first respondent's answering affidavit are to be accepted by the court unless the first respondent's versions are so far-fetched or evidently flawed that the court will be justified in rejecting the version merely on the papers.¹²⁶ This was the rule which was laid down by the court in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹²⁷

An employer can apply to court to enforce a restraint interdict pending appeal. Section 18 of the Superior Courts Act 10 of 2013 read together with rule 49(11) of the High Court Rules provides that an applicant who shows that exceptional circumstances exist, and that it would suffer irreparable harm and that respondent would not suffer irreparable harm if the interdict is not enforced, the court will order that the interdict be enforced pending appeal.¹²⁸

2 ENFORCEABILITY OF RESTRAINT OF TRADE AGREEMENTS

The Constitution forms the value system against which the dispute between an employer and a former employee with regard to the enforcement of a restraint of trade must be resolved.¹²⁹ When the enforcement of a restraint of trade is sought, the contractual principles of *pacta sunt servanda*; that is the sanctity of contract and the freedom of trade come into being.¹³⁰ The sanctity of contract principle provides that it is paramount to honour agreements which have been entered into, including those which limit the exercise of a trade in future; while the freedom of trade principle provides that every individual has the right to engage in economic activity without restriction.¹³¹ Although both principles are inter-related a tension exists, which is linked to the issue of which principle should be given preference when the court adjudicates a matter in which the enforcement of a restraint of trade is sought.¹³² These

¹²⁴*SPP Pumps (SA) (Pty) Ltd v Stoop & Another* 2015 (36) *ILJ* 1134 (LC) para 18. See also *Waste Products* (note 23 above) 86D. Requirements for interim relief are similar. See *Shoprite Checkers* (note 81 above) para 47 and *S R van Jaarsveld* (note 39 above) para 403.

¹²⁵*Pinnacle Technology* (note 119 above) para 7.

¹²⁶ *Ibid.*

¹²⁷ 1984 (3) SA 623 (A) at 634H-635C.

¹²⁸*L'Oreal SA (Pty) Ltd v Kilpatrick & Another* 2015 (36) *ILJ* 2617 (LC) para 32-38. See also *E-Merge IT Recruitment CC v Brits & Another* 2016 (37) *ILJ* 1145 (LC) para 6-9 and para 37.

¹²⁹*David Crouch Marketing CC v Du Plessis* 2009 (30) *ILJ* 1828 (LC) para 17.

¹³⁰ S W J van der Merwe *et al Contract General Principles* 4 ed (2012) 184.

¹³¹ C-J Pretorius (note 95 above).

¹³² *Ibid.*

principles are basic to modern society as far as individual interests and public interests are concerned.¹³³

The enforceability of a restraint agreement is dependent on whether the party for whose benefit it has been concluded and who seeks its enforcement, has a proprietary interest which is justifiable of protection.¹³⁴ If the restraint does not protect a proprietary interest of the party who wishes to enforce it, the dispute will end there.¹³⁵ Where a proprietary interest is protected, the reasonableness of the restraint must be determined.¹³⁶ Prior to determining if a restraint of trade clause is reasonable, it must first be established if the clause in question qualifies as a restraint of trade.¹³⁷

2.1 Proprietary interest

Although there is no closed list of proprietary interests which may be protected,¹³⁸ there are two categories of proprietary interests which can be protected by a restraint; namely trade connections¹³⁹ and trade secrets.¹⁴⁰ Trade connections are the employer's relationships with customers, potential customers, suppliers and others,¹⁴¹ and are an important aspect of a business's incorporeal property known as goodwill.¹⁴² While an employer's trade connections may be unlawful, it does not mean that the lawful trade connections could and should not be protected.¹⁴³ Whether information constitutes a trade secret is a question of fact.¹⁴⁴ Trade secrets consist of confidential information which is useful for the carrying on of a business, which if disclosed to a competitor could be used by the competitor to gain a relative competitive advantage over the employer.¹⁴⁵ There are specific trade secrets so confidential

¹³³Van der Merwe (note 130 above).

¹³⁴*Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C) para 11.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷P J Sutherland 'Payments of commission made subject to resolute conditions that restrain trade' (2001) 118(3) *SALJ* 403.

¹³⁸*Dickinson Holdings (Group) (Pty) Ltd and Others v Du Plessis and Another* 2008 (4) SA 214 (N) para 31.

¹³⁹*Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) 502D.

¹⁴⁰*Ibid* 502E.

¹⁴¹*Ibid* (note 139 above).

¹⁴²*Ibid.* See also *Advtech* (note 136 above); *Document Warehouse* (note 22 above) para 25; *Walter McNaughtan (Pty) Ltd v Schwartz and Others* 2004 (3) SA 381 (C) 386I-J; *Shoprite Checkers* (note 81 above) para 31; T Dooka (note 19 above) 136.

¹⁴³*Super Towing (Pty) Ltd v Thomas and Another* 2001 (2) SA 969 (W) para 22.

¹⁴⁴*Walter McNaughtan* (note 142 above) 388J.

¹⁴⁵*Sibex* (note 139 above). See also *Advtech* (note 142 above); *Document Warehouse* (note 142 above); *Walter McNaughtan* (note 142 above); *Shoprite Checkers* (note 142 above); T Dooka (note 142 above).

that, even though they may have been memorised by the employee when he left his employment, they cannot lawfully be used for anyone's benefit but the employer's.¹⁴⁶

Pricing strategies and manufacturing processes, methods of operations, knowledge of business conditions, and customer attachments can also be protected by restraint of trade agreements.¹⁴⁷ The mere elimination of competition does not justify the enforcement of a restraint of trade.¹⁴⁸ The mere assertion that certain methodologies and processes are confidential is insufficient.¹⁴⁹

There are two types of confidential information which enjoy protection: 1) an employer's confidential information to which an employee may have¹⁵⁰ access to and which is of such a nature that the employee may never use it except for the benefit of the employer and which the employee remains bound to keep secret at all times after leaving the employer's employ;¹⁵¹ 2) the information of an employer which an employee must guard as confidential for as long as he remains in the employ of the employer¹⁵² because of his/her general implied duty of good faith to his employer¹⁵³ but which is of such a nature that it is carried away in the employee's head after his employment has ended and which the employee is free to use for the benefit of himself or others provided that he has not whilst still employed by that employer broken his duty of good faith by making or copying a list of that employer's customers or deliberately memorising that list.¹⁵⁴

Not every piece of information which is obtained by an employee during the course of his employment for an employer qualifies as secret or confidential.¹⁵⁵ Furthermore, ordinary general information about a business does not become confidential because the proprietor elects to label it as such.¹⁵⁶ An express term requiring confidentiality is not required in an employment contract.¹⁵⁷ The fact that an application or process may be a very simple solution

¹⁴⁶*Arrow Altech* (note 123 above) para 24.

¹⁴⁷*Dickinson Holdings* (note 138 above) para 32.

¹⁴⁸*Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) 484B.

¹⁴⁹*L Frahm-Arp* (note 102 above).

¹⁵⁰*Waste Products* (note 23 above) 576H.

¹⁵¹*Ibid* 576I.

¹⁵²*Ibid*.

¹⁵³*Ibid* 576J.

¹⁵⁴*Ibid* 577A.

¹⁵⁵*Advtech* (note 134 above) para 20.

¹⁵⁶*Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another* 2005 (3) SA 205 (N) 210H-I.

¹⁵⁷*Waste Products* (note 23 above) 580B.

to a problem and may be self-evident once attention is drawn to it, does not mean that it is not protectable as being confidential information or a secret process.¹⁵⁸

2.2 Confidential information

For information to qualify as confidential, the information in question must meet the following three requirements:

- i. it must involve and be capable of application in trade or industry, that is it must be useful;
- ii. it must not be public knowledge and public property, that is objectively determined it must be known to only a restricted number of people or to a closed circle; and
- iii. objectively determined it must be of economic value to the person seeking to protect it.¹⁵⁹

If it is objectively established that a particular piece of information could be reasonably useful to a competitor, namely to gain an advantage over the plaintiff,¹⁶⁰ such knowledge is prima facie confidential between the employee and third parties.¹⁶¹

The following categories of confidential information can be protected by a restraint of trade:

- i. customer lists which are drawn up by a trader and kept confidential for the trader's business purposes;
- ii. information which is received by an employee in relation to business opportunities which are available to the employer;
- iii. information received by the employee in confidence while in the employ of an employer remains protected by a legal duty, implied by the employment contract;
- iv. information while being in the public domain is protected as confidential;
- v. when skill and labour has been expended in gathering and compiling the information into a useful form, and when the compiler has kept the compilation confidential, or has distributed it on a confidential basis;
- vi. information which relates to the marketing of a new product will be confidential if such information is the product of skill and labour, and has been kept confidential;

¹⁵⁸Ibid 578I-J.

¹⁵⁹*Document Warehouse* (note 145 above). See also *Walter Mcnaughtan* (note 142 above) 389A-B; *Waste Products* (note 23 above) 577B.

¹⁶⁰*Waste Products* (note 23 above) 577G.

¹⁶¹Ibid 577H.

- vii. information relating to the specifications of a product, and a process of manufacture will be confidential if skill and industry has been expended or if they have been kept confidential; and
- viii. an individual who is in a fiduciary relationship with a tenderer, and is in possession of information relating to the prices which one person has competitively tendered to do work for another.¹⁶²

The type of information itself does not give rise to its confidentiality.¹⁶³ What is regarded as confidential information depends on the facts and circumstances of a particular case.¹⁶⁴ However, if the information in question could be objectively and reasonably serviceable or useful to a trade competitor, it will be regarded as confidential information between a former employer and a former employee.¹⁶⁵

The fact that the employee asserts that he will not disclose any of the confidential information or customer connections which he had acquired during its employment to third parties, constitutes evidence that the employee has appropriated himself to the details of the confidential information and customer connections, and is therefore in a position to disclose and use such information to his advantage during his employment with the new employer.¹⁶⁶ Furthermore, where the employee declares and formally undertakes that he will not, in his new employment utilise the knowledge which he had gained of the former employer's business to the detriment of the former employer, constitutes a tacit concession by the employee that the former employer has proprietary rights which are worthy of protection.¹⁶⁷

2.3 Onus

It is in very rare instances that the employee and not the employer claims compliance with the terms of a restraint of trade.¹⁶⁸ The employer bears the onus of invoking the restraint and proving its breach.¹⁶⁹ The onus of proving that the restraint is unenforceable because it is

¹⁶²*Dickinson Holdings* (note 138 above) para 33. See also *Document Warehouse* (note 22 above) para 26; *Pinnacle Technology* (note 119 above) para 28.

¹⁶³*Dickinson Holdings* (note 138 above) para 34. See also *Pinnacle Technology* (note 119 above) para 29.

¹⁶⁴*Dickinson Holdings* (note 163 above). See also *Pinnacle Technology* (note 163 above); *Arrow Altech* (note 123 above) para 16.

¹⁶⁵*Dickinson Holdings* (note 164 above) para 35. See also *S R van Jaarsveld* (note 39 above); *Pinnacle Technology* (note 164 above); *Arrow Altech* (note 164 above).

¹⁶⁶*Document Warehouse* (note 22 above) para 39. See also *Bht Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) 57J - 58B.

¹⁶⁷*Document Warehouse* (note 22 above) para 42.

¹⁶⁸*Vigne v Afgri Trading (Pty) Ltd & Another* 2010 (31) ILJ 347 (GNP) 349C-D.

¹⁶⁹*Vox* (note 58 above) para 18.

unreasonable rests on the party seeking to escape the enforcement of the restraint.¹⁷⁰ An acknowledgement by the employee in a restraint agreement that the restraint is fair, reasonable and necessary is not decisive.¹⁷¹ The employee will have to prove on a balance of probability that it will be unreasonable to enforce the restraint.¹⁷² The employee must provide the court with clear and concrete evidence as to why the restraint is unreasonable.¹⁷³ The employee must show that the employer has no protectable interest in the form of trade secrets, confidential information, goodwill or trade connections, that the restraint was not reasonably necessary to legitimately protect the employer's protectable proprietary interests such as his trade connections and trade secrets, and must prove that at the time that enforcement of the restraint was sought, the restraint was solely directed at the restriction of fair competition.¹⁷⁴ The circumstances which the court will consider cover an extensive field and include those relating to the nature, extent and duration of the restraint, and the legitimate interest of the parties, as well as the equality or otherwise of the parties' bargaining powers.¹⁷⁵

In order for the employer to be successful in enforcing a restraint, he must have a real and substantial interest which is deserving of protection,¹⁷⁶ and must establish that its proprietary interests; namely its confidential information or trade secrets justify protection under the restraint.¹⁷⁷ The employer's interest in enforcing the restraint of trade is to protect its confidential information,¹⁷⁸ as well as its customer connections, as upon the termination of the employee's employment, the employee may be able to induce the customers with whom he had built a close relationship with to follow him to his new place of employment, due to his personal knowledge of and influence that he has over the customers.¹⁷⁹ Moreover, it must be demonstrated in reasonable clear terms that the information, know-how, technology or method in question is unique and peculiar to the employer and is not public knowledge,

¹⁷⁰Ibid. See also *Reeves* (note 60 above) 776C.

¹⁷¹*Arrow Altech* (note 123 above) para 28.

¹⁷²*Reeves* (note 60 above) 776D. See also *Lifeguards Africa (Pty) Ltd v Raubenheimer* 2006 (27) ILJ 2521 (D) para 28.

¹⁷³*Dickinson Holdings* (note 138 above) para 95.

¹⁷⁴*Dickinson Holdings* (note 138 above) para 85.

¹⁷⁵*Reeves* (note 60 above) 776E. See *Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster* 2009 (30) ILJ 1762 (C) at para 31.

¹⁷⁶*Document Warehouse* (note 22 above) para 41.

¹⁷⁷Ibid para 23.

¹⁷⁸Ibid para 26.

¹⁷⁹Ibid para 27. See also *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital AirevMeintjes & Another* 2012(33) ILJ 629 (LC) para 34, 39; *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) para 6; *Hirt & Carter (Pty) Ltd v Mansfield & Another* 2008 (29) ILJ 1075 (D) para 76 and 87.

public property and is more than just trivial.¹⁸⁰ The employer must show that the confidential information or trade secrets which the employee had received during the course of his employment are being or will be used by the employee in a competing business or that an obligation not to use them will not be sufficient to protect them.¹⁸¹ The employer must also prove that the employee will be able to potentially exploit his confidential information or customer connections in his new employment.¹⁸² It is sufficient for the employer to create the real probability that the employee will consciously or unconsciously do so in his employment due to the loyalty he will owe to his new employer.¹⁸³ If the employer has no proprietary interests which justify protection under the restraint, the restraint will be regarded as unreasonable and contrary to public policy with its intention being to only prevent competition.¹⁸⁴

It is not necessary for the court to find that the employee would use his previous employer's trade secrets and confidential information in his new employment, it is sufficient if the employee could do so.¹⁸⁵ Action cannot be taken against an employee, if a court has ordered an employee to disclose trade secrets.¹⁸⁶ It was held in *Technor (Pty) Ltd and Others v Rishworth*,¹⁸⁷ that a restraint which remains effective until the lifetime of a party or for an indefinite period may be found to be reasonable, even though it may be so onerous that it contravenes public policy.

Once it is established that the party seeking enforcement of the restraint has a proprietary interest which justifies protection, the restraint clause must also satisfy the test for reasonableness; that is it must be reasonable between the parties and not contrary to public policy.¹⁸⁸ The courts will not hesitate to enforce a restraint of trade agreement where the terms agreed upon by the parties to the agreement are reasonable and not against public policy as public policy requires contracts to be enforced.¹⁸⁹ It is imperative that individuals are held to the agreements that they enter into.¹⁹⁰ Predictability and accountability in

¹⁸⁰John Saner *Agreements in Restraint of trade in South African Law* (1999) 7-14(1).

¹⁸¹*Kwik Kopy* (note 148 above) 486F-G.

¹⁸²*Document Warehouse* (note 22 above) para 21. See also *Pinnacle Technology* (note 119 above) para 32.

¹⁸³ *Ibid.*

¹⁸⁴*Document Warehouse* (note 22 above) para 23.

¹⁸⁵*Shoprite Checkers* (note 81 above) para 40.

¹⁸⁶ *Ibid.*

¹⁸⁷1995 (4) SA 1034 (T) 1038D.

¹⁸⁸*Super Safes (Pty) Ltd & others v Voulgarides & others* 1975 (2) SA 783 (W) 785D.

¹⁸⁹*Document Warehouse* (note 22 above) para 22.

¹⁹⁰*Pinnacle Technology* (note 119 above) para 66.

commercial activity is a social value which is not to be lightly subordinated to the specious claims of ‘freedom’ by rule breakers.¹⁹¹

2.4 Reasonableness

In determining the reasonableness of a restraint of trade, a court must make a value judgement and consider two principal policy considerations.¹⁹² The first is that the public interest requires that parties should comply with their contractual obligations.¹⁹³ This is expressed by the *pacta sunt servanda* maxim.¹⁹⁴ The second is that it is in the interests of society that all persons should be productive and be permitted to engage in trade and commerce or the professions.¹⁹⁵ When applying these principal considerations, the court must examine the parties’ particular interests.¹⁹⁶ A restraint which is reasonable between the parties may for some other reason be contrary to the public interest.¹⁹⁷

The aforementioned policy considerations reflect both the common law and constitutional values.¹⁹⁸ It is not simply a question of deciding by using evidentiary rules what version to accept with the result automatically following.¹⁹⁹ Forming part of the constitutional value of dignity as found in section 10 of the Constitution is contractual autonomy.²⁰⁰ It is by entering into contracts that an individual takes part in economic life.²⁰¹ Therefore, the freedom to contract is vital component of the section 22 right of the Constitution.²⁰² Section 22 reflects the close relationship between the freedom to choose a vocation and the nature of a society that is founded on human dignity as envisioned by the Constitution.²⁰³

The Appellate Division (as it was known then) in *Basson v Chilwan*²⁰⁴ established the following test for reasonableness which has been regarded as one of the most influential statements of law:²⁰⁵

¹⁹¹ Ibid.

¹⁹² Reddy (note 21 above) para 15.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid para 16.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid (note 195 above).

¹⁹⁹ PinnacleTechnology (note 119 above) para 9.

²⁰⁰ Reddy (note 197 above).

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ 1993 (3) SA 742, 767F-I. Hereafter referred to as *Basson*.

²⁰⁵ Vodacom (note 78 above) para 5.

- i. Does one party have an interest which deserves protection at the termination of the employment contract?
- ii. If so, is such an interest being prejudiced by the other party?
- iii. If so, does such interest weigh up qualitatively and quantitatively against the interests of the other party that the other party should not be economically inactive and unproductive?
- iv. Is there another public policy factor which does not have anything to do with the relationship between the parties which requires that the restraint either be enforced or disallowed?²⁰⁶

A fifth question to the enquiry was added by *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and another*,²⁰⁷ namely whether the restraint is wider than what is necessary to protect the protectable interest.²⁰⁸ The usefulness of the information and the prospect of it being diminished is also considered as well as whether the employee has a prospect of relocating and establishing himself in any another industry and becoming gainfully employed.²⁰⁹ Additionally, the circumstances which caused the wrongful termination of the employee's employment should be taken into account, as a restraint of trade agreement can be enforced even where there has been the wrongful termination of the employee's employment contract.²¹⁰ The enquiry undertaken is an extensive one and factors such as the nature, extent and duration of the restraint; the area in which the restraint applies; the proprietary interests of the former employer; whether the former employee has the ability to earn a living, as well as factors peculiar to the parties and their bargaining powers and interests are taken into account at the time of the enforcement of the restraint.²¹¹

The common law approach of balancing or reconciling the parties' interests gives effect to s 36(1) of the Constitution.²¹² A restraint of trade agreement is concluded in terms of the law of general application as referred to s 36(1) of the Constitution.²¹³ In terms of restraint of trade agreements, the law of general application consists of the law of contract, which permits

²⁰⁶*Shoprite Checkers* (note 81 above) para 23. See also *Jonsson Workwear* (note 85 above).

²⁰⁷1999 (1) SA 472 (W).

²⁰⁸*KwikKopy* (note 148 above) 484D. See also *Shoprite Checkers* (note 81 above) para 24.

²⁰⁹*Walter Mcnaughtan* (note 142 above) 389C-E.

²¹⁰*Reeves* (note 60 above) 776F-G.

²¹¹C Todd (note 101 above) 114. See also *Reddy* (note 195 above); *Tuv Sud SA (Pty) Ltd v Branders & Another* 2015 (36) ILJ 2398 (LC) para 6.

²¹²*Reddy* (note 21 above) para 17.

²¹³*Ibid.*

contractual freedom and the conclusion of agreements.²¹⁴ The four questions listed by the court in *Basson* reflect the questions posed by s 36(1) of the Constitution.²¹⁵ The fifth enquiry, that is whether the restraint goes further than necessary to protect the interest corresponds with s 36(1) (e) of the Constitution.²¹⁶ The value judgement required by *Basson* determines whether the restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²¹⁷

An agreement which unreasonably restrains an employee's freedom of trade will not be enforced.²¹⁸ An unreasonable restraint is one which is prejudicial to public policy, the enforcement of which will be contrary to the public interest.²¹⁹ The test that is applied; is having regard to all the circumstances, does the restraint go further than is reasonably necessary to protect the employer's interests²²⁰ In *Magna Alloys* it was held that the only criterion for unenforceability is prejudice to the public interest. But no indication was provided as to what would render a restraint prejudicial to the public interest.²²¹ It was suggested in *Basson* that in order to determine if a restraint is contrary to public policy, the facts of a case must be looked at. In *Sunshine Records (Pty) Ltd v Frobling & others*²²² it was held that the public interest requires that parties should comply with their contractual obligations regardless of how unfair they may be, and all persons should be permitted to engage in commerce. In *Knox D'Arcy Ltd & Another v Shaw & Another*²²³ the court held that where a restraint is so unreasonable that the court's protection is required, the restrained party's right to engage in economic activity is protected, despite him/her agreeing to the restraint of trade.²²⁴ Where the public interest is harmed, a restraint of trade clause would be unenforceable even if it is found to be reasonable between the parties.²²⁵ A restraint of trade will be contrary to the public interest if there is no real threat to the employer's proprietary interest, the period of the restraint is unreasonably long in relation to the interests that the employer is seeking to protect, or the geographic area in which the restraint applies is

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ T Dooka (note 35 above).

²¹⁹ Reeves (note 60 above) 776B-C.

²²⁰ Ibid (note 168).

²²¹ T Dooka (note 142 above). See also Van der Merwe (note 130 above; 185).

²²² Note 89 above.

²²³ 1996 (2) SA 651 (W).

²²⁴ T Dooka (note 19 above).

²²⁵ Ibid (note 142 above).

unreasonably wide in relation to the interests that need protection.²²⁶ Other factors that should also be considered include the nature, extent and duration of the restraint.²²⁷

Employees are not regularly in possession of unique formulae, methods or designs.²²⁸ They only acquire specialised skills which form part of their general knowledge and skills.²²⁹ Hence, while an employee can be restrained from the use or disclosure of confidential information which was imparted to or received by him during the course of his employment, an employee who utilises his own expertise, knowledge, skill and experience for the benefit of his new employer cannot be restrained by means of a restraint of trade contract.²³⁰ Therefore, an employee may use the general skills and knowledge which he acquired during his former employment, even where his new employer may benefit from his knowledge and skills.²³¹ This is because the employee's skills and abilities are a part of himself or an attribute of himself²³² and therefore, he cannot ordinarily be restrained from utilising his skills and abilities.²³³

Despite an employer having an interest in retaining the services of an employee who has been trained in an established field of work through the employer's expense, and the employee gains knowledge and skills in the public domain which he might not have otherwise gained, such an interest does not constitute to be the employer's property.²³⁴ The employer has no proprietary interest in the employee, his know-how or skills.²³⁵ This is because, the know-how and skills in the public domain which the employee gains through the training becomes a part of him, and does not in any way belong to the employer.²³⁶ Therefore, the employee's use of his skills and know-how cannot be restrained by way of a restraint of trade clause. However, the employee's seniority is an important consideration,²³⁷ and it can be difficult to distinguish if an employee has breached the former employer's right, when he uses his

²²⁶Reddy (note 203 above).

²²⁷T Dooka (note 224 above).

²²⁸L Frahm-Arp (note 149 above).

²²⁹Ibid.

²³⁰Dickinson Holdings (note 138 above) para 36. See also *FMW Admin Services CC v Stander & Others* (2015) 36 ILJ 1051 (LC) para 38.

²³¹J Grogan (note 76 above).

²³²Reddy (note 21 above) para 18. See also *Arrow Altech* (note 123 above) para 66.

²³³Dickinson Holdings (note 138 above) para 37.

²³⁴Ibid.

²³⁵Ibid. See also Reddy (note 232 above).

²³⁶Dickinson Holdings (note 235 above)

²³⁷Ibid para 38. See paras 39-42 for an illustration of this statement. *Waste Products* (note 23 above; 576E-G).

knowledge and skills.²³⁸ The courts have shown sympathy towards employers' rights to trade secrets.²³⁹

The employer can request the court to not only protect what it regards as confidential information being passed on to a competitor by a former employee, but also to prevent the employee from working for a competitor.²⁴⁰ This is because; experience has shown that it is not sufficient to incorporate a provision in an employment contract against the disclosure of confidential information, as it is firstly difficult to clearly categorise information which is to be regarded as confidential and information which is not, and secondly it is very difficult to prove a breach of the provision where the information is of such a nature that the employee can memorise.²⁴¹ As a result of these difficulties, the practical solution would be to prevent the employee from being employed by a competitor for a short period of time.²⁴²

2.5 Remedies

The remedies for the misuse of confidential information are an interdict and/or a claim for damages.²⁴³ An interdict is a drastic and extraordinary remedy which is granted at the discretion of the court.²⁴⁴ To succeed the following must be established:

- i. the plaintiff must have an interest in the confidential information and he/she need not be the owner of such information;²⁴⁵
- ii. the information must be of a confidential nature.²⁴⁶ A relationship must exist between the parties, which imposes a duty on the defendant to preserve the confidence of the information imparted to him/her. The most common form of relationship imposing such a duty is that between the employer and employee;²⁴⁷
- iii. the defendant must have knowingly appropriated the plaintiff's confidential information;²⁴⁸

²³⁸Grogan (note 231 above).

²³⁹Ibid 51.

²⁴⁰*Dickinson Holdings* (note 138 above) para 81.

²⁴¹ Ibid.

²⁴²Ibid. See *Reddy* (note 21 above) para 21.

²⁴³*Waste Products* (note 23 above) 573F.

²⁴⁴*Forwarding African Transport Service CC t/a FatsvManica Africa (Pty) Ltd & Others* 2005 (26) ILJ 734 (D) 743E.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷Ibid 581E.

²⁴⁸Ibid 573G.

- iv. the defendant must be in improper possession or have made improper use of the information, whether as a springboard or otherwise to obtain an unfair advantage for himself; and
- v. the plaintiff must have suffered damage as a result.²⁴⁹

The owner of confidential information has a right to prevent its use by anyone else.²⁵⁰ However, the right to protect confidential information is not confined to the owner as the person who is in lawful possession of the confidential information is also entitled to protect the information.²⁵¹ The wrong which is committed is the unlawful infringement of a competitor's right to be protected from unlawful competition.²⁵²

Spring boarding may constitute the unlawful use of confidential information and the use of that information²⁵³ to gain a springboard in order to compete.²⁵⁴ Spring boarding entails using the fruits of someone else's labour as the starting point, and not starting at the beginning in developing a technique, process, piece of equipment or product.²⁵⁵ In terms of the springboard doctrine, an interdict against the use of confidential information may be limited by the duration of the advantage obtained or the time saved, by reason of having had access to the confidential information.²⁵⁶ However, the interdict may not be limited in time where the confidential information sought to be protected is a trade secret.²⁵⁷ Evidence of damages must be present for the grant of the relief of damages.²⁵⁸

The allegation that, as a result of the area and duration of the restraint being unreasonable the employee is prevented from exercising his qualifications and skills for the duration of the restraint in the area that it operates, must be supported by admissible evidence,²⁵⁹ which is unambiguous and substantial in nature.²⁶⁰ For instance, the employee can put before the court the steps that he has taken to secure alternative employment, and the unsuccessful results which accrued.²⁶¹ Moreover, a court will look at the industry in which the employer trades, as

²⁴⁹Ibid 573H.

²⁵⁰Ibid 573I-J.

²⁵¹Ibid 574A.

²⁵²Ibid 574B.

²⁵³ Ibid 582E.

²⁵⁴Ibid 582F.

²⁵⁵ Ibid.

²⁵⁶Ibid 583F.

²⁵⁷Ibid 583G.

²⁵⁸Ibid 584G.

²⁵⁹*Dickinson Holdings* (note 138 above) paras 75-77.

²⁶⁰Ibid para 79.

²⁶¹Ibid para 76.

well as the qualifications, experience and skills of the employee.²⁶² In determining the employee's potential to find employment within the fields which require his/her skills and experience if the restraint in question is enforced, the size of the market in which the employee may utilise his skills, is considered.²⁶³ If the industry in question is an international one, and not only limited to South Africa, the court would find it difficult to accept that the employee cannot be employed.²⁶⁴ In considering whether the area of the restraint is reasonable, the court will look at whether or not it is necessary to protect a legitimate interest of the employer.²⁶⁵ The willingness of the employer to reduce the period of the restraint has no impact on the enforceability of the restraint.²⁶⁶

2.6 Other aspects relating to restraint of trade

When the wrongful termination of an employee by the employer is fraudulent, courts will on that ground alone refuse to enforce the restraint.²⁶⁷ An express provision in terms of which one contracting party undertakes to condone or submit to the fraudulent conduct of the other will be regarded as *contra bonos mores* and offensive to the interests of society to the extent that it will be rendered illegal and void.²⁶⁸ A provision which expressly permits a restraint to be invoked by such conduct will be regarded as *contra bonos mores*.²⁶⁹ A provision which is stated in language wide enough to confer a benefit on a party resulting from his own fraud or wilful wrongdoing will not be enforceable to the extent that it does so.²⁷⁰

The circumstances of, and reasons as to why the employment relationship between the employer and employee has terminated is generally irrelevant to the operation of the restraint of trade even where the termination occurred as a result of a breach by the employer, because the employer's need for protection of its proprietary interests is independent from the manner in which the employment contract is terminated.²⁷¹ Such a breach may be committed in good faith and may be of a technical nature only, or there may be fault on the part of the employer and employee.²⁷² Where the breach on the part of the employer is less than innocent, the

²⁶²Ibid para 95.

²⁶³ Ibid.

²⁶⁴Ibid para 78.

²⁶⁵*Document Warehouse* (note 22 above) para 47.

²⁶⁶ Ibid.

²⁶⁷*Reeves* (note 60 above) 775C.

²⁶⁸Ibid 775C-E.

²⁶⁹ Ibid 775E.

²⁷⁰Ibid 775G.

²⁷¹Ibid 772F-G. See also *SPP Pumps* (note 124 above) 39; *T Dooka* (note 73 above).

²⁷² Ibid 772G.

employee is free to pursue his contractual or statutory remedies against the employer.²⁷³ Where provision has been made in the employment contract for the giving of notice, the damage suffered by the employee may not amount to much, however the loss which is suffered by the employer as a result of the restraint being held invalid may be considerable.²⁷⁴ An employee may have his damages assessed on the basis of the existence of the restraint.²⁷⁵

Where the Labour Relations Act 66 of 1995²⁷⁶ provides protection to an employee, an implied term of fairness over and above that protection is not included in the employment contract.²⁷⁷ Therefore, the courts are not obliged to develop the common law by simply incorporating a constitutional right into an employment contract.²⁷⁸ An employee who raises the defence of an unfair dismissal in order to avoid the enforcement of the restraint of trade provision would need to show that the enforcement of the restraint is reciprocal to the employer's obligation to act fairly.²⁷⁹ An employee can also as an alternative defence claim for cancellation of the employment contract by the employer.²⁸⁰ This will occur where the employer repudiates the employment contract without any proper reason or gives insufficient notice of the termination of an employment contract which is continuing in nature.²⁸¹ While employers are obliged to deal fairly with their employees, this obligation is based in labour law and not the law of contract. Therefore, an employee who seeks to evade the enforcement of a restraint of trade on the basis of an unfair dismissal must seek the alternative remedies that are provided of in the Act.²⁸² When these remedies are ignored, the separate field of labour law and the law of contract are muddled.²⁸³ Therefore, an employee who is aggrieved by the termination of the employment contract is free to pursue his/her statutory remedies for unfair dismissal in terms of the Act and not in terms of contractual remedies and the law of contract.

²⁷³ Ibid 772H.

²⁷⁴ Ibid 772I.

²⁷⁵ Ibid 772I-J.

²⁷⁶ Hereafter referred to as the Act.

²⁷⁷ P van der Merwe (note 93 above). See also *SAMSA v Mckenzie* (017/09) [2010] ZASCA 2 (15 February 2010).

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² P van der Merwe (note 277 above).

²⁸³ Ibid.

The controversial issue that had risen was who bore the onus of proving that the restraint in question is not contrary to public policy.²⁸⁴ In the case of *Magna Alloys* the court held that the party who alleged that he is not bound by the restraint of trade in question bore the burden of proving that the enforcement of the restraint of trade was contrary to public policy.²⁸⁵ However, the decision of the court in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth & Another*²⁸⁶ not only altered the burden of proof in restraint of trade agreements, but also provided a good illustration of the doctrine of *stare decisis* (the courts have to abide by decided cases).²⁸⁷ In *Canon* the court questioned whether this position was in conflict with section 22 of the Constitution, which provides that every person has the right to choose their trade, occupation or profession freely.²⁸⁸ The court in *Canon*²⁸⁹ held that although, the court's decision in *Magna Alloys* was an Appellant Division decision, thereby making it binding on every South African court, the Constitution is the supreme law of the country, and every court has to take into account the provisions of the Bill of Rights which is contained in the Constitution.²⁹⁰ As the restraint of trade clause limited the employee's constitutional right to the freedom of trade, professions and occupation, it would be inconsistent with the Constitution to impose the burden of proof on the employee to prove that he had a constitutional right.²⁹¹ The employer had the burden of proving that the employee had forfeited his constitutional right.²⁹² The employer in addition to invoking the restraint of trade provision and proving that there was a breach of said provision, the employer had to prove that in terms of section 36 of the Constitution the restraint of trade provision was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

With regard to the issue of onus, the court in *Magna Alloys* held that the acceptance of the public policy criterion means that the party who alleges that he is not bound by a restraint of trade to which he had agreed to, bears the onus of proving that its enforcement would be contrary to public policy.²⁹³ The issue of onus is now settled. Where the onus lies in a

²⁸⁴C Todd (note 61 above) 115.

²⁸⁵ 897-898.

²⁸⁶ See note 156 above.

²⁸⁷R Kelbrick 'Restraints of trade and the constitution' (2006) 14(3) *JBL* 131.

²⁸⁸ *Ibid.*

²⁸⁹ See note 156 above.

²⁹⁰ *Ibid* 209.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Dickinson Holdings* (note 138 above) para 87.

particular case is a consequence of the substantive law on the issue.²⁹⁴ The substantive law is the law which was laid down in *Magna Alloys*.²⁹⁵ In determining whether a contract is contrary to public policy, constitutional values must be infused into the enquiry.²⁹⁶ In order for the employee's onus to be discharged, he must put sufficient facts before the court.²⁹⁷

The South African law on restraint of trade had been applied in terms of English and Roman-Dutch law, and has also been influenced by the interim and final Constitutions. Some case law have preferred the common law approach, whilst others have stressed the constitutional aspects of restraint of trade.²⁹⁸ South African courts are dismissive of the suggestion that the constitutional dispensation required a revision of the restraint of trade law.²⁹⁹

2.7 Constitutionality

The principles which had been set out by the then Appellate Division in *Magna Alloys* were challenged in light of the provisions in the Bill of Rights as contained in the final Constitution.³⁰⁰ In *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*,³⁰¹ the court had to decide on whether the Constitution had an effect on restraint of trade provisions.³⁰² The court was requested to find that restraint of trade agreements were unconstitutional in terms of s 22 of the Constitution.³⁰³

The court in arriving at its decision referred to a number of earlier cases which were decided under s 26 of the interim Constitution, where it was held that the principles³⁰⁴ which were set out by the Appellate Division in *Magna Alloys* was still good law.³⁰⁵ The court held that although the remarks which were made by the court in *Knox D'Arcy Ltd and Another v Shaw and Another*³⁰⁶ were made with reference to s 26 of the interim Constitution Act 200 of 1993, they remained appropriate post the advent of the final Constitution,³⁰⁷ namely that the

²⁹⁴Reddy (note 21 above) para 14.

²⁹⁵ Ibid.

²⁹⁶Ibid para 92.

²⁹⁷Ibid para 97.

²⁹⁸ C-J Pretorius (note 95 above).

²⁹⁹ J Neethling (note 96 above). See also *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) para 30.

³⁰⁰*Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé & another* 2011 (32) ILJ 601 (LC) para 17.

³⁰¹2001 (2) SA 853 (SE).

³⁰²Ibid 860B-C.

³⁰³*Esquire System* (note 300 above).

³⁰⁴ Restraint of trade provisions are prima facie enforceable and that the onus lies on the party seeking to be released from the restraint on the basis that it is unreasonable.

³⁰⁵*Esquire System* (note 303 above).

³⁰⁶Note 223 above.

³⁰⁷*Fidelity*(note 301 above) 861G-H.

Constitution does not interfere in the private affairs of individuals to the extent that it would, as matter of public policy protect them against their own foolhardy or rash decisions.³⁰⁸ Provided that there is no superseding public policy principle which is isolated, the freedom of the person encapsulates the freedom to pursue, as he/she chooses his/her benefit or his/her disadvantage.³⁰⁹ The court went on to provide that it is generally regarded as immoral and dishonourable for a promisor to breach his trust, even where he does to escape the consequences of a poorly considered bargain, there is no principle in an open and democratic society which is based on freedom and equality which would justify him repudiating his obligations. The enforcement of a bargain, although unwise recognises the fundamental constitutional principle of the individual's autonomy.³¹⁰ The court further provided that insofar as a restraint limits the rights as contained in s 22 of the Constitution, the common law which was developed by the Courts with regard to restraints of trade was of general application and complied with the s 36(1)³¹¹ requirements.³¹² Where a restraint clause is regarded as material, any party to any agreement is free to agree to include the clause in the agreement.³¹³ In terms of the common law, restraint clauses are enforceable provided that they are not in conflict with public policy.³¹⁴ Therefore, if a restraint clause is found to be enforceable by the Courts, that is it is reasonable and not contrary to public policy, the requirements of s 36(1) will have been met.³¹⁵

3 CONCLUSION

It is trite that restraint of trade agreements are valid and enforceable, except where the court can be convinced of its unenforceability. This is due to the *Magna Alloys* judgment, and subsequent cases. The enforceability of a restraint of trade is dependent on the person who is seeking the enforcement of the restraint, in almost all instances it is the employer, having a proprietary interest which justifies protection. Furthermore, the restraint must be reasonable and not contrary to public policy. The onus is on the employer to invoke the restraint and its breach and the employee must prove on a balance of probabilities that the restraint is unreasonable. The test for reasonableness was set out by the court in *Basson*. In addition to

³⁰⁸Ibid 861G-I.

³⁰⁹Ibid 816H-J.

³¹⁰Ibid 816I-862B.

³¹¹ The limitation clause as contained in the Constitution.

³¹²*Fidelity* (note 301 above) 862A-B.

³¹³Ibid 862B.

³¹⁴ Ibid.

³¹⁵Ibid 862E.

the test, many other factors are taken into account. Public policy and constitutional values must always be considered by the court in determining the enforceability of a restraint.

The next chapter will discuss the courts' approach in adjudicating matters relating to restraint of trade prior to the landmark case of *Magna Alloys* as well as the judgment which was handed down in *Magna Alloys*.

3 CHAPTER THREE

In this chapter the courts' approach in adjudicating matters relating to restraint of trade prior to the landmark case of *Magna Alloys*, as well as the judgment which was handed down in *Magna Alloys* will be discussed.

1 INTRODUCTION

Prior to the decision of the Appellate Division (as it was known then) in *Magna Alloys*, the traditional approach which developed under the influence of English law and subsequently adopted by South African courts, was that contracts in restraint of trade were prima facie void, and therefore unenforceable.³¹⁶ However, a restraint could be enforced if it was reasonable between the parties and not contrary to the public interest.³¹⁷ A valid restraint was one which served some interest of the party in whose favour it had operated. Therefore, in the case of an employment relationship the interests that an employer could protect were his trade secrets and trade connections against exploitation by the employee.³¹⁸

The party who relied upon the restraint bore the onus of proving that it was reasonable.³¹⁹ This meant that the party had to provide proof that there were special circumstances which justified that the restraint provided no more than adequate protection to the covenantee.³²⁰ The fact that the contracting parties had defined terms that they, in their opinion had regarded to be reasonable did not necessarily mean that the court would have also regarded those terms to be reasonable.³²¹ It was the court's duty to determine whether the restraint of trade was reasonable.³²² The onus of proving that a restraint which was reasonable between the parties, but contrary to the public interest rested upon the person who alleged so.³²³ This onus was not a light one.³²⁴

Where the restraint was agreed upon by parties who had contracted on equal terms, the courts tended to not interfere since the parties were regarded to be the best judges of what protection

³¹⁶Reddy (note 86 above).

³¹⁷*Super Safes* (note 188 above) 785C-E. See also *Cowan v Pomeroy* 1952 (3) SA 645 (C), 649; *Diner v Carpet Manufacturing Co of SA Ltd* 1969 (2) SA 101 (D), 103; *Cansa (Pty) Ltd v Van der Nest* 1974 (2) SA 64 (C), 66.

³¹⁸*Super Safes* (note 317 above) 785E-F. See also *Ailing & Steak v Olivier* 1949 (1) SA 215 (T) 220.

³¹⁹*Super Safes* (note 317 above). See also *Cowan* (note 317 above); *Diner* (note 317 above); *Cansa* (note 317 above).

³²⁰*Katz v Efthimiou* 1948 (4) SA 603 (O) 613.

³²¹*Ibid* 612.

³²²*Ibid*.

³²³*Magna Alloys* 887G.

³²⁴*Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 (1) SA 673 (O) 685–689.

was reasonable for their own interests.³²⁵ However, this did not constitute conclusive evidence of reasonableness. It has been held that a restraint of trade, which was agreed upon by parties who had contracted on equal terms, was invalid because it went further than was reasonably necessary to protect the interests of the parties.³²⁶ When parties had contracted on an unequal footing, it was more difficult for the covenantor to discharge the onus of proving the restraint was reasonable in reference to the interests of the parties.³²⁷ The question of the equality of the parties was a question of fact and not of law, with each case being decided on its own facts.³²⁸ Employees are often, in relation to their employers, in a position of economic inequality. However, competition amongst employers may be such that an employee may occupy a better bargaining position, while parties other than the employer and employee may be bargaining from an unequal position.³²⁹

South African law, under the influence of English law, favoured the freedom of trade over the sanctity of contracts.³³⁰ This was demonstrated in the rule that restraint of trade provisions were *prima facie* void, and unlike other contractual terms subject to the reasonableness test.³³¹ The party seeking to enforce the restraint had to prove that it was reasonable between the parties.³³² This meant that the restraint of trade must have been reasonably necessary to protect the specified interests of the party in whose favour the restraint had operated.³³³ This general approach addressed the frequent inequality in bargaining power in employment contracts, between the employer and employee, where the employee submitted to the restraint.³³⁴

1.1 Controversy surrounding the traditional approach

Prior to the Appellate Division's decision in *Magna Alloys*, the question of whether English law governed the validity of restraint of trade had caused controversy.³³⁵ Numerous South

³²⁵ *Filmer and another v Van Staaten* 1965 (2) SA 575 (W) 578F-G.

³²⁶ *Van de Pol v Silbermann and Another* 1952 (2) SA 561 (A) 571F-G.

³²⁷ *Biografic (Pvt) Ltd v Wilson* 1974 (2) SA 342 (R) 346F-H.

³²⁸ *Cansa* (note 317 above) 67.

³²⁹ *Ibid.* *Biografic* (note 327 above) 347-348.

³³⁰ J T Schoombie 'Agreements in restraint of trade: the appellate division confirms new principles' (1985) 48 *THRHR* 129.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid* 130.

³³⁴ *Ibid.*

³³⁵ P Aronstam 'Restraint of trade re-examined' (1978) 95 *SALJ* 21.

African courts had regarded English law and South African law to be identical³³⁶, while in other cases English law was considered to be of persuasive value.³³⁷ It was also submitted that the South African law required an evaluation, as the courts had failed to critically examine the historical origins of the English law.³³⁸ Furthermore, a few South African judges had expressed their reservations about whether the South African law on restraint of trade was the same as the English law.³³⁹ The courts had very seldom asked whence had the rules of restraint of trade come.³⁴⁰ On several occasions the traditional approach and rules were either rejected or questioned by the courts.³⁴¹ The court in *Katz v Efthimiou* stated that the rule that contracts in restraint of trade were generally considered to be in conflict with public policy was absolutely foreign to the Roman and Roman-Dutch systems of law, and that considerable difficulty was experienced in locating the Roman-Dutch source of the traditional approach.³⁴² Furthermore, *Voet* never had contracts in restraint of trade in mind.³⁴³ Justification for the adoption of the English law could presumably be found in the *Digest* (35.1.71.2) and *Voet* (2.14.16).³⁴⁴ The court went on further to state that although, the rule which states that contracts in restraint of trade are contrary to public policy, it went against Roman and Roman-Dutch law, and had been embedded into the South African system of law.³⁴⁵ In *SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd*³⁴⁶ the court stated that there was uncertainty about whether South African courts were correct in applying the English law on restraint of trade. It was submitted that South African courts should not accept English law in its entirety, and that the judiciary by seeking guidance from other legal systems and without violating South African legal principles³⁴⁷ should develop the law on restraints of trade so that it was equitable, reflected the moral standards of the time and gave effect to both individuals and the public interest.³⁴⁸

³³⁶*Ibid.* See also *Durban Rickshas Ltd v Ball* 1933 NPD 479, 489; *New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75, 82; *Holmes v Goodall & Williams Ltd* 1936 CPD 35, 42.

³³⁷P Aronstam (note 335 above) 22. See also *Dempsey v Shambo* 1936 EDL 330, 333; *Brooks and Wynberg v New United Yeast Distributors (Pty) Ltd* 1936 TPD 296, 304.

³³⁸C Nathan 'The rules relating to contracts in restraint of trade-whence and whither? A decade later' 1979 96 *SALJ* 35. See also E Kahn 'The rules relating to contracts in restraint of trade-whence and whither?' (1968) 85(4) *SALJ* 394.

³³⁹Aronstam (note 337 above).

³⁴⁰Khan (note 338 above).

³⁴¹Schoombee (note 330 above) 128.

³⁴²*Katz* (note 320 above) 610.

³⁴³*Ibid.*

³⁴⁴*Ibid.*

³⁴⁵*Ibid.*

³⁴⁶1968 (2) SA 777 (D) 787.

³⁴⁷Kahn (note 338) 398.

³⁴⁸*Ibid* 399.

Of particular significance were the cases of *Roffey v Catterall*, *Edwards & Goudré (Pty) Ltd*,³⁴⁹ *National Chemsearch (SA) (Pty) Ltd v Borrowman*,³⁵⁰ and *Drewtons (Pty) Ltd v Carlie*.³⁵¹ Didcott, J in *Roffey*³⁵² stated that the case in question had raised fundamental questions about some of the legal principles which had governed restraint of trade provisions in South Africa.³⁵³ Didcott, J enunciated a new approach on restraint of trade³⁵⁴ and held that not only was the sanctity of contract principle given preference in South African law, but that public policy in South Africa did not regard restraint of trade provisions as prima facie void, and that they were only contrary to public policy and unenforceable when they had been proved to be unreasonable.³⁵⁵ Didcott, J, despite the lack of Roman-Dutch authority on the issue accepted that regardless of what the law had generally stated about restraints of trade, restraint of trade provisions which unreasonably restrained trade were against public policy, and could not be enforced.³⁵⁶ He went on further to hold that the issue was not on whom the onus of proof laid, but rather what had to be proved. This depended on whether restraints of trade were prima facie void.³⁵⁷

The court held that contracts which were valid in form were prima facie enforceable in South African law, unless grounds for their avoidance could be proved.³⁵⁸ Therefore, it followed from the ordinary South African contractual principles that restraint of trade provisions would be enforced, unless their unreasonableness was proved.³⁵⁹

Although, the principle of sanctity of contract was in conflict with the principle of freedom of trade,³⁶⁰ the unqualified acceptance of one principle was impossible.³⁶¹ The sanctity of contract principle was not only firmly entrenched in the South African system, but was also more commanding, and ‘vibrated’ more strongly in the South African jurisprudence than the freedom of trade.³⁶² The public were more interested in the preservation of loyalty to contracts and the freedom to bargain, however a moral dimension was also involved, which

³⁴⁹1977 (4) SA 494 (N).

³⁵⁰1979 (3) SA 1092 (T).

³⁵¹1981 (4) SA 305 (C). See also *SA Wire Co* (note 346 above) 777D.

³⁵²Note 349 above.

³⁵³*Ibid* 495.

³⁵⁴ C Visser ‘The principle pacta servanda sunt in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade’ (1984) 101(4) *SALJ* 641.

³⁵⁵*Roffey* (note 349 above) 505H-506.

³⁵⁶*Ibid* 503H.

³⁵⁷*Ibid* 503A.

³⁵⁸*Ibid*.

³⁵⁹*Ibid* 504A.

³⁶⁰*Ibid* 504G.

³⁶¹*Ibid* 505B-C.

³⁶²*Ibid* 505E-F.

gave the sanctity of contract principle universality and durability.³⁶³ This moral dimension consisted of the requirement that people should keep their promises, and this transcended all else.³⁶⁴

Didcott, J went on to consider whether restraint of trade provisions were ordinarily void.³⁶⁵ English law, Roman-Dutch law and South African law provided that agreements which infringed public policy were unenforceable.³⁶⁶ However, while South African law followed English law on the issue of restraints of trade; that is restraints of trade were generally regarded to be contrary to public policy, Roman-Dutch authorities did not consider restraint of trade agreements to be contrary to public policy.³⁶⁷ When South African courts imitated the English law on restraint of trade, a South African ‘cult’³⁶⁸ was developed.³⁶⁹ However, it was questioned, and the imitation was not entirely uniform.³⁷⁰

Didcott, J held that restraint of trade provisions were not *prima facie* void, and that public policy in South Africa did not generally condemn restraint of trade provisions. Furthermore, unreasonable restraint of trade provisions were contrary to public policy and unenforceable.³⁷¹ Didcott, J relied on the judgment of Bale, C.J in *South African Breweries Ltd. v Muriel*,³⁷² in which Bale, C.J held that the public policy endorsed the sanctity of contracts more certainly than any other favouring freedom of trade.³⁷³ Didcott, J further overruled the decision of the Full Bench in *Durban Rickshas Ltd. v Ball*,³⁷⁴ because the honourable judge deemed the latter decision to be incorrect, even though the decision was binding on the court.³⁷⁵ Didcott, J furnished three reasons for his decision.

First, Matthews, A.J.P. applied the law that was applied in English case law, as well as some South African case law which had followed the English decisions. Although, Matthews, A.J.P.’s judgment had stood for more than 40 years, overruling it would not have disturbed

³⁶³Ibid 505F-G.

³⁶⁴Ibid 505G.

³⁶⁵Ibid 502B.

³⁶⁶Ibid 502E-G.

³⁶⁷Ibid 202E-G.

³⁶⁸Ibid 503B.

³⁶⁹Ibid.

³⁷⁰Ibid 502.

³⁷¹Ibid 505H-506.

³⁷² 1905 (26) N.L.R. 362, 367-368.

³⁷³ *Roffey* (note 349 above) 506C-D.

³⁷⁴ 1933 NPD 479.

³⁷⁵Ibid 506E-F.

arrangements which were made in reliance on it which concerned the court.³⁷⁶ Secondly, most covenanters when agreeing to restraint of trade provisions presumably intended to observe them, and no special allowance was given to those who do not observe the restraint.³⁷⁷ Thirdly, judicial precedent did not enjoy much force when public policy was in issue, meaning that decisions which are based upon public policy do not possess the same binding authority as decisions which formulate legal principles.³⁷⁸ Additionally, the rule of policy should be determined with near accuracy for the current or present time period.³⁷⁹

In *National Chemsearch*³⁸⁰ the court held that the appeal had raised a number of problems relating to the enforcement of restraint of trade agreements.³⁸¹ The court held that there was a difference between the personal opinion of a Judge and the law on a particular subject.³⁸² Botha, J held that it was of no consequence that there was no Roman-Dutch source which provided that restraint of trade agreements were, or could be contrary to public policy, and that the views of old authorities on what type of agreement was contrary to public policy was not necessarily binding in modern times.³⁸³ Botha, J in his opinion, thought that the sanctity of contracts should have taken preference over the freedom of trade, and was in agreement with Didcott, J's reasoning on this view.³⁸⁴ However, Botha, J did not share Didcott, J's conclusion that in terms of South African public policy restraint of trade provisions were not prima facie void.³⁸⁵ Botha, J held that Didcott, J's decision had not only produced startling and questionable results³⁸⁶, but also that judicial precedent which went more than fifty years back, and in which eminent Judges consistently applied the same principles with regard to public policy could not be ignored as was done by Didcott, J,³⁸⁷ even if they were criticised for their uncritical adoption of English law principles.³⁸⁸ Botha, J was of the opinion that on the question of which principle should take precedence, there was room for legitimate differences of opinion.³⁸⁹

³⁷⁶Ibid 506F-G.

³⁷⁷Ibid 506F-H.

³⁷⁸Ibid 506G-H.

³⁷⁹Ibid 506H.

³⁸⁰Note 350 above.

³⁸¹Ibid 1094H.

³⁸²Ibid 1099G.

³⁸³Ibid 1099B-D.

³⁸⁴Ibid 1099H.

³⁸⁵Ibid 1100B.

³⁸⁶Ibid 1100E-F.

³⁸⁷Ibid 1100F.

³⁸⁸Ibid 1100G.

³⁸⁹ Ibid 1101

*Roffey*³⁹⁰ was a provincial decision, and according to Botha, J did not have the function of departing from a binding decision that was considered to be wrong by Didcott, J with conviction. This was the function of the Appellate Division.³⁹¹

Botha, J went to provide that South African courts were not obliged to apply all the English rule and principles relating to the enforceability of restraint of trade agreements. The English law was open to scrutiny and two questions could be asked: to what extent was English law already followed in South African law, and secondly on its merits, whether it deserved to be followed.³⁹²

2 MAGNA ALLOYS: THE LANDMARK CASE

Restraint of trade cases rarely reach the Supreme Court of Appeal (SCA), because by the time an application is made for an urgent interdict in order to enforce the restraint, the period for which the restraint of trade provision would operate for, would have lapsed by the time the matter reached the courts.³⁹³ At the time that the *Magna Alloys* case was heard in the Appellate Division, more than five years had lapsed since the end of the restraint period.³⁹⁴ It was only the claim for damages and the substantial amount of legal costs which had kept the matter alive.³⁹⁵

The *Magna Alloys* case is important because it was heard in the Appellate Division, and has been referred to as a landmark decision³⁹⁶ as it changed the law on restraint of trade.³⁹⁷ The court's decision introduced a significant change to the approach that was adopted by courts before it with regard to matters relating to restraint of trade, by declining to follow earlier decisions.³⁹⁸ It held that restraint of trade provisions are valid and enforceable and should be honoured except where they unreasonably restrict a person's right to trade or work and are in conflict with s 22 of the Constitution. *Magna Alloys* remains as the leading case on restraints in South Africa.³⁹⁹

³⁹⁰Note 349 above.

³⁹¹*Chemsearch* (note 350 above) 1101F.

³⁹²*Ibid* 1102D.

³⁹³*Schoombee* (note 330 above) 134.

³⁹⁴*Ibid*.

³⁹⁵*Ibid*.

³⁹⁶*Den Braven* (note 179 above) para 25.

³⁹⁷*Ibid*.

³⁹⁸*Ibid*. See also *Document Warehouse* (note 22 above) para 16.

³⁹⁹*Esquire System* (note 300 above) para 15.

The Appellate Division in *Magna Alloys* held that numerous South African courts, in deciding on the enforceability of a restraint of trade applied a law which the common law that is the Roman-Dutch had not provided for.⁴⁰⁰ The Roman-Dutch law had not provided that restraints of trade were prohibited.⁴⁰¹ Rather, the English law on restraints of trade was applied.⁴⁰² The English law provided for two rules. The first being that restraint of trade provisions were prima facie invalid, and that the party who sought to enforce the restraint had to prove that it was reasonable in reference to the parties.⁴⁰³ The second provided that the party who alleged that the restraint was against public policy bore the onus of proving so.⁴⁰⁴

The Appellate Division held that every restraint agreement which is signed by a restrainee is prima facie enforceable, and that where the restrainee wishes not to be restrained, he/she bears the onus to prove that the restraint is unreasonable, and contrary to public policy.⁴⁰⁵ A court in determining whether the restraint is contrary to public policy, will consider the facts and circumstances which existed at the time that the restrainer attempts to enforce the restraint agreement and will balance two key considerations.⁴⁰⁶ The first is that public policy requires that parties comply with their contractual obligations even if they are unreasonable or unfair. This is the *pacta sunt servanda* maxim.⁴⁰⁷ Secondly, all persons should in the interest of society be permitted as far as possible to freely engage in commerce or the profession freely.⁴⁰⁸

The court went on further to hold that *pacta sunt servanda* should predominate.⁴⁰⁹ It was in the public interest that everyone should, as far as possible be able to freely operate in the commercial and professional world, and that agreements which were freely entered into be honoured.⁴¹⁰ In South African law, agreements which were contrary to the public interest were unenforceable.⁴¹¹

⁴⁰⁰Schoombee (note 395 above). See *Magna Alloys* 890C.

⁴⁰¹*Magna Alloys* 890C.

⁴⁰²*Magna Alloys* 886H.

⁴⁰³Schoombee (note 400 above).

⁴⁰⁴Ibid.

⁴⁰⁵*Esquire System* (note 399 above).

⁴⁰⁶Ibid.

⁴⁰⁷Ibid.

⁴⁰⁸Ibid.

⁴⁰⁹Schoombee (note 334 above).

⁴¹⁰Schoombee (note 403 above).

⁴¹¹Ibid.

Furthermore, the enforceability of a restraint of trade was determined by asking whether its enforcement would prejudice the public interest.⁴¹² Therefore, having regard to the circumstances of a particular case, a restraint of trade provision would be unenforceable if its enforcement would be contrary to the public interest.⁴¹³ If a person was bound to an unreasonable restraint of trade, the public interest would probably be prejudiced.⁴¹⁴ It was ultimately on the ground of public policy that the restraint was examined in order to determine a restraint's enforceability and its unreasonableness.⁴¹⁵ However, what constitutes the public policy is apt to change and changes according to the changing face of commerce.⁴¹⁶ It must always be asked: is it in the interest of the community that the restraint be held reasonable and enforceable.⁴¹⁷

The acceptance of the view that the enforceability of a restraint of trade was dependent on whether its enforcement would prejudice the public interest resulted in the following consequences:

- i. the party who alleged that he was not bound by the restraint of trade, bore the onus of proving that the enforcement of the restraint was contrary to the public interest;
- ii. the court had to consider the circumstances that existed at the time that the enforcement was sought and;
- iii. the court could declare a part of the restraint to be enforceable or unenforceable, and was not limited to finding if the restraint as a whole was enforceable or unenforceable.⁴¹⁸

There had been debate about whether the appellate division had approved the traditional approach to restraint of trade in cases such as *Van der Pol v Silbermann*.⁴¹⁹ The Appellate Division held that the case did not constitute a binding precedent, as the Appellate Division had assumed that South African law had corresponded to English law.⁴²⁰ Although the Appellate Division had overruled the decisions of provincial courts which had applied the traditional doctrine, they were regarded to be of importance as they had indicated that for

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ *Magna Alloys* 888C-E.

⁴¹⁶ *Magna Alloys* 888C-E.

⁴¹⁷ *Magna Alloys* 888D.

⁴¹⁸ Schoombee (note 414 above).

⁴¹⁹ 1952 (2) SA 561 (A). See also Schoombee (note 330 above) 138.

⁴²⁰ Schoombee (note 418 above).

many decades, South African courts were of the view that it was in the public interest that everyone should, as far as possible be able to operate freely in the commercial and professional world, and that an unreasonable restraint upon this freedom, or a restraint prejudicial to the public interest should not be allowed.⁴²¹

2.1 Issues that arose out of the Appellate Division's decision

The Appellate Division had resolved some of the controversial issues surrounding restraint of trade, but simultaneously left a number of crucial questions unanswered.⁴²² Although new guidelines were laid down, the practical implications of many of them were uncertain.⁴²³ Insufficient attention was also paid to the theoretical and practical implications of the new guidelines.⁴²⁴ The foundation of the court's decision was comprised of judgments that were pronounced by the provincial courts in the cases of *Roffey*⁴²⁵, *Chemsearch* and *Drewtons*.⁴²⁶ However, this was problematic because the judgments had differed from each other in important aspects, and the Appellate Division did not clarify which case's approach it had favoured.⁴²⁷

The court followed the judgment in *Drewtons*⁴²⁸ case when it was held that a restraint of trade was never invalid or void. It may only be unenforceable.⁴²⁹ Enforceability was not explicitly tested against the covenantee's traditional proprietary or commercial interests.⁴³⁰ *Roffey*⁴³¹ and *Chemsearch* were followed when the Appellate Division attached considerable weight to the question of whether the restraint in question was reasonable.⁴³² On the issue of partial enforcement of a restraint, both *Chemsearch* and *Drewtons*⁴³³ were followed.⁴³⁴ While both *Chemsearch*⁴³⁵ and *Drewtons* did not utilise the traditional approach relating to severability, *Chemsearch* added qualifications which were absent in *Drewtons*.⁴³⁶

⁴²¹ Ibid.

⁴²² Ibid (note 341 above).

⁴²³ Ibid (note 409 above).

⁴²⁴ Ibid.

⁴²⁵ Note 349 above.

⁴²⁶ Schoombee (note 424 above).

⁴²⁷ Ibid.

⁴²⁸ Note 350 above.

⁴²⁹ Schoombee (note 427 above).

⁴³⁰ Ibid.

⁴³¹ Note 349 above.

⁴³² Schoombee (note 429 above).

⁴³³ Note 350 above.

⁴³⁴ Schoombee (note 432 above).

⁴³⁵ Note 350 above.

⁴³⁶ Schoombee (note 434 above).

The Appellate Division did not provide a convincing explanation of why the sanctity of contract was preferred over the freedom of trade.⁴³⁷ A general discussion was provided, and no mention was made of the role that is played by specific economic interests for example, the protectable interest of the covenantee in justifying restraints.⁴³⁸ It is interests like these which are at the core of restraints of trade.⁴³⁹ Furthermore, no mention was made of the possible unequal bargaining power between employers and employees.⁴⁴⁰ The Appellate Division, in order to make a logical decision, changed specific rules relating to restraints, especially the rule governing onus and preferred the sanctity of contract.⁴⁴¹ As a result, the role of economic interests was not addressed.⁴⁴² However, the traditional doctrine addressed this issue, by requiring that restraints of trade provisions went no further than to protect the defined proprietary and commercial interests of the covenantee.⁴⁴³ The possible inequality of the bargaining power between the employer and employee assisted in shaping the traditional rules relating to reasonableness and onus.⁴⁴⁴ In changing these rules, the Appellate Division paid no attention to this component of the traditional doctrine.⁴⁴⁵

While the Appellate Division emphasised the reasonableness test, the court did not analyse and rule upon the way in which our courts had over the years applied the reasonableness test, and had given it a definite content by coupling it with the covenantee's protectable interest.⁴⁴⁶ Moreover, the Appellate Division had not provided clarity on whether the lower courts should have followed the English law, or should have adopted the approach taken by the court in *Roffey*.⁴⁴⁷

The Appellate Division held that the reasonableness of the restraint of trade provision was to be determined between the parties, and with reference to the covenantee's protectable interest.⁴⁴⁸ While reasonableness was still relevant, the test for enforceability was whether the public interest was prejudiced.⁴⁴⁹ The traditional doctrine's two prong test, that is reasonableness between the parties or prejudice to the public interest was replaced by the

⁴³⁷Ibid 139.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴²Ibid 140.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶Ibid (note 419 above).

⁴⁴⁷Aronstam (note 335 above) 25.

⁴⁴⁸Schoombee(note 438 above).

⁴⁴⁹ Ibid.

single test of whether the public interest would be prejudiced.⁴⁵⁰ It was submitted that this was to pose problems in the matters that came to the courts after the Appellate Division's decision.⁴⁵¹

3 CONCLUSION

The decision of *Magna Alloys* that a restraint of trade clause is generally enforceable, means that it must be treated in the way as any other contractual provision involving private parties.⁴⁵² A restraint which is contrary to public policy is unenforceable. Public policy represents the legal convictions of the community and the values which are held most dear by society,⁴⁵³ and is deeply rooted in the Constitution and in the values which underlie it.⁴⁵⁴ In determining what constitutes public policy, and whether a contractual provision is contrary to public policy reference must be made to the values which underlie our constitutional democracy.⁴⁵⁵ As a result, contractual provisions which are contrary to the values which are protected in the Constitution are contrary to public policy, and unenforceable.⁴⁵⁶

Chapter four will focus on garden leave provisions, as they are a new aspect of restraint of trade which has not been considered by South African courts prior to February 2016. The recent case of *Vodacom (Pty) Ltd v Motsa and Another*⁴⁵⁷ will also be discussed.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² R H Christie & G B Bradfield *The Law of Contract in South Africa* 6 ed (2011) 378.

⁴⁵³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid para 29.

⁴⁵⁶ Ibid.

⁴⁵⁷ *Vodacom* (note 78 above).

1 INTRODUCTION

The concept of garden leave primarily originates from English law, and forms part of an employee's employment contract.⁴⁵⁸ Employers in England had no assurance that a court will enforce a restraint of trade provision, thereby preventing key employees from working for a competitor despite the inclusion of restraint of trade clauses in their employees employment contracts, a variation of a restraint of trade clause called garden leave was developed, and it proved to be an effective solution to the uncertainty surrounding the enforcement of restraint of trade clauses.⁴⁵⁹

The 1987 appeal case of *Evening Standard Co.v Henderson*⁴⁶⁰ gave rise to the concept of garden leave. The law provided that if one party to a contract of service repudiated the contract but the other party did not accept it, the contract will remain in existence.⁴⁶¹ The employee had repudiated his employment contract and the employer had not accepted the repudiation.⁴⁶² The court enforced what was previously regarded as an unenforceable restraint of trade clause, because the employer undertook to pay the employee's salary for the period of the restraint.⁴⁶³ The court's decision brought about a drastic change in English employment law.⁴⁶⁴

It was in *Provident Financial Groupv Hayward* ⁴⁶⁵that the court examined a garden leave clause.⁴⁶⁶ The employee's employment contract provided that he had to furnish the employer with one year's prior notice before terminating his employment contract, and also provided that the employer could exclude the former employee from the employment premises as well as the employer could suspend him from his duties at any time, but that the employee would receive his full salary and benefits during the notice period.⁴⁶⁷ The court held that it was this

⁴⁵⁸ T Moiloa and B Sono 'Botanical sabbatical: Labour court gives the green light to "garden leave" clauses in employment contracts' (7 April 2016) available at <http://www.werksmans.com/legal-briefs-view/botanical-sabbatical-labour-court-gives-the-green-light-to-garden-leave-clauses-in-employment-contracts/>, accessed on 16 October 2016.

⁴⁵⁹ G T Lembrich 'Garden leave: a possible solution to the uncertain enforceability of restrictive employment covenants' 2002 102 *Columbia Law Review* 2292.

⁴⁶⁰ 1987 I.C.R. 588 (C.A. 1986).

⁴⁶¹ *Ibid* 168.

⁴⁶² *Ibid*.

⁴⁶³ *Ibid*.

⁴⁶⁴ Lembrich (note 459 above) 2309.

⁴⁶⁵ 1989 (3) All E.R. 298 (C.A. 1988).

⁴⁶⁶ Lembrich (note 459 above) 2310.

⁴⁶⁷ *Provident* (note 465 above) 163.

expression which was colloquially known as garden leave.⁴⁶⁸ The case was regarded to have wider importance because garden leave clauses are imposed on many senior executives and it may be that these executives are hardly in a position to negotiate over the terms of their contracts of service.⁴⁶⁹ However, the court expressed concern about employers restraining employees from accepting alternative employment by simply paying the employee his full salary.⁴⁷⁰ The court held that long periods of garden leave were capable of abuse, as it is a weapon that employers can utilise to ensure that an employee does not tender notice of his termination of his employment contract, if he will be unable to work for someone else for a long period of time.⁴⁷¹ Any executive who gives notice and leaves his place of employment will likely find work in the same line of business that his former employer was engaged, not to cheat the employer, but to get the best advantage of his own personal expertise.⁴⁷² A wide clause prohibiting the employee from working for anyone else would not be enforced, even if the employee is offered full pay, if it appears that the other business for which the employee wishes to work for before the expiration of his notice has nothing to do with the employer's business.⁴⁷³ The court recognised and implicitly approved the use of garden leave clauses to prevent an employee from being employed by a competitor in a similar position.⁴⁷⁴

2 GARDEN LEAVE PROVISIONS

A garden leave or sterilisation clause is commonly incorporated into senior executives'⁴⁷⁵ employment contracts, and arises when an employee terminates his/her employment contract so that he/she can work for a competitor, or when the employer terminates the employee's employment contract.⁴⁷⁶ Employers, especially in the financial sector have been increasingly incorporating garden leave clauses into their employees' contracts.⁴⁷⁷

It requires the employee to furnish the employer with a specific and reasonably long period of notice⁴⁷⁸ before terminating his employment contract,⁴⁷⁹ and provides that while the

⁴⁶⁸Ibid 164.

⁴⁶⁹Ibid 165.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³Ibid 168.

⁴⁷⁴Lembrich (note 459 above) 2311.

⁴⁷⁵Ibid (note 466 above).

⁴⁷⁶I.G.C. Stratton 'Restraint of trade during and on the termination of a contract of employment' (1997) (12) *Denning Law Journal* 111.

⁴⁷⁷ J Bowers and S Honeyball *Textbook on Labour Law* 6 ed 2000 39.

⁴⁷⁸ Usually three to twelve months. See Lembrich (note 459 above) 2305.

⁴⁷⁹Lembrich (note 459 above) 2292.

employee is serving his/her notice period, he/she will not be able to undertake his/her normal duties,⁴⁸⁰ but he/she must remain accessible to the employer.⁴⁸¹

The employer promises to not sue the employee for damages, as a result of the employee's failure to fulfil his duties under the employment contract.⁴⁸² Furthermore, the employer may not force the employee to do any work,⁴⁸³ and the employee will be paid his/her full salary and benefits.⁴⁸⁴ Additionally, as the employee remains an 'employee' of the employer, he cannot work for a competitor⁴⁸⁵ nor do anything to harm the employer.⁴⁸⁶

The reason for the incorporation of such a clause is that it allows the employee's possible successor time to become established,⁴⁸⁷ and by the time the employee re-enters the job market, the employee's use of his full knowledge and skill will not pose a threat to the former employer's business,⁴⁸⁸ as during the long notice period the employee would have not had access to the employer's confidential information, and the confidential information which he already had would have become obsolete or less valuable to competitors once he enters the job market again.⁴⁸⁹ Furthermore, the long notice period may make the employee less attractive to a competitor who requires an employee to begin work immediately, and therefore the competitor may be deterred from hiring the employee.⁴⁹⁰

Courts are more likely to permit an employer to dictate the actions of an employee rather than a former employee.⁴⁹¹ Garden leave clauses have provided employers with the protection that they require, is fair to employees, and have been generally more readily accepted and enforced by the English courts, compared to the traditional restraint of trade clauses.⁴⁹² They have become widely utilised.⁴⁹³ Many American employers have begun

⁴⁸⁰Stratton (note 476 above) 112.

⁴⁸¹ Ibid.

⁴⁸²Lembrich (note 478 above).

⁴⁸³ Ibid

⁴⁸⁴Stratton (note 480 above).

⁴⁸⁵Ibid 111-112.

⁴⁸⁶Lembrich (note 483 above).

⁴⁸⁷Stratton (note 484 above).

⁴⁸⁸A Coleman 'The legal protection of confidential information and its potential impact on employment patterns in the computing industries' (1992) 1(2) *Law, Computers & Artificial Intelligence* 225.

⁴⁸⁹Lembrich (note 483 above).

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³Ibid 2314.

inserting garden leave provisions into the employment contracts of their key employees in the hopes that they would be enforced.⁴⁹⁴

2.1 Origin of the 'garden leave' name

The clause is called garden leave, because it was assumed that the notice period in which the employee was not required to undertake his normal duties at his place of employment, he would be at home working in his garden while being financially secure.⁴⁹⁵

2.2 Enforceability

The enforceability of a garden leave provision is dependent on whether the employer has a proprietary interest to protect.⁴⁹⁶ An element of the proprietary interest is the money that is made available to the departing employee during his former employment.⁴⁹⁷ A garden leave provision will be not be enforceable if it is geographically too wide, or the period of the restraint is too long, even where the employee is paid his full salary and benefits during his notice period.⁴⁹⁸

2.3 Similarities and differences between garden leave and restraint of trade

Garden leave is similar to a restraint of trade, as they both require an employee not to work for a rival trader, or in a business which is similar to the employee's former employer for a specified period of time.⁴⁹⁹ Furthermore, it has the same effect as a restraint of trade clause, because it stifles competition, and reduces the risk of the usage or disclosure of trade secrets.⁵⁰⁰

A garden leave clause takes effect prior to the termination of the employee's employment contract, because although the employee serves notice on the employer or vice versa and the contract terminates at a future date, the employee will be nevertheless will serve out his notice,⁵⁰¹ while a restraint of trade clause takes effect after the termination of the employee's employment contract. Furthermore, the essential difference between garden leave and

⁴⁹⁴Ibid (note 492 above).

⁴⁹⁵ Ibid.

⁴⁹⁶ Stratton (note 476 above)115.

⁴⁹⁷ Ibid.

⁴⁹⁸Ibid 116.

⁴⁹⁹Coleman (note 488 above) 226.

⁵⁰⁰ Ibid.

⁵⁰¹Stratton (note 487 above).

restraint of trade clauses is that during garden leave the employee is not only paid during the notice period, but that /she remains an employee of his former employer.⁵⁰²

2.4 Arguments and issues raised in respect of garden leave

There are several arguments which arise in respect of the enforceability or otherwise of garden leave. In terms of the forced starvation argument, if the employee is not paid his/her salary and benefits during the notice period by the employer, the employee can argue that as a result of him starving, the garden leave clause should not be enforced.⁵⁰³ However, the employer can argue that although the employee's standard of living may be severely reduced, the employee will not starve due to the country's welfare system.⁵⁰⁴ A more compelling argument may be that the employee has been reduced to idleness, and as a result has no duties to perform, and cannot exercise his skills.⁵⁰⁵ An issue which arises is whether an employer can lawfully prevent an employee from working, and whether an employee has an implied right to work.⁵⁰⁶ If the implied right is based on the contract, there is no reason why the right should not be expressly excluded.⁵⁰⁷ However, in terms of public policy, each individual has a right to work, and therefore, the garden leave clause may be void.⁵⁰⁸

If the garden leave in question is enforced, the employer's bargaining power is increased when confronted by an employee who wishes to leave, and whose future career may be in jeopardy.⁵⁰⁹ The courts had considered damages to be an inadequate remedy for breach of garden leave.⁵¹⁰ The longer the notice period that an employee has to serve, the less is the chance of the court enforcing the garden leave.⁵¹¹ Only a portion of the notice period will be enforced by a court, where the entire notice period is not necessary for the employer's protection.⁵¹²

In practice, the notice periods for both parties are usually the same.⁵¹³ Longer notice periods tend to favour the employee, because if his employment contracted is terminated he will

⁵⁰²Lembrich (note 495 above).

⁵⁰³Stratton (note 476 above) 113.

⁵⁰⁴Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶Ibid.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹Ibid 114.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³Note 496 above.

receive compensation.⁵¹⁴ If an employer wishes to retain the services of a valuable employee, a longer notice period may be accepted, whereas an ambitious employee may require a shorter notice period in the event that a better employment opportunity for him arises, and he wishes to take up the employment as soon as possible.⁵¹⁵ However, a relatively short notice period is desirable in the interests of the employer to ensure the clause is enforceable as well as reducing compensation in the event of termination.⁵¹⁶ A garden leave clause can also be a relevant factor in determining the enforceability of a restraint of trade clause.⁵¹⁷

3 GARDEN LEAVE IN SOUTH AFRICA

In the recent case of *Vodacom*⁵¹⁸ the court had to consider the effect that a garden leave provision had on the enforceability of a restraint of trade. Garden leave provisions had not been considered by our courts before February 2016.

3.1 Facts

Godfrey Motsa,⁵¹⁹ a senior executive employee commenced employment with Vodacom⁵²⁰ on 8 January 2007. He was also a director of Vodacom, a member of its exco, and chief officer of the consumer business unit.⁵²¹ During October 2015 he tendered his resignation from Vodacom's employ after informing the CEO Shameel Joosub⁵²² that he had received an employment offer from MTN.⁵²³ However, he withdrew his resignation upon the improvement of his remuneration package.⁵²⁴ On 22 December 2015, Vodacom became aware that MTN had communicated to its senior employees that Motsa was to be appointed as its vice-president for the SEA region which included Southern Africa.⁵²⁵ On 23 December 2015 Motsa resigned,⁵²⁶ after informing Joosub on the same day that although he was considering an employment offer from MTN he had not accepted it.⁵²⁷

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ Note 78 above.

⁵¹⁹ The first respondent. Hereinafter Motsa.

⁵²⁰ The applicant. Hereinafter Vodacom.

⁵²¹ *Vodacom* (note 78 above) para 4.

⁵²² Hereinafter Joosub.

⁵²³ The second respondent.

⁵²⁴ *Vodacom* (note 78 above) para 20.

⁵²⁵ Ibid para 7.

⁵²⁶ Ibid para 1.

⁵²⁷ Ibid (note 525 above).

Vodacom brought an urgent application to court, seeking a final order to hold Motsa to a notice period of six months (garden leave), and after the expiry of the notice period to a further six months restraint undertaking.⁵²⁸ Vodacom argued that Motsa's failure to give the required notice resulted in him breaching the employment contract. Motsa argued that he was bound only by the restraint undertaking, and not the notice period because Vodacom elected not to hold him to his notice period on 23 December 2015 by paying him in lieu of the notice period, and as a result his employment terminated immediately.⁵²⁹ He further argued that the restraint undertaking became operative on 23 December 2015. Moreover, he argued that he could not be restrained for a further six months beyond the expiry of his notice period because the useful life of the confidential information which he had access to, was six months. Therefore, an enforcement of the restraint beyond six months would be unreasonable.⁵³⁰

Clause 16 and 18 of Motsa's employment contract regulated the termination of his employment and restraint of trade obligations respectively. Clause 16 provided that:

- i. termination of the employment contract will occur when either party furnishes the other party with a no less than six months' prior written notice;
- ii. Vodacom in its sole and absolute discretion and for any reason whatsoever can require him not to work or attend to his ordinary employment related duties and responsibilities during his notice period. However, he will be required to be available during the period to assist Vodacom, and at the request of Vodacom provide a seamless transition of his responsibilities;
- iii. he will not, during the notice period have any contact with customers or clients of Vodacom without prior written consent from Vodacom and;
- iv. where a no less than six months' prior written notice has been furnished, he will be required to work in that notice period, except where Vodacom pays him in lieu of the notice.⁵³¹

Clause 18 dealt with restraint of trade obligations which the parties agreed to. It provided that six months after the date on which Motsa's employment terminates, he is restrained from

⁵²⁸ Ibid (note 526 above)

⁵²⁹ Ibid para 2.

⁵³⁰ Ibid para 3.

⁵³¹ Note 205 above.

being employed or otherwise engaged in the business of any competitor within the Southern and parts of East and West Africa.⁵³²

3.2 Issues

The issues that the court had to consider were as follows:

- i. the relationship, if any between a garden leave provision and a restraint undertaking;
- ii. if Motsa was obligated to serve a notice period;
- iii. whether the six month notice clause was against public policy, unreasonable and unenforceable;
- iv. the date on which the restraint undertaking would operate;
- v. whether the enforcement of the restraint beyond six months would be unreasonable.
- vi. whether Motsa is bound to both the notice period and restraint undertaking, or just the restraint undertaking; and
- vii. whether any period of enforced commercial inactivity either by way of a garden leave provision or restraint of trade, or both is unreasonable after having regard to the proprietary interest that the employer seeks to protect.

The court in *Sihlali v South African Broadcasting Corporation*⁵³³ held that resignation is a unilateral act.⁵³⁴ In *Massmart Holdings v Vera & another*⁵³⁵ it was held that a restraint agreement (restraint) is enforceable provided that it is reasonable.⁵³⁶ A reasonable restraint is one which protects some proprietary interest of the party seeking its enforcement.⁵³⁷ The party seeking the enforcement of the restraint is required to invoke the restraint and prove that there has been a breach. The party seeking to avoid the restraint bears the onus of proving on proving on a balance of probabilities that the restraint is unenforceable because it is unreasonable.⁵³⁸

⁵³²Ibid para 6.

⁵³³*Sihlali v South African Broadcasting Corporation* (J799/08; 14 January 2009).

⁵³⁴*Vodacom*(note 78 above) para 19.

⁵³⁵*Massmart Holdings v Vera & another* Unreported, J1945-15.

⁵³⁶*Vodacom* (note 524 above).

⁵³⁷Ibid para 34.

⁵³⁸ Ibid.

The test for determining the reasonableness of a restraint was set out by the court in *Basson v Chilwan*,⁵³⁹ and is regarded as one of the most influential statements of law.⁵⁴⁰ The test comprises of four questions:

- i. Is there one party who has an interest deserving of protection at the termination of the agreement?
- ii. Is such interest being prejudiced by the other party?
- iii. If so, does such interest weigh up qualitatively and quantitatively against the interests of the latter party that the latter party should not be economically inactive and unproductive?, and
- iv. Is there another facet 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?⁵⁴¹

3.3 Judgment

Before February 2016, the concept of garden leave and its relationship, if any with a restraint had not been considered by the South African Labour Courts.⁵⁴² A garden leave clause provides that where an employee gives notice of the termination of his employment, the employer may require the employee to spend either the entirety or a part of the notice period not working, thereby allowing the confidential information which the employee had access to, to become stale and simultaneously the employee is kept out of a competitor's clutches.⁵⁴³ As a result, and as an advantage to the employer, the employee is commercially inactive and no risk of the reasonableness of the restraint undertaking would be attracted.⁵⁴⁴ However, the employee is entitled to remuneration during the garden leave period, and the employee must be available to the employer, should the employer require his assistance.

Section 39(1)(c) of the Constitution provides that when interpreting the Bill of Rights, a court may consider foreign law. The court considered a number of foreign authorities which dealt with the relationship between a garden leave and a restraint.⁵⁴⁵

⁵³⁹Note 204 above.

⁵⁴⁰*Vodacom* (note 536 above).

⁵⁴¹*Ibid.*

⁵⁴²*Ibid* para 22.

⁵⁴³*Ibid.*

⁵⁴⁴*Ibid.*

⁵⁴⁵*Ibid* paras 23-25.

In *William Hill Organisation v Tucker*⁵⁴⁶ the court held that in order for a garden leave provision to be enforced, the provision must be justified on similar grounds to those that are necessary to prove the validity of a restraint, and a garden leave provision must not be enforced to any greater extent than would be covered by a justifiable restraint previously entered into by an employee.⁵⁴⁷ Furthermore, employers are increasingly relying on garden leave provisions compared to conventional restraint provisions, because the courts have treated garden leave provisions with greater flexibility than restraint provisions.⁵⁴⁸ Moreover, where the contract to which the employer is bound, obligates the employer to permit the employee to perform the duties of the post to which he was appointed in accordance with his contract and during the period of his notice before it was given, the employer must expressly provide for a garden leave provision in the employee's employment contract.⁵⁴⁹

The Court of Appeal in *Credit Suisse v Armstrong*⁵⁵⁰ held that ordinarily there is no relationship between a restraint and a garden leave provision. If a restraint was valid, the employer was entitled to enforce it. Where the garden leave provision is in excess of one year, a court may not enforce a further protection in terms of a restraint. The court upheld the post termination restraint even though the employee had already served a six months garden leave.⁵⁵¹

In *Tullett Prebon plc v BGC Brokers LP*⁵⁵² it was held that a court has a discretion in deciding whether to enforce a post termination restraint when a garden leave provision has already been enforced, and that where a garden leave provision has been enforced the court will decline to enforce a post termination restraint as the employer would have received all the protection that he was entitled to. In exercising its discretion the court will take into account the period for which the employer is entitled to protection, and whether the employer is entitled to protection for a period beyond that which is made available for in a garden leave provision. The court will exercise its discretion when considering the period for which to enforce a restraint, provided that the restraint is reasonable.

⁵⁴⁶[1998] IRLR 313 (CA).

⁵⁴⁷*Ibid* 301-302.

⁵⁴⁸*Vodacom* (note 78 above) para 23. See *William Hill* (note 546 above) 301.

⁵⁴⁹*William Hill* (note 548 above).

⁵⁵⁰[1996] ICR 882, 892.

⁵⁵¹*Vodacom* (note 78 above) para 24.

⁵⁵²[2010] EWHC 484 (QB).

The New Zealand Employment Court in the case of *Air New Zealand v Grant Kerr*⁵⁵³ held that a garden leave provision should be taken into account by the court when considering the reasonableness of the duration of any post termination restraint.⁵⁵⁴

After considering the foreign cases, the court saw ‘no reason to adopt a different approach.’⁵⁵⁵ The court held that in determining the reasonableness of the duration of a restraint, ‘the full period that an employee is out of the market should be taken into account’,⁵⁵⁶ and that any period of enforced commercial inactivity prior to the termination of employment is relevant in determining the reasonableness of post termination restraint.⁵⁵⁷ The court went on further to state that this position is consistent with the broader public interest which is against experienced and competent employees being inactive and their skills being wasted during an unreasonably long absence from commercial activity.⁵⁵⁸ The reason why highly paid executives command such lucrative remuneration packages is because of the restraint and other ‘golden handcuff clauses’ that are inserted into their employment contracts, and is a factor that should be taken into account when determining the reasonableness of a post termination restraint period. Public policy considerations and the employee’s right to exercise his/her skills need to also be taken into account by the courts.

3.1.1 If Motsa was obligated to serve a notice period

In determining if Motsa was obligated to serve a notice period, the court considered whether or not Vodacom had waived its rights by not requiring Motsa to work out his notice period.⁵⁵⁹ In determining if Vodacom had elected to pay Motsa in lieu of the notice, the court objectively assessed the wording of the communicate between Vodacom and Motsa,⁵⁶⁰ and Motsa’s resignation against the fact that he was reminded by Joosub, Nyoka and Mbungela that the termination of his employment contract was subject to a six month notice clause and a six month restraint and that Vodacom could elect whether or not to enforce these provisions.⁵⁶¹

⁵⁵³[2013] NZEmpc 153 ARC 38/13.

⁵⁵⁴Ibid para 71. See also *Vodacom* (note 78 above) para 25.

⁵⁵⁵*Vodacom* (note 78 above) para 26.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹Ibid para 27.

⁵⁶⁰Ibid para 29.

⁵⁶¹Ibid para 33.

Clause 16 of Motsa's employment contract provided Vodacom with three options with regard to the notice period:⁵⁶²

- i. Motsa would work out the notice period and be paid;
- ii. in terms of the garden leave provision, Motsa would be paid to remain at home but remain available to assist Vodacom and provide a seamless transition of his responsibilities; and
- iii. Vodacom would pay Motsa in lieu of the notice resulting in the immediate termination of Motsa's employment contract and Motsa would have been entitled to the remuneration that he would have earned during the notice period.

Motsa relied on the email communication which was sent by Vodacom on 24 December 2015, and which stated that Motsa was leaving Vodacom with 'immediate effect' to prove that Vodacom paid him in lieu of the notice. However the email did not state that Vodacom did so.⁵⁶³ Motsa also engaged in two telephone conversations with Joosub and Nyoka on 23 December 2015, in terms of which Joosub outlined the options that Vodacom, had available to it, and Nyoka informed Motsa that if he were to resign and take up employment with a competitor, Vodacom would enforce both the notice period and garden leave provision.⁵⁶⁴ Despite Nyoka's advice, Motsa resigned, and intended to join MTN, Vodacom's largest competitor.⁵⁶⁵

Motsa admitted that his only concern, at the time that he read the communicate which was issued by Vodacom on 24 December 2015 was for his reputation. The court held that this concern was inconsistent with his belief that Vodacom had elected to pay him in lieu of the notice.⁵⁶⁶

Motsa failed to establish that Vodacom waived its rights to enforce the notice period as he was unable to point to a single meeting, telephone conversation or item of correspondence, after he had received advice on the options that were available to Vodacom should he resign which indicated that Vodacom had released him from his notice period or that Vodacom had paid him in lieu of the notice.⁵⁶⁷ Furthermore, the words 'immediate effect' did not unequivocally state that Motsa would be leaving the employ of Vodacom with immediate

⁵⁶²Ibid para 30.

⁵⁶³Ibid para 31.

⁵⁶⁴Ibid para 32.

⁵⁶⁵Ibid (note 561 above).

⁵⁶⁶Ibid para 34.

⁵⁶⁷Ibid para 35.

effect or that Vodacom would pay him in lieu of the notice. Moreover, the words ‘with immediate effect’ are a public relations response that is used by corporations on the resignation of their employees.⁵⁶⁸

The six month notice clause was not against public policy, not unreasonable nor unenforceable as the wording of the clause intended to render Motsa commercially inactive for six months, and Motsa was aware of what he was signing when he entered into the employment contract.⁵⁶⁹ Motsa was therefore bound to the notice clause which terminated on 30 June 2016.⁵⁷⁰

3.1.2 Motsa’s restraint undertakings

Motsa’s restraint undertakings were assessed in accordance with the principle that restraint undertakings should include the garden leave period.⁵⁷¹ The intention of a garden leave clause is to sterilise the employee, and during garden leave period Motsa would: be prohibited from having contact with Vodacom’s customers and clients, and not be able to have access to Vodacom’s trade secrets, and any trade connections which may be of value to MTN.⁵⁷²

As Motsa was a senior executive, a director, chief officer of the consumer business unit and a member of Vodacom’s exco, he had intimate knowledge of: strategic: business decisions on a micro-level; decisions taken and instructions issued by the exco in respect of Vodacom’s South African business; and plans that covered every aspect of Vodacom’s business for the forthcoming three years.⁵⁷³ This information would be of benefit to a competitor. The court held that on this basis alone, and the useful life of the information to which Motsa was exposed, a restraint period which spanned a 12 month period following Motsa’s resignation was not unreasonable.⁵⁷⁴ Therefore Motsa’s employment terminated on 30 June 2016 and the restraint undertaking would operate from 1 July 2016 until 31 December 2016, and he had to pay the applicant’s costs as well as the costs of senior counsel.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid para 36.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid para 38.

⁵⁷² Ibid para 39.

⁵⁷³ Ibid para 41.

⁵⁷⁴ Ibid.

4 COMMENTS

This decision of the Labour Court sets a precedent, because the Labour Courts in South Africa have up until now not had an opportunity to consider garden leave clauses and their impact, if any on restraints. The judgement is an indication of the significance and weight that the court will place on information which employees have intimate knowledge, and are in possession of upon their resignation. The case also highlights the importance of an employee being able to prove his/her defence. Motsa was unable to prove any of his claims and as a result failed in his defence. The finding of the court might have been different if he was able to prove his claim. The court's finding also serves as a warning to employers who wish to enforce both garden leave and restraint clauses, in that if both clauses put together results in the employee being on the side-lines for longer than is reasonably necessary to protect the employer's proprietary interests, the restraint may be found to unreasonable and unenforceable.⁵⁷⁵

5 CONCLUSION

Garden leave provisions are a new concept in South African law and are not provided for in the Basic Conditions of Employment Act 75 of 1997.⁵⁷⁶ They are a desirable risk mitigating measure for employers as employees in high executive positions will continue to be head-hunted by competitors' even after a significant period of commercial inactivity.⁵⁷⁷ However, the honourable Judge Van Niekerk stressed that when employers include garden leave provisions into employment contracts, consideration must be given to the length of the provision, and that the broader public policy requires that skilled and experienced employees not be commercially inactive for a lengthy period of time as the consequence could be that their trade abilities will be of no benefit to themselves or their employers.⁵⁷⁸

While every citizen has the constitutional right to choose and practise their profession, trade or occupation freely, this right is not unfettered, and can be regulated by the law on restraint of trade. It is trite that restraint of trade agreements are valid and enforceable, except where the courts can be convinced of its unenforceability. This law arose out of the landmark decision of the then Appellate Division in the *Magna Alloys* case, which has been approved

⁵⁷⁵ L Frahm-Arp 'Garden leave and restraint of trade agreements – can garden leave be an effective substitute for a restraint undertakings or can it cause the restraint undertaking to be unenforceable?' available at <http://www.fasken.com/garden-leave-and-restraint-of-trade/>, accessed on 16 April 2016.

⁵⁷⁶ Moilola (note 458 above).

⁵⁷⁷ Ibid.

⁵⁷⁸ Vodacom (note 558 above).

by the courts in subsequent cases, especially the Supreme Court of Appeal. A consequence of the then Appellate Division's decision is that restraint of trade provisions must be treated in the same way as any other contractual provision involving private parties.

The enforceability of a restraint of trade provision is dependent on the person who is seeking the enforcement of the restraint, having a proprietary interest which justifies protection. In almost all instances this person is the employer. Furthermore, the restraint must be reasonable and not contrary to public policy. The onus is on the employer to invoke the restraint and its breach and the employee must prove on a balance of probabilities that the restraint is unreasonable. The test for reasonableness was set out by the court in *Basson* and has been regarded as one of the most influential statements of law. In addition to this test, many other factors are taken into account. Public policy and constitutional values must always be considered by the courts in determining the enforceability of a restraint.

A restraint which is contrary to public policy is unenforceable. Public policy represents the legal convictions of the community and the values which are held most dear by society. It is deeply rooted in the Constitution and in the values which underlie it. In determining what constitutes public policy, and whether a contractual provision is contrary to public policy reference must be made to the values which underlie our constitutional democracy. As a result, contractual provisions which are contrary to the values that are protected by the Constitution are contrary to public policy, and unenforceable.

Garden leave provisions are a new concept in South African law and are not provided for in the Basic Conditions of Employment Act 75 of 1997. They are a desirable risk mitigating measure for employers as employees in high executive positions will continue to be head-hunted by competitors' even after a significant period of commercial inactivity. The decision of the Labour Court in terms of garden leave sets a precedent, because the Labour Courts in South Africa before February 2016 had not had an opportunity to consider garden leave clauses and their impact, if any on restraints. The judgment serves as a warning to employers who wish to enforce both garden leave and restraint clauses, in that if both clauses put together results in the employee being on the side-lines for longer than is reasonably necessary to protect the employer's proprietary interests, the restraint may be found to unreasonable and unenforceable. Garden leave is an innovation which would soon be adjudicated by the courts throughout South Africa due to the additional protection it affords to the employer.

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