



University of KwaZulu-Natal

School of Law

**RESTRAINT OF TRADE CLAUSES: DOES THE ENFORCEMENT THEREOF
PROMOTE ANTI-COMPETITIVE BEHAVIOUR IN SOUTH AFRICAN LAW?**

By

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Declaration of Candidate

I, Mthokozisi Wesley Nhlakanipho Sithole, hereby declare that the content of this work, unless stated otherwise in the dissertation, is my own and embodies my own views and opinions and not of those of the University of KwaZulu-Natal.

I further submit that this is my own work and it has not been submitted before for any academic examination or assessment in respect of any qualification.



Mthokozisi Wesley Nhlakanipho Sithole

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Chapter 1

Introduction

1.1 Introduction

The motivation behind this research is best illustrated by the following analogy. Zulu Pharmacare (Pty) Ltd sells its subsidiary company BG (Pty) Ltd, an insurance company, to Evercare (Pty) Ltd. Zulu Pharmacare (Pty) Ltd and Evercare (Pty) Ltd conclude a sale of business agreement whereby they incorporate a restraint of trade clause which provides that upon selling its company, Zulu Pharmacare (Pty) Ltd will not be able to operate in the insurance industry as per the restraint of trade clause. After a month from selling the company, Zulu Pharmacare (Pty) Ltd opens up another insurance company and alleges that the restraint of trade clause contravenes section 4(1)(a) of the Competition Act¹ (hereafter referred to as the Act) because the restraint of trade clause may result in inhibiting competition.

Another analogy that motivated this research is a scenario whereby a company, JP's Fried Chicken, signs a restraint of trade clause with its employee Zanele, a previously disadvantaged person. After 10 years working with and for JP's Fried Chicken, Zanele is retrenched due to a downturn in the economy and the introduction of advanced machinery into the business that can do the work Zanele was responsible for. Zanele then decides to start her own company specialising in the same industry as her former employer's company. JP's Fried Chicken therefore enforces the restraint of trade thereby preventing Zanele from successfully starting her own company. Zanele's defence to the contractual claim regarding the restraint of trade clause is that in South Africa the Act and its purpose,² *inter alia*, allows for the promotion and development³ of the South African economy by creating a competitive market as well as to give small businesses an chance to take part in the economy⁴ by trading and competing with other businesses.

As a result of the above, the aim of this research paper is to analyse whether or not enforcing a restraint of trade clause in certain circumstances, such as the above,

¹ Competition Act 89 of 1998.

² Ibid s 2 provides that, 'The Act's purpose is to promote and maintain competition in South Africa.'

³ Ibid s 2(d).

⁴ Ibid s 2(e).

promotes anti-competitive behaviour. This research will further analyse whether or not restraint of trade clauses incorporated in sale of business agreements inhibit competition in terms of section 4(1)(a) and 5(1) of the Act,⁵ which prohibits agreements entered into between companies that may cause the prevention or reduction of competition by, *inter alia*, preventing a company from entering into the market.

1.1.1 Overview of restraint of trade agreements

A restraint of trade restricts an employee's freedom to freely participate and conduct commercial activities at their own discretion or preference.⁶ A restraint of trade can be defined as a term or clause found in a contract that restricts someone from economic activity.⁷ The court's judgment in *Magna Alloys and Research SA (Pty) Ltd v Ellis*,⁸ ('Magna Alloys') stated that, a restraint of trade will be valid as long as it is not unreasonable and *contra bonos mores*. A restraint of trade will be held to be enforceable if it complies with three basic requirements, which are; it must protect a legitimate business interest, it must also not go against public policy, and it must be reasonable in the relevant circumstances. Legitimate business interests that are recognised are exclusive interests that include; highly classified data, trade connections and goodwill of a business.⁹ A legitimate interest that is worthy of protection must exist when using a restraint of trade and it must not be used to rule out lawful competition.¹⁰

An interest that qualifies to be protected by a restraint of trade clause is one that relates to personal and confidential knowledge and/or information of the employer that would enable the employee to influence and take advantage of the employer's customers if competition were to be allowed.¹¹ Therefore, this involves an enquiry by

⁵ Ibid s 4(1)(a) and s 5(1)(a) provides that, 'An agreement entered between companies in horizontal and vertical relationship are prohibited if they result in preventing competition unless any party in such agreement can justify that there is pro-competitive benefit that outweighs the possibility of anti-competitiveness resulting from such agreement.'

⁶ JV Du Plessis and MA Fourie *A Practical Guide To Labour Law* 8 ed (2017) 30.

⁷ Y Mupangavanhu 'The Relationship between Restraints of Trade and Garden Leave' (2017) *PER/PELJ* 2.

⁸ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

⁹ L Foo & W Low 'Restraint of trade: Freedom to contract v freedom to trade in the free trade world' (2013) *Law Gazette*, available at <http://v1.lawgazette.com.sg/2013-04/725.htm>, accessed on 24 March 2018.

¹⁰ *Laser Junction (Pty) Ltd v Fick* 2017 SA ZAKZDHC at para 34.

¹¹ *Medtronic (Africa) (Pty) Limited v Kleynhans and Another* 2015 (2) SA 430 (ZALCJHB).

the court that asks whether the conduct of the employee is one that threatens the legitimate interests of the employer.¹²

Where an employer enforces a restraint of trade clause such an employer will succeed if they can prove that they have a legitimate proprietary interest¹³ worthy of being protecting in terms of law, the restraint is reasonable in regards to the 'geographical area and duration concerned, and the terms of the restraint are reasonable and clear when applied.'¹⁴ Thus, this thesis will look at whether or not if, in certain circumstances, where all three requirements are present, a restraint of trade will result in anti-competitive if enforced.

This research will further analyse restraint of trade clauses concluded between companies in sale of business agreements and whether or not when enforcing such a restraint in a sale of business agreement it will constitute an infringement of the Act. Upon selling its goodwill, a company may never act contrary to the agreements in the restraint.¹⁵ The goodwill of a company is its driving force¹⁶ and a restraint of trade clause is the best tool to protect it where a company is selling its goodwill to another. Where a sale of business agreement has a restraint of trade clause incorporated in it, trading in contravention of such goodwill and restraint of trade clause may result in unlawful and anti-competitive behaviour,¹⁷ however this is not always the case.

In *Nedschroef v Teamcor*,¹⁸ the court held that the restraint of trade clause that was incorporated in the sale of business agreement which prevented Nedschroef from participating in the same industry as its subsidiary company upon selling it, was anti-competitive and thus a prohibited practice which contravened section 4(1)(a) of the

¹² Mupangavanhu (note 7 above; 4).

¹³ *Pam Golding Properties (Pty) Ltd v Greef and Another* 2018 SA 140 ZAGPJHC at para 12.

¹⁴ S Writer 'Restraint of trade-What you need to know' (2018)1 *Business Tech* available at <https://businesstech.co.za/news/business/243849/restraints-of-trade-what-you-need-to-know/>, accessed on 11 June 2018.

¹⁵ *Van der Watt v Jonker* 2011 SA 140 ZASCA para 12.

¹⁶ K Thompson 'Selling a business with its goodwill means that the seller can never come back and impact upon that goodwill' (2013) 1 *Polity* available at <http://www.polity.org.za/article/selling-a-business-with-its-goodwill-means-a-seller-can-never-come-back-and-impact-upon-that-goodwill-2013-01-25>, accessed on 28 November 2018.

¹⁷ *Ibid* 1.

¹⁸ *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd/Waco International Ltd/CBC Fasteners (Pty) Ltd/Avlock International (Pty) Ltd (CT)* (unreported case no 95/IR/Oct05, 1-2-2006) at para 67.

Competition Act.¹⁹ However, courts have further held that restraint of trade clauses incorporated in sale of business agreements do not prevent competition.

Furthermore, the Competition Commission²⁰ held that a restraint of trade clause in a sale of business agreement was not unreasonable nor was it anti-competitive as it did not result in 'lessening and/or preventing competition in the market' and that it did not enhance the acquiring company's market power. This research paper will analyse how competition law and restraint of trade clauses in sale of goodwill business agreements can overlap and if whether or not such restraint of trade clauses result of reducing or preventing competition.

1.1.2 Overview of competition law in South Africa

Previous legislations in South Africa such as the Regulation of Monopolistic Conditions Act of 1955²¹ and the Maintenance and Promotion of Competition Act²² were held to be inadequate and did not develop the economy of South Africa²³ and the need to remedy 'concentration of economic power' was necessary²⁴ thus the Competition Act 89 of 1998 was promulgated in 1999 to provide for a more detailed and effective way of, *inter alia*, improving the economy and addressing anti-competitive behaviour in South Africa.

This Act, through sections 4²⁵ and 5,²⁶ aims at combating anti-competitive behaviours by companies such, *inter alia*, agreements and/or clauses that they enter into that may result in the prevention of competition, and/or preventing the development of the economy of South Africa, unless any party to such clause and/or agreement is able to provide proof of any pro-competitive advantage resulting from such clauses and/or agreement.²⁷

¹⁹ S 4(1)(a) of Act 89 of 1998.

²⁰ See findings of the Competition Commission in *K2017136283 (South Africa) (Pty) Ltd And Crabtree Electrical Accessories SA (A Division of Powertech Industries) (Pty) Ltd/LM137Aug17* para 10-11.

²¹ Act 24 of 1955.

²² Act 96 of 1979.

²³ K Moodaliyar & S Roberts *The development of competition law and economics in South Africa* (2012) ix. See Introduction: Reflecting on the maturing South African competition law regime.

²⁴ M Wise 'Competition law and policy in South Africa' (2004) *OECD Journal* 5(4) 14.

²⁵ S 4(1)(a) of Act 89 of 1998.

²⁶ S 5(1)(a) of Act 89 of 1998.

²⁷ A le Grange & A Aukema 'Vertical agreements and dominant Firms' (2017) 1 *Global Legal Group* 113.

This research will analyse and discuss the purpose of the Act, section 2, and the abovementioned sections regarding restraint of trade clauses in order to reconcile restraint of trade clauses with competition law, particularly anti-competitive behaviour.

Anti-competitive behaviour, amongst many other practices, includes practices whereby dominant companies engage in exclusionary acts that are aimed at preventing competitors from growing in the market or forcing them out of the market.²⁸ Effective competition promotes economic growth and is essential for a free-market economy.²⁹ Section 2 of the Competition Act³⁰ lays out the main purpose of competition law in South Africa which is to ensure that competition is promoted and maintained amongst companies and persons. The Act prohibits unfair competition, abuses of power and anti-competitive behavior in the market.³¹ Myeni³² states that the purpose of the Competition Act³³ starts with economic efficiency and that it is further accompanied by sets of objectives. The objectives of the Competition Act³⁴ are, *inter alia*, to develop the economy of South Africa,³⁵ and to make sure that small and medium sized companies have equal chance to participate in the freely in the market and the economy.³⁶ South Africa's government recognises the importance of small businesses together with the issue of the high unemployment rate.³⁷

²⁸ 'Competition Policy in South Africa' *Investment Analysts Society of South Africa NPC* 2018, available at <http://www.iassa.co.za/competition-policy-in-south-africa/>, accessed on 22/11/2018.

²⁹ T Woker 'Understanding the relationship between franchising and the law of competition' (2006) 18 *SA Merc LJ* 4.

³⁰ Act 89 of 1998.

³¹ S 2 of Act 89 of 1998.

³² W Myeni *Public interest and merger controls in South Africa: The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations* (LLM thesis, 2017) 3.

³³ Act 89 of 1998.

³⁴ S 2 of Act 89 of 1998.

³⁵ *Ibid* s 2(a).

³⁶ *Ibid* s 2 (e).

³⁷ The Department of Trade & Industry: 'The small, medium and micro enterprise sector of South Africa' 2016 Research Note 1 *Bureau for Economic Research* 5. 'The government recognises the importance of small businesses and how South Africa struggles with an alarmingly high national unemployment rate of 25% (Statistics South Africa, Quarter 2: 2015), which is partly exacerbated by a chronic shortage of skilled labour.'

1.2 Purpose and Rationale of the Study

This research's purpose is to discuss whether the enforcement of a restraint of trade clause promoted anti-competitive behaviour in South Africa particularly in the context of employment agreements and sale of business agreements between companies. The purpose of the Act³⁸ is to promote competition and, *inter alia*, ensure that agreements, such as restraint of trade clauses, are not entered into between companies that have the effect of preventing competition. Because of the great concentration in the market by major business and structure of the economy, small and medium business development is important in South Africa.³⁹ Thus, the competition laws regulating our country are aimed at fulfilling this duty by supporting the growth and development of small and medium businesses to take part in South Africa's economy.⁴⁰

The main aim of a restraint of trade agreement is to make sure that a company's interests such as its goodwill, trade secrets and clientele are protected from unfair competition from its competitors or former employees. The purpose of my research is analyse this area of restraint of trade agreements and if whether or not they are contrary to the promotion and maintenance of competition in South Africa.

A company can sell its business to the buyer and then decide to start up another business, using the same capital it received from selling its business, to start another company that will compete with the (now) buyer's company, and these situations are circumvented with the conclusion of a restraint of trade clause. Now section 4(1)(a) and 5(1)(a) of the Act disallows agreements similar to the latter that may result in preventing competition. The purpose of this research paper is to discuss how we can reconcile restraint of trade clauses with competition law.

This research aims to contribute to the law of contract on restraint of trade clauses by providing a different perspective of restraint of trade clauses by looking at restraints from the perspective of competition law in South Africa.

³⁸ S 2 of Act 89 of 1998.

³⁹ T Hartzenberg 'Competitive policy and practice in South Africa: Promoting competition for development symposium on competition law and policy in developing countries' (2006) 26 (6) *Northwestern Journal of International Law & Business* 26 (3) 669.

⁴⁰ S 2(e) of Act 89 of 1998.

1.3 Research Objectives

This premise of this research will be based around the following research questions:

- (i) Under what circumstances will a restraint of trade be unenforceable?
- (ii) How was competition law regulated in South Africa prior to the promulgation of the Competition Act 89 of 1998? How is it currently regulated?
- (iii) Does enforcing a restraint of trade clause result in anti-competitive behaviour?

1.4 Methodology

The method of research I have elected to use will comprise of books and online databases including Oxford Academic, University of KwaZulu-Natal Library, LexisNexis, Sabinet, and Jutastat. I also intend on basing my study on relevant competition law textbooks and articles.

This research aims to provide an analytical overview on the enforcement of restraint of trade clauses and their effects on competition law in South African. Thus, my method of research will be purely based on desktop research whereby I will be analysing and discussing case law and journal articles on competition law and restraint of trade clause.

1.5 Dissertation Structure

In Chapter 2, I will discuss restraint of trade clauses in South Africa and their Constitutionality.

Chapter 3 of this research paper will briefly discuss the history of competition law of South Africa as well as the purpose of the Competition Act. The purpose of explaining the historical overview is to provide knowledge of the history of competition law in South Africa and how the Competition Act came about, that regulates and prohibits anti-competitive conducts by companies. The advent of the Competition Act was to ensure that amongst other purposes and ambitions, that the economy in the country is diversified so as to benefit all the citizens of South Africa. Koornhof & Prins⁴¹ stated that the aforementioned ambitions were translated into the

⁴¹ D Davis 'The development of competition law and economics in South Africa' *South African Law Journal* (2014) 131, Issue 3 712.

preamble and purpose (Section 2) of the Competition Act in order to ensure the development and 'democratisation' of the economy and to address historical disadvantage.

In Chapter 4, I will discuss competition law in South Africa and restraint of trade clauses and if whether or not there is an overlap between the 2 and further, if competition laws should be considered when enforcing the restraint of trade clause.

In chapter 5 I will conclude my dissertation by providing recommendations and possible solutions to my research problem by discuss the possibility of whether restraint of trade clauses can still be operative and allowed only to the extent that it does not curtail or suppress competition in regards to allowing a former employee to start a company. Furthermore, I will also discuss whether or not the Competition Act should also be taken into consideration when evaluating the enforcement, effect and reasonableness of restraint of trade clauses.

Chapter 2

Restraint of trade clauses in South Africa and their constitutionality

2.1 What is a restraint of trade in South Africa

This chapter will discuss the legal principles of the doctrine of restraint of trade clause in South Africa without limiting it only to the restraint of trade clause in the employment context. A restraint of trade is whereby a person agrees to curtail their, *inter alia*, freedom to choose employment, occupation and/or to start a business that will be in competition with their former employer after their employment terminates. A restraint is a restriction on an employee's freedom to participate and conduct commercial activities at their own discretion or preference.⁴² Whitcher J⁴³ described a restraint of trade as an agreement which can only be enforceable if it aims at protecting legitimate interests which include, but are not limited to, confidential information and customer or trade influences and connections, and such interests, in terms of the law, must be deserving of protection. A restraint of trade is a clause that forms part of an employment contract or a sale of business agreement which aims at preventing a person or a company from exercising and/or engaging in a trade or profession at the person's discretion and imposes limitation on the free will of such person.⁴⁴

Msizi J⁴⁵ stated that the sole purpose of a restraint is to eliminate possible sabotage by the former employee, by precluding such employee, who has relies on information obtained whilst with the former employer, from establishing themselves riding on information acquired whilst with the former employer.

⁴² JV Du Plessis et al *A Practical guide to labour law* 8 ed (2017) 30.

⁴³ *Aquatan (Pty) Ltd v Janse Van Vuuren and Another* 2017 (2) SA 141 ZALCJHB at para 41.

⁴⁴ 'Restraint of trade: What effect does it have today?' *Management Today*, 16 September 2006 available at, http://journals.co.za.ukzn.idm.oclc.org/docserver/fulltext/mantod/22/8/mantod_v22_n8_a23.pdf?expires=1529257227&id=id&accname=57926&checksum=7C6AE5F1721666536B60D3AA698B253A, accessed on 11 June 2018, 55.

⁴⁵ *City Paint & Tool (Pty) Ltd v Chamberlain and Another* 2018 SA 27 ZAECPEHC.

2.2 The legality of a restraint of trade

Prior to *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,⁴⁶ South African courts followed the English position which state that restraint of trade clauses are not consistent with public policy and are invalid. The South African legal system on restraint of trade clauses shifted away from English law influence to a more Roman-Dutch law influence. In *Magna Alloys*⁴⁷ the Appellate Division held that in Roman-Dutch law there was no rule to the effect that restraint of trade contracts were not enforceable. In *Knox D'Arcy v Shaw*⁴⁸ Van Schalkwyk J stated that:

'The origin of English laws on restraint of trade clauses that they are *prima facie* invalid goes back to ancient times where employees were at not at an advantage when it came to entering into employment with their employers. It is now obvious that principles underlying English law has long since been overhauled by events and development and that now there are no public policy reasons as to why an employee who voluntarily consents to a restraint of trade clause should be presumed to be at a disadvantage.'⁴⁹

In the context of an employment contract, the constitutionality of restraint of trade clauses in South Africa has been a contentious topic on numerous occasions. According to Calitz section 22 of the Constitution,⁵⁰ which protects a person right to work must not be interpreted in isolation.⁵¹ Thus, it is submitted that the rights to freedom of movement,⁵² the right not to be subjected to forced labour, the right to freedom of association⁵³ and the right to dignity⁵⁴ should also be one of the factors that are taken into consideration when the right to a trade is considered.

In *Affordable Medicines Trust v Minister of Health*⁵⁵ it was indicated that a person's ability to work and their labour forms part of their dignity and identity. Human dignity was held to be an important component to the freedom to work in *Minister of Home Affairs v Watchenuka*.⁵⁶

'Even in instances where it is not required in order to survive, the freedom to engage in productive work remains an important element to human dignity...A person's self-worth and,

⁴⁶ 1984 (4) 874 (A).

⁴⁷ 1984 (4) SA 874 (A).

⁴⁸ *Knox D'Arcy v Shaw* 1996 (2) SA 651 (W).

⁴⁹ *Supra* at para 650.

⁵⁰ Section 22 of the Constitution.

⁵¹ K Calitz 'Restraint of trade agreements in employment contracts: Time for pacta sunt servanda to bow out?' (2011) 1 *Stell LR* 64.

⁵² S 21(1) of the Constitution.

⁵³ *Ibid* s 18.

⁵⁴ *Ibid* s 10.

⁵⁵ 2005 (6) SA 529 (CC) at para 59.

⁵⁶ 2004 (2) SA 120 (SCA).

and their satisfaction of what being a human is, is most often associated with being recognised and acknowledged socially.⁵⁷

Enforcing a restraint of trade clause in South Africa is dependent on the purpose and/or rationale for the restraint of trade, the nature and type of activity of the employee or company restrained, the duration and area stipulated in the restraint of trade clause, as well as the parties bargaining and economic positions to the restraint of trade.⁵⁸

For the restraint of trade to be rendered enforceable in South Africa, it must be aimed at protecting a legitimate interest, not be contrary to public policy and be reasonable. Therefore, if a company aims at enforcing a restraint on another, after the sale of business, it must establish that it has a goodwill that it has procured and that such goodwill is worthy of protection as it is a legitimate interest that can be protected by the restraint of trade clause. Cachalia J⁵⁹ stated that a restraint of trade clause is unenforceable if it is unreasonable, thus contrary to public policy, and if it does not protect an interest of the employer that is recognized in law, but is merely aimed at eliminating the employer's competition. An unreasonable restraint of trade would be one that, *inter alia*, does not have an interests worth protecting⁶⁰

2.2.1 Reasonableness of a restraint of trade

To enforce a restraint one must show that it is reasonable *inter partes*.⁶¹ Seegobin J⁶² stated that a restraint of trade agreement is only enforceable and valid unless it is held to be unreasonable. Reasonableness is a vital criterion in determining if a restraint of trade clause is *contra bonos mores*.⁶³ The enquiry of reasonableness involves taking into considerations the prevailing facts and circumstances of the parties at the time the restraint of trade clause is enforced.⁶⁴ Courts generally ask whether the particular restraint of trade clause is applied reasonably in order to protect the relevant business interests.⁶⁵ Thus, a court will have to decide if an

⁵⁷ *Supra* at para 25 to 30.

⁵⁸ *WNS Global Services SA (Pty) Ltd v Hayes* 2018 SA 175 ZALCJHB at para 43.

⁵⁹ *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) at para 20.

⁶⁰ *Profibre Products (Pty) Ltd v Govindsami* 2018 (2) SA 240 (ZALCJHB) at para 17.

⁶¹ *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at para 47.

⁶² *Johannes Van Veijeren t/a Van Veijeren & Partners v Kruger* 2016 SA ZAKZPHC at para 1.

⁶³ A Naidoo *Recent case law on the Influence of the Constitution on the Enforceability of Restraint of Trade Agreements* (unpublished LLM thesis, University of Pretoria, 2013) 44.

⁶⁴ *Best Advice Financial Services (Pty) Ltd v Smith and Another* 2018 SA 46 ZAFSHC at para 14.

⁶⁵ C Arup *et al* 'Restraints of Trade: The Legal Practice' (2013) 36(1) *UNSW Law Journal Volume 4*.

employer or a company in a sale of business has a restraint that is reasonable in the circumstances in protecting their interests. In *Basson v Chilwan*⁶⁶ the court provided four considerations that should be looked at when considering the enforcement and reasonableness of a restraint of trade, and they are;

- 'Is there an interest deserving of protection?;
- If so, is that interest being threatened by the other contracting party?;
- If the latter is applicable, does the interest weigh quantitatively and qualitatively against the interest of the other party not to be economically inactive and unproductive?; and
- Is there any aspect of public policy which has nothing to do with the relationship of the contracting parties that requires that the restraint of trade be rejected or maintained?

The reasonableness of the restraint of trade clause is connected with, *inter alia*, the duration stipulated in the restraint of trade clause, hence, an unreasonably lengthy duration can cause such a clause to be unreasonable and thus not enforceable.

The time stipulated in the restraint of trade of trade clause has to be reasonable and such will be subject to the circumstances, thus, in practice this will mean a reasonable duration of the restraint.⁶⁷ The period in a restraint is one of the ways in which the interests of the parties can be weighed and where a restraint of trade clause is involved, the period expressed in the restraint of trade clause is an important factor when assessing reasonableness.⁶⁸ The aim of a restraint of trade is to protect an employer's trade secrets and such restraint remains operative for the duration specified, of which such duration must be reasonable.⁶⁹ Principles concerning reasonableness of the period of the restraint are also relevant and important factors and they are normally assessed as one of the ways of evaluating the reasonableness of the restraint of trade clause, therefore it is imperative to note that the duration or period in the restraint of trade clause must be rational and reasonable.⁷⁰

⁶⁶ 1993 (3) SA 742 (A) at para 46-47.

⁶⁷ IGC Stratton 'Restraint of trade during and on the termination of a contract of employment' (2001) *Dening Law Journal* 119.

⁶⁸ C Arup 'What/whose knowledge? Restraint of trade and concepts of knowledge' (2012) 36(1) *Melbourne University Law Review* 392.

⁶⁹ *Reeves v Marfield insurance Brokers* 1996 3 SA 766 SCA at para 18.

⁷⁰ *Aquatan (Pty) Ltd v Janse Van Vuuren and Another* 2017 (2) SA 141 ZALCJHB at para 45.

According to Seymour⁷¹, there is no clear-cut boundary or line that can be said exist in regards to the restraint of trade clause to be rendered reasonable, and beyond which, excessive, therefore, one of the primary elements in determining if a restraint is reasonable is the range of the region or area from which a person is restricted. In *Barkhuizen v Napier*, Ngcobo J⁷² stated that the period of the restraint of trade clause or rather its reasonableness should be evaluated with reference to the relevant circumstances of the parties. Courts should, in determining the reasonableness of a restraint of trade clauses, make a value judgment and the important considerations that come into play are two, the first being the right to trade, or practice a particular profession and the second being public interest.⁷³ A restraint of trade clause will be unreasonable in instances whereby the interest of restrained employee outweighs the interest of the employer or the company that is deserving of protection.⁷⁴ The restraint of trade doctrine must ensure that there is a balance struck between safe guarding the employer's legitimate secrets and simultaneously ensure that such protection does not go beyond reasonable bounds,⁷⁵ and the reasonable bounds, referred to above, in the context of a sale of business contracts would be if the restraint does not contravene section 4(1)⁷⁶ and 5(1)⁷⁷ of the Act.

According to Boules and Macpherson,⁷⁸ even if a party endeavours to protect a legitimate business interest, should the restraint of clause be found to be overreaching and unreasonable it is likely to mean that the clause will be deemed to be void. When considering the reasonableness of any restraint of trade clause, it is necessary to examine the reasonableness of the restraint of trade clause in two parts, firstly, according to the public interests and, secondly, between the parties.⁷⁹ In

⁷¹ C Seymour *Agreements in Restraint of trade* (Unpublished LLM thesis, Cornell University, 1891)

11.

⁷² SA (5) 323 (CC) at para 64.

⁷³ *Document Warehouse (Pty) Limited v Truebody and Another* 2010 SA ZAGPJHC at para 20.

⁷⁴ 'Restraint of Trade: The Vexed Question – Is It Reasonable?' *Shepstone & Wylie* 3 October 2017, available at <http://www.wylie.co.za/articles/restraint-trade-vexed-question-reasonable/>, accessed on 21/06/2018.

⁷⁵ S Kapnaoullas & B Clarke 'Confidentiality agreements and the protection of trade secrets: does it have to be all or nothing?' (2005) 10(1) *Deakin Law Review* 14.

⁷⁶ S 4(1)(a) of Act 89 of 1998.

⁷⁷ S 5(1)(a) of Act 89 of 1998.

⁷⁸ 'Drafting and enforcing restraint of trade clauses: Recent developments and trends' Corney & Lind Lawyers, 4 March 2015 at 3, available at <http://www.corneyandlind.com.au/wp-content/uploads/2015/03/Restraints-of-Trade-Article-presented-by-Alistair-Macpherson.pdf>. Accessed on 21/06/2018.

⁷⁹ JD Heydon 'Recent Developments in Restraint of Trade' 1975 21(3) *McGill Law Journal* 19.

South African Recycling Equipment v Leleux,⁸⁰ Tlhotlhemaje J explained the balancing of interests in relation to the reasonableness of the restraint of trade clauses in employment contracts as follows;

‘when a restraint of trade is enforce, courts must make sure that they strike a balance between the interests of both parties. Other than constitutional concerns, the balancing acts which courts have to undertake in considering the enforceability or otherwise the reasonableness of the restraint of trade is that of having to weigh between circumvention of limiting or even inhibiting healthy competition and the sanctity of contracts.’⁸¹

Tlhotlhemaje J seems to indicate that weighing the sacredness of contracting with the need to avoid restricting healthy competition is one of the ways of establishing if the restraint of trade clause is reasonable or not. Rochow adds on by saying that reasonableness of a restraint of trade clause therefore involves the weighing of the restraint of trade clause’s effects, on the one hand, and the quantum of the benefit the enforcer of the restraint will receive as a result of the restraint of trade clause on the other hand.⁸² The test of reasonableness is a subjective test dealing with the particular persons involved. In nineteenth century restraint of trade cases the use and/or application of the word ‘reasonable’ may be understood better from a moral and ethical viewpoint rather than one of assessing the reasonable person’s perspective or the balancing of probabilities.⁸³

In *Replication Technology Group (Pty) Ltd v Gallo Africa Limited*⁸⁴ the court held that RTG had not been restrained in such a way that it would not be able to participate in the market as it had already maintained contact with its main customers, and that it had remained in the market for a long time, thus the restraint of trade clause in the sale of business agreement was held to be reasonable and enforceable. This decision indicated that where reasonableness on a restraint of trade clause in a sale of business agreement will not only depend on the duration of the restraint, but also the type of business, nature and impact the restrained company has in the market where it is restrained from participating in.

⁸⁰ *South African Recycling Equipment v Leleux* 2013 13 SA 519 ZALCD.

⁸¹ *South African Recycling Equipment v Leleux* 2013 13 SA 519 ZALCD at para 40.

⁸² N Rochow ‘Toward a modern reasoned approach to the doctrine of restraint of trade’ (2014) 5 The Western Australian Jurist 24.

⁸³ C Dent ‘Unpacking post-employment restraint of trade decisions: The motivators of the key Players’ (2014) 26(1) *Bond Law Review* 15.

⁸⁴ *Replication Technology Group (Pty) Ltd v Gallo Africa Limited* (92/1R/Sep07) [2007] (CT) at 32.

Two requirements must be satisfied in order for the restraint of trade clause is found reasonable. Firstly, the party seeking to enforce the restraint must have a legitimate interest and secondly, the restraint of trade clause must not be one that goes any further than what is needed to protect such interest.⁸⁵ A restraint of trade clause in an employment contract is deemed unreasonable if it is aimed at doing greater than what is required in order to offer protection to the person for whose advantage the restraint of trade clause is imposed.⁸⁶

Although a restraint of trade clause in an employment contract is deemed valid and legal, the question however is that, is the restraint of trade clause reasonable⁸⁷, therefore the yardstick the courts use to decide on the enforceability of a restraint of trade clause is reasonableness.⁸⁸

2.2.2 Legitimate interested protected

The main purpose for a restraint of trade is to protect a valid and legitimate interest of the person enforcing the restraint of trade and restrict the employee's commercial conduct. A goodwill of a company is a valid enough interest that comprises of two factors, where the business is located and force or impact.⁸⁹ Thus, where a company can show that it has bought the goodwill from the restrained party, it can successfully argue that such goodwill is one deserving of protection by the restraint of trade clause.

Referring to employer and employee restraint, Steenkamp J⁹⁰ stated that a restraint of trade clause is enforceable in restricting the employee's trade or activities if the employee, for example, had access to the company's customers and know-how and could use these to the advantage of a competitor or to the detriment of the

⁸⁵ J Johnson 'Restraint of trade law in sport' (2009)10 *Sports Law eJournal* 2.

⁸⁶ McEwen & Chambers 'Employee restraint of trade clauses and confidential information' (2008) available at [http://old.vicbar.com.au/GetFile.ashx?file=pdf/Graeme%20McEwen%20Employee%20Restraint%20%20Trade%20Clauses%20and%20Confidential%20Information%20Article\(15%2008%2008\).pdf](http://old.vicbar.com.au/GetFile.ashx?file=pdf/Graeme%20McEwen%20Employee%20Restraint%20%20Trade%20Clauses%20and%20Confidential%20Information%20Article(15%2008%2008).pdf), accessed on 1 July 2018.

⁸⁷ PG Luckman *Restraint of trade in the employment context* (Unpublished LLM thesis, Nelson Mandela Metropolitan University, 2007) 16.

⁸⁸ Y Mupangavanhu 'The Relationship between Restraints of Trade and Garden Leave' (2017) *PER/PELJ* 6.

⁸⁹ *Van der Watt v Jonker* 2011 SA 140 ZASCA para 12

⁹⁰ *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and Another* 2011 SA 198 ZALC.

employer's company. Christie⁹¹ states that what should be analysed depends on whether the restraint is seeking to protect the interests of the party enforcing the restraint and, if so, whether the activity or conduct of the employee sought to be restrained falls within limits reasonably necessary to protect that interest.

The court in *Reeves v Marfield Insurance Brokers*⁹² explained the purpose and aim of a restraint of trade clause by stating that, 'the legitimate object of a restraint of trade clause is to protect goodwill and trade secrets.' Therefore, where a company or an employer proves that their goodwill is at risk and that such goodwill exists, it will render the restraint enforceable as it is aimed at protecting the interest rather than preventing competition.

In employment contract, the emphasis is on the interests of the employer when enforcing a restraint of trade and factors involving the interests of the employee have not always been considered.⁹³ To establish if there is a right to enforce the restraint, the court must consider whether there is an interest that deserves protection and if there is, whether the employee is in a position to threaten that interest and further, if that must interest should be weighed alongside the employees interest of not being economically active and unproductive.⁹⁴

Restraint of trades are created primarily to ensure the preservation of confidential information,⁹⁵ customer connections⁹⁶ and/or trade secrets⁹⁷ The accepted proprietary interests include, but not limited to, the maintenance of workforce, goodwill, highly confidential information and trade connections.⁹⁸ In *Super Safes (Pty) Ltd v Voulgarides*,⁹⁹ the court stated that the interest sought to be protected in a restraint of trade clause may include the employer's trade secrets and connections that that the employer needs to be protected against the exploitation by a person

⁹¹ GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) 427.

⁹² 1996 3 SA 766 (SCA) at para 18.

⁹³ K Calitz 'Restraint of trade agreement in employment contracts: Time for pacta sunt servanda to bow out?' (2011) (1) *Stell LR* 53.

⁹⁴ *Continuous Oxygen Suppliers v Meintjes* 2011 2 SA LCJHB at para 10 page 27.

⁹⁵ A Naidoo *Recent case law on the Influence of the Constitution on the Enforceability of Restraint of Trade Agreements* (Unpublished LLM thesis, University of Pretoria, 2013) 46.

⁹⁶ *Basson v Chilwan* 1993 (3) SA 742 (A).

⁹⁷ *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T).

⁹⁸ Foo & Low 2013. <http://www.lawgazette.com.sg/2013-04/725.htm>. Accessed on 1/07/2018.

⁹⁹ 1975 (2) SA 783 (W).

whom the employer had employed. The issue with legitimate interest is whether the interest is one that is threatened by the conduct of the employee.¹⁰⁰

Stratton¹⁰¹ states that usually the employee's role in the operation of the business as well as the type of business of the employer will indicate whether the interest sought to be protected is one deserving protection. An restraining company or employer must first be able to identify a business interest that is protectable legitimately in order for it to be protectable by the restraint of trade clause,¹⁰² hence in the case of an employment contract, the employer must show that it will suffer damages should the employee not be restrained.¹⁰³ However, in the case of restraints in sale of business agreements, the restrained company will usually show that it will suffer damages if the restraint of trade clause is enforced and that the restraint contravenes the Act.¹⁰⁴

Courts must always endeavour to first establish the evidence that pertains to the employer's confidential information regarding its customers when deciding on whether or not to protect the employer's interests, before it can decide to restraint the employee and from having influence over the customers as well.¹⁰⁵ Therefore, employers must be aware of the fact that restraints will only be enforceable where there is an interest worthy of protection, and that the employer can prove such interest.¹⁰⁶ The legitimate interests that are deserving of protection include goodwill, confidential information and trade secrets, thus only the aforementioned interests may be protected by the restraint of trade clause and not just prevention of competition.¹⁰⁷

¹⁰⁰ *Super Group Trading (Pty) Ltd v Naidoo* 2015 SA DHC.

¹⁰¹ IGC Stratton 'Restraint of trade during and on the termination of a contract of employment' (2001) *Denning Law Journal* 118.

¹⁰² *Strike Productions (Pty) Ltd v Bon View trading 131 (Pty) Ltd and Others* 2011 (1) SA ZAGPJHC.

¹⁰³ 'Drafting and enforcing restraint of trade clauses: Recent Developments and trends' Corney & Lind Lawyers, 4 March 2015 at 3, available at

<http://www.corneyandlind.com.au/wpcontent/uploads/2015/03/Restraints-of-Trade-Article-presented-by-Alistair-Macpherson.pdf>. Accessed on 2 July 2018.

¹⁰⁴ *Replication Technology Group Supra* note 19 above at 1.

¹⁰⁵ C Arup 'What/whose knowledge? Restraint of trade and concepts of knowledge' (2012) 36(1) *Melbourne University Law Review* 395.

¹⁰⁶ 'Restraint of trade clauses - separating the chaff from the wheat' *Polity* 4 September 2009, available at <http://www.polity.org.za/article/restraint-of-trade-clauses---separating-the-chaff-from-the-wheat-2009-09-04>. Accessed on 2 July 2018.

¹⁰⁷ McEwen & Chambers 'Employee restraint of trade clauses and confidential information' (2008) available

2.2.3 The restraint must not be contrary to public interest

Mupangavanhu¹⁰⁸ states that the doctrine of public policy is never stagnant and it is not easy to comprehensively define, but it refers to the court's considerations and analysis's when interpreting contracts. Dike states that 'freedom of trade doctrine is hinged on public policy and is based on the principle that public interest functions the best where parties in a commercial transaction are at liberty to enter legal relations without any form of restriction as to whom, where and when such legal relations may be made.'¹⁰⁹

In explaining public policy, the court¹¹⁰ held that:

'Public policy requires that restrained parties in terms of restraint clauses should be able to compete freely and fairly in the market place to use their skills their advantage; and where the restraint of trade is aimed at curbing or preventing fair competition it will be contrary to public policy and unreasonable.'¹¹¹

To assess whether the restraint of trade is reasonable the court must assess, *inter alia*, whether or not an aspect of public policy exists that either works against or is in support of the enforcement of the restraint of trade clause.¹¹² Johnson¹¹³ is of the opinion that a contract will not be enforceable if it contains provisions that are not in line with public policy. Therefore, in order for courts to accept restraint of trades the clause must remain in conformity with public policy and not be *contra bonos more*.

In a merger between *Heinz Foods South Africa (Pty) Ltd and Today Frozen Foods Today Frozen Foods (a business unit of Pioneer Foods (Pty) Ltd)*,¹¹⁴ the Competition Tribunal had to consider the restraint of trade clause that prohibited both companies from competing with one another for the duration of the partnership. The Competition Tribunal held that the restraint of trade clause did not have any concerns of public

at, [http://old.vicbar.com.au/GetFile.ashx?file=pdf/Graeme%20McEwen%20Employee%20Restraint%20Trade%20Clauses%20and%20Confidential%20Information%20Article\(15%208%2008\).pdf](http://old.vicbar.com.au/GetFile.ashx?file=pdf/Graeme%20McEwen%20Employee%20Restraint%20Trade%20Clauses%20and%20Confidential%20Information%20Article(15%208%2008).pdf), accessed on 1 July 2018.

¹⁰⁸ B Mupangavanhu 'Yet another Missed Opportunity to Develop the Common Law of Contract? An Analysis of Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd [2011] ZACC 30' 2013 1 *Speculum Juris* 27(1) 154.

¹⁰⁹ O Dike 'Do area of mutual interest agreements breach the doctrine of freedom of trade?' 2008 *University of Dundee* 6*.

¹¹⁰ *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 T.

¹¹¹ *Ibid* at 289 para 4.

¹¹² *Best Advice Financial Services (Pty) Ltd v Smith and Another* SA 46 2018 ZAFSHC at para 15.

¹¹³ J Johnson 'Restraint of trade law in sport' (2009)10 *Sports Law eJournal* 1.

¹¹⁴ Competition Tribunal case no.: 42/LM/Aug03.

interest and thus it was enforceable.¹¹⁵ In this case, the court considered the impact of the restraint of trade and partnership it had on employment and noted that it would not result in major job losses thus not significantly affecting public interest.¹¹⁶ The Competition Tribunal showed that there is a need to evaluate the impact of a restraint of trade clause on employees as a matter of public interest and if it will not adversely affect their employment. Therefore, this case reveals that in restraint of trade clauses involving companies, public interest involves assessing the impact the restraint will have on employment.

In *Basson v Chilwan*¹¹⁷ the court referred to the decision in *Magna Alloys*¹¹⁸ where the court explained on the aspect of public policy the court as follows:

‘...The public interest must, therefore, be the courts’ benchmark when deciding whether or not they will enforce the restraint of trade clause or not.’

Assessing a restraint involves the weighing up of two main considerations;¹¹⁹ the first is that it is commonly required by public interest that the parties to a restraint of trade agreement should comply with their contractual obligations, whether or not they are unfair and unreasonable.¹²⁰ The second consideration is that all persons, for the sake of public policy and interest, be permitted to freely engage in professions of their choice.¹²¹

In evaluating the enforceability and validity of a restraint of trade clause, the court in *Automotive Tooling Systems v Wilkens*¹²² looked at the knowledge that the and skills that the employee had obtained during its employment with its employer, and the held that the employer had no interest that could be protected hence, the restraint of trade clause was found to be to unenforceable and inimical to public policy. In determining the enforceability of a restraint of trade clause, the courts must always consider constitutional values and public policy.

¹¹⁵ Ibid 21.

¹¹⁶ Ibid 18-19.

¹¹⁷ 1993 (3) SA 742 (A) at para 50.

¹¹⁸ 1984 (4) SA 874 (A).

¹¹⁹ *Laser Junction (Pty) Ltd v Fick* 2017 SA ZAKZDHC at para 35.

¹²⁰ A Danka *A Discussion Surrounding Restraint of Trade in Employment Law* (Unpublished LLM thesis, University KwaZulu-Natal, 2017) 10.

¹²¹ *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 794.

¹²² 2007 (2) SA 271 SCA.

A restraint of trade clause is held to be unreasonable if it goes against public policy hence, it is important to establish whether such public policy requires the restraint of trade to be upheld or rejected.¹²³ In *Barkhuizen v Napier*,¹²⁴ the court expounded on the issue of contracts that are not in conformity with public policy by stating that:

‘What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values cherished in our Constitution is contrary to public policy and is, thus, unenforceable.’¹²⁵

The conclusion of a restraint of trade clause must also involve the balance of competing public interests,¹²⁶ and if a restraint of trade raises a question of public interest that needs to be addressed the court should address that particular public interest first.¹²⁷ Magkoka J stated that it is commonly accepted, that a restraint of trade clause will be contrary to public policy if it fails to protect any proprietary interest and simply seeks to inhibit competition.¹²⁸ It is pertinent to note that courts hold the public interests in high regard and as paramount¹²⁹, without it, any contract formed will not be enforceable. Courts will be loath to enforce a restraint of trade with provisions that are unreasonable¹³⁰ and contrary to public policy.¹³¹

2.3 Conclusion

It is important to note that after the *Magana Alloys*¹³² case, restraint of trade clauses are *prima facie* valid and enforceable until proven otherwise. Further to the afore ventilated, restriction of the employee’s right to trade or engage in economic activities using a restraint of trade clause is allowed provided that the three requirements are met. It has been established on what grounds will a restraint of

¹²³ ‘Restraint of trade: A guide for employers’ *Business Report* 2 April 2016, available at <http://www.iol.co.za/business/news/restraint-of-trade-a-guide-for-employers-2003761>. Accessed on 6/07/2018.

¹²⁴ 2007 (5) SA 323 (CC).

¹²⁵ Ibid at para 29.

¹²⁶ L Foo & W Low ‘Restraint of trade: Freedom to contract v freedom to trade in the free trade world’ (2013) *Law Gazette*, available at <http://v1.lawgazette.com.sg/2013-04/725.htm>, Accessed on 6/07/2018.

¹²⁷ *Laser Junction (Pty) Ltd v Fick* 2017 SA ZAKZDHC at para 24.

¹²⁸ *Potgieter v Meyer* 2016 (7) SA 533 ZAGPPHC at para 14.

¹²⁹ *Printing and Numerical Registering Co v Sampson* (1875) LR 19: an English patent and contract law case.

¹³⁰ *WNS Global Services SA (Pty) Ltd v Hayes* SA 2018 175 ZALCJHB.

¹³¹ *Document Warehouse (Pty) Limited v Truebody and Another* SA 269 2010 ZAGPJHC.

¹³² 1984 (4) 874 (A).

trade clause be enforced and when it will not. Where an employer uses a restraint of trade clause as a tool that completely shuts out competition, instead of protecting its legitimate interests, such a restraint will not be enforceable. Thus, as it stands, the law requires a legitimate interests in order for a restraint to be enforceable by the employer. Further to the above, regarding restraint amongst companies, it can be noted that the goodwill of a company, as its driving force and valid interest, it is what the court will look to evaluate when deciding if whether or not to uphold a restraint.

The findings of the Competition Tribunal¹³³ is evident that the public policy or public interest aspect is one involving the impact the restraint will have on employment and further to the above, is one that will be considered when evaluating the validness of a restraint of trade clause between companies. It is clear that restraint of trade clauses in employment agreements are sometimes evaluated differently to those between two companies, however both have the effect of inhibiting competition if not applied correctly as discussed in the above chapter. The latter shall be discussed in detail in my chapter 4 if whether or not the enforcement of restraint of trade clauses inhibits competition.

¹³³ Competition Tribunal: *Heinz Foods South Africa (Pty) Ltd v Today Frozen Foods (Pty) Ltd*, Case no: 42/LM/Aug03.

Chapter 3

Competition law in South Africa

3.1 Brief historical background of competition law in South Africa

For the purpose of this research, it is important to understand the history of competition law in South Africa and how South Africa's competition law jurisprudence has developed over the past decades concerning the regulation of, *inter alia*, unfair competition. In the past, the Board of Trade and Industry (hereinafter referred to as 'the Board') dealt with South Africa's competition law matters.¹³⁴ During the early 20th century South Africa had no overarching competition law legislation that was broad and therefore, with an attempt to broaden the Board's scope, the Undue Restraint of Trade Act¹³⁵ was introduced, but its tenure was short-lived as it received criticism by the Board itself.¹³⁶

The Board did not have an executive independent authority, rather it was an administrative body that was tasked with only making suggestions and recommendations to the Minister of Trade and Industry who then decided unilaterally whether to accept or reject any recommendations by the Board.¹³⁷ With a capacity that restricted its scope as well as few staff and limited resources,¹³⁸ the Board only provided for advice on the administrative process and recommended action¹³⁹ within the standard of public interest. Advice on issues on competition policy¹⁴⁰ was provided by the Board, and during the periods of 1923 to 1944 one of its reports led to South Africa's first legislation on competition law, the Regulation of Monopolistic Conditions Act of 1955.¹⁴¹

Under this Act,¹⁴² anti-competitive practices were defined, but none of the practices were controlled and prohibited. In 1980, a brand new competition law regime was

¹³⁴ P Koornhof & D Prins 'Assessing the Nature of Competition Law Enforcement in South Africa' *Law, Democracy and Development* 18 138.

¹³⁵ Undue Restraint of Trade Act 59 of 1949.

¹³⁶ Koornhof & Prins (note 134 above; 138).

¹³⁷ R Simon 'The Role for Competition Policy in Economic Development: The South African Experience' (2004) 24 (1) 5.

¹³⁸ *Ibid* 137.

¹³⁹ M Wise 'Competition law and policy in South Africa' (2004) *OECD Journal* 5(4) 7.

¹⁴⁰ Myeni (note 36 above; 10).

¹⁴¹ Wise (note 139 above; 12).

¹⁴² Act 24 of 1955.

proposed by *The Mouton Commission Report* which ultimately led to the Maintenance and Promotion of Competition Act¹⁴³ and through this act South Africa's first specialised and independent board was established, the Competition Board.¹⁴⁴ This board dealt with a variety of competition law matters related to restrictive practices¹⁴⁵ until 1999.¹⁴⁶

According to Brooks, the aforementioned Act¹⁴⁷ had a number of shortcomings such as ineffective investigations on anti-competitive behaviour namely, *inter alia*, collusive price fixing and collusive market sharing. This Act's¹⁴⁸ subsequent enforcement and investigations by the relevant Minister¹⁴⁹ resulted in the Minister's involvement being too 'extensive and decisive' as it had the authority to instruct the Competition Board to investigate or not to investigate matters and this led to an issue whereby 'political expediency rather than sound competition law analysis and resolution prompted the minister's decision.'¹⁵⁰ It is evident that these 'structural and behavioural rigidities' posed by the Act¹⁵¹ prevented the proper development of South Africa's economy.¹⁵²

After 1994, the government of South Africa wanted to create a unique and customised piece of competition law legislation that would eliminate anti-competitive behavior and concentrated ownership in the market that favoured white families, and one that would ensure the promotion of markets that would benefit the entire population of the South Africa and not a single race group.¹⁵³ Thus, one of the policies and measures taken by the government as a 'tool for consensus building' in order to achieve the above as well as growth and free access to the economy for all was through, *inter alia*, the formation of NEDLAC (National Economic Development

¹⁴³ Act 96 of 1979.

¹⁴⁴ Koornhof & Prins (note 134 above; 139).

¹⁴⁵ Koornhof & Prins (note 134 above; 139).

¹⁴⁶ Simon (note 137 above; 5)..

¹⁴⁷ Act 96 of 1979.

¹⁴⁸ Act 96 of 1979.

¹⁴⁹ P Brooks 'Redefining the objectives of South African competition law' (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 297.

¹⁵⁰ *Ibid* 298.

¹⁵¹ Act 96 of 1979.

¹⁵² K Moodaliyar & S Roberts *The development of competition law and economics in South Africa* (2012) ix. See Introduction: Reflecting on the maturing South African competition law regime.

¹⁵³ D Davis 'The development of competition law and economics in South Africa' *South African Law Journal* (2014) 131, Issue 3 712.

and Labour Council).¹⁵⁴ In 1998, the trade and industry chamber of NEDLAC considered the Department of Trade and Industry's proposals on competition law policy and this was when the Competition Act no. 89¹⁵⁵ was adopted became effective as of 1 September 1999.¹⁵⁶ Thus, the need for a robust development of South Africa's competition law was necessary and this was achieved by the enactment of the Competition Act of 1998.¹⁵⁷

3.2 The Competition Act's purpose

For the purposes of my research, it is important to understand the purpose of the Competition Act¹⁵⁸ (hereinafter referred to as the Act) and how it regulates competition and anti-competitive behavior in South Africa. The purpose of the Act is to ensure that competition in South Africa is promoted and maintained and includes that:

- (i) the development of South Africa's economy is promoted;¹⁵⁹
- (ii) consumers in the market are provide with product choices and competitive prices;¹⁶⁰
- (iii) the social and economic welfare of South Africans is advanced and that employment is promoted;¹⁶¹
- (iv) foreign competition's role in South Africa is recognized and to make sure that there is an expansion of opportunities for South Africans to participate in the global business environment;¹⁶²
- (v) there is an equitable opportunity to participate in the economy for small and medium-sized companies;¹⁶³ and
- (vi) there is an increase in the ownership stakes of historically disadvantaged people by promoting a greater spread of ownership.¹⁶⁴

The Act thus aims to ensure that there is a balance between the need for social welfare development in achieving economic excellence in South Africa's economy and efficiency.¹⁶⁵ Thus, the Act's purpose seeks to achieve the proverbial 'rainbow

¹⁵⁴ Wise (note 139 above; 16).

¹⁵⁵ Act 89 of 1998. Competition Act was also amended in 2000.

¹⁵⁶ Wise (note 139 above; 17).

¹⁵⁷ Act 89 of 1998.

¹⁵⁸ Act 89 of 1998.

¹⁵⁹ Ibid s 2(a).

¹⁶⁰ Ibid s 2(b).

¹⁶¹ Ibid s 2(c).

¹⁶² Ibid s 2(d).

¹⁶³ Ibid s 2(e).

¹⁶⁴ Ibid s 2(f).

¹⁶⁵ T Hartzenberg 'Competitive policy and practice in South Africa: Promoting competition for development symposium on competition law and policy in developing countries' (2006) 26 (6) *Northwestern Journal of International Law & Business* 26 (3) 669.

nation' by ensuring that diversity is accomplished within the economy to ensure that not just small businesses are able to participate in the market sector, but also previously disadvantaged people. Hartzenberg¹⁶⁶ explains that with the already highly concentrated and conglomerate structure of many businesses in South Africa in the mining, food, retail market sectors and so forth, small and medium enterprises ('SME') already face a challenge to enter the market beyond the normal challenges faced by SMEs.

Thus, this 'conglomerate structure' and the vertical positions of businesses in South Africa proves to be a major difficulty for SMEs to participate in the economy. In addition to the Acts purpose aiming to assist SMEs, the need for previously disadvantaged people to access the market is greater due to the unequal distribution of income due to past historical racial issues. With the Act promoting the spread of ownership particularly amongst previously disadvantaged persons, it reflects a concern that has haunted black people for decades that South Africa has had the most unequal distribution of income in the world for many decades.¹⁶⁷

The problems the Act seeks to address are broadly explained in its preamble and include, *inter alia*, antic-competitive practices that are caused by 'inadequate restraint' and unjust and unfair restrictions on free participation of companies in the market and economy.¹⁶⁸ Thus, the Act aims to achieve, amongst economic efficiency, equality by redressing the imbalances of the past as required to by section 9(2) of the Constitution.¹⁶⁹ In addition to the latter, one Act prohibits anti-competitive behavior defined in section 1(1) (ix)) of the Act¹⁷⁰ as an exclusionary act whereby a competitor or company refuses to grant a competitor access to a market and to be part of the economy. One of the main examples of this would be the enforcement of a restraint of trade clause by a former employer who does not want their former employee to compete with them.

Through its wide competition policy objectives that include socio-economic factors, there has been a significant development in South Africa's competition law in that it

¹⁶⁶ Ibid 669.

¹⁶⁷ Ibid 669.

¹⁶⁸ Wise (note 18).

¹⁶⁹ S 9(2) of the Constitution.

¹⁷⁰ Wise (note 139 above; 18) See also Section 1(1) (x) of the Competition Act which defines "exclusionary act" as an act that impedes or prevents a firm entering into, or expanding within, a market.'

has a much broader and comprehensively established legislation, through its purposes,¹⁷¹ anti-competitive behavior is prevented. Koornhof and Prins¹⁷² believe that the Act's nature is 'distinctly socio-economic' thus, in reference to the latter and the purpose of the Act, Brooks¹⁷³ states that:

'The ostensibly peremptory language of section 1(2), which is quoted above, when read in conjunction with section 2, in effect instructs the competition authorities to take economic, social justice, developmental and transformatory objectives into account in assessing cases that come before them.'

The establishment of the Act has thus ensured a well-developed competition jurisprudence in South Africa to ensure that the purpose of the Act prevents anti-competitive behavior in a much broader way through its purposes. Moodaliyar and Roberts opine that South Africa's competition law jurisprudence has developed significantly through the enactment of the Competition Act of 1998.¹⁷⁴ Since its inception, the Act, amongst other measures, ensures that anti-competitive behaviour is regulated and eradicated through the establishment of an independent Competition Tribunal, a Competition Commission as well as a Competition Appeal Court.

3.2.1 The Competition Tribunal

As the decision-maker of first instance, the Competition Tribunal consists of a Chairperson and a minimum of 3 and not more than 10 members, men or women, who are all appointed by the President of South Africa recommended by the Minister of Trade¹⁷⁵ and it has jurisdiction throughout South Africa.¹⁷⁶ The Competition Tribunal deals with adjudication of matters that have been referred to it by the Competition Commission, or any complainant that has been granted that power to do so in terms of section 51(1) of the Act.¹⁷⁷ The Competition Tribunal may conduct its hearing in an inquisitorial or informal manner and must ensure that all of the matters

¹⁷¹ S 2 (a) to (f) of Act 89 of 1998.

¹⁷² Koornhof & Prins (note 134 above; 142).

¹⁷³ Brooks (note 149 above; 305).

¹⁷⁴ Moodaliyar (note 152 above; ix).

¹⁷⁵ S 26(2) of Act 89 of 1998.

¹⁷⁶ Ibid s 26(1)(a).

¹⁷⁷ S 51(1)(a) of Act 89 of 1998.

is hears are in a speedy and expeditious manner in accordance with principles of natural justice.¹⁷⁸

3.2.2 The Competition Commission

This independent investigative body established by the Act consist of the Commission and one or more Deputy Commissions, which must be elected by the Minister.¹⁷⁹ This board is very different from the previous board that was mainly an administrative board, which was in operation under the Maintenance and Promotion of Competition Act¹⁸⁰ till 1999. The Competition Commission ensures that anti-competitive behavior is regulated, monitored and investigated. The Competition Commission has the powers to, *inter alia*, regulate, investigate and authorise or prohibit mergers and acquisitions.¹⁸¹

3.2.3 The Competition Appeal Court

The Competition Appeal Court is the court whereby decisions of the tribunal may be reviewed.¹⁸² This court has the power to amend, review, confirm or set aside judgments and also has the power to make any judgement/decisions where necessary.¹⁸³ The Judge President of the Competition Appeal Court is required to preside over any matters that appear before the court.¹⁸⁴ Any decision and/or judgments laid down by the Judge President of the Competition Appeal Court must be in writing and have reasons for the decision.¹⁸⁵

3.3 Conclusion

With the early legislative attempts of the regulation of South Africa's competition law, it is apparent that market regulation has always been a necessity for, amongst many other things, a growing economy and diversified market. South Africa's competition law jurisprudence has always been developed, from the period of 1923¹⁸⁶ to date, and thus there has always been the need to ensure that restrictive practices and

¹⁷⁸ Koornhof & Prins (note 134 above; 142). See also S 52 of Act 89 of 1998.

¹⁷⁹ Hartzenberg (note 166 above; 671). See also S 19(2) of Act 89 of 1998.

¹⁸⁰ Act 96 of 1979.

¹⁸¹ S 21(1) of Act 89 of 1998.

¹⁸² *Ibid* s 35(1)(a).

¹⁸³ Hartzenberg (note 166 above; 672).

¹⁸⁴ *Ibid* s 38(1)(a).

¹⁸⁵ *Ibid* s 38(5).

¹⁸⁶ M Wise 'Competition law and policy in South Africa' (2004) *OECD Journal* 5(4) 12.

unfair and unlawful competition by companies is prohibited and regulated to ensure market and economic development. In proposing new legislation, from the first competition law legislation the Regulation of Monopolistic Conditions Act of 1955¹⁸⁷ to the *Maintenance and Promotion of Competition Act*,¹⁸⁸ many shortcomings that were identified by the Board of Trade and Industry.¹⁸⁹

The former legislation was not effective in terms of its enforcement of anti-competitive behaviours under this act. For almost 20 years, the *Maintenance and Promotion of Competition Act* had ordered only 18 investigations under alleged cartels and dominant companies¹⁹⁰ and this led to the act receiving criticism as being too cautious¹⁹¹ and not effective. In the 1970s when the *Maintenance and Promotion of Competition Act* came into effect, South African competition law seemed to have finally properly addresses the shortcomings of its predecessor, however this Act's mechanisms in addressing anti-competitive conduct was inadequate for a complete and well developed competition law regime.

In terms of *Maintenance and Promotion of Competition Act*, there was a lack of expertise on the part of the officers who prosecuted and investigated competition law matters and, further to that, the act provided that violations of the provisions of the act would be treated as a criminal offence and thus, the burden of proof had to be beyond a reasonable doubt and this lead to an unsuccessful mechanisms due to high rates of more serious crime dominating investigative resources.¹⁹²

Brooks¹⁹³ postulated that, the main objective of competition law is to make sure that there promotion of fairness and proficiency in the commercial environment. With the enactment of the Competition Act,¹⁹⁴ the latter seems to have been the principle objective of the legislature as the act, through its purpose¹⁹⁵ has ensured that not only is anti-competitive and unfair practice is regulated, but that there is fairness in the market environment. In amplification of the aforementioned, the *Competition*

¹⁸⁷ Act 24 of 1955.

¹⁸⁸ Act 96 of 1979.

¹⁸⁹ Koornhof & Prins (note 134 above; 139).

¹⁹⁰ Koornhof & Prins (note 134 above; 138).

¹⁹¹ Koornhof & Prins (note 134 above; 138).

¹⁹² Koornhof & Prins (note 134 above; 139).

¹⁹³ Brooks (note 149 above; 296).

¹⁹⁴ Act 89 of 1998.

¹⁹⁵ S 2 of Act 89 of 1998.

Act's purpose and the objectives display that the legislature intended to ensure that the constitutional values enshrined and upheld through the enactment and enforcement of the act. South Africa's competition law has gone through many changes and has experienced many shortcomings in order to ensure that its economy is maintained and well developed.

With the current competition law, legislation it has ensured that market participation is for everybody, provided it is lawful, and that no person can be prevented from engaging in economic activity or be a competitor in the business environment. For the purposes of my research it is pertinent to note that South Africa's competition legislation has gone through numerous developments to ensure that market participation and economic development is achieved by all citizens and the act makes mention of agreements prohibited and unenforceable if they go against the purpose and objectives of the act. If an agreement, such as a restraint of trade clause, results in a prohibited practice¹⁹⁶ as contemplated in sections 4(1)(a)¹⁹⁷ and 5(1)¹⁹⁸ of the *Competition Act*, such agreement will have the corollary of being held to result in unfair competition and thus be held to be ineffective in terms of the Act. The latter will be comprehensively and analytically discussed under chapter 4 whereby I will define and elaborate on anti-competitive behaviour in respect of restraint of trade clauses.

¹⁹⁶ *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd/Waco International Ltd/CBC Fasteners (Pty) Ltd/Avlock International (Pty) Ltd (CT)* (unreported case no 95/IR/Oct05, 1-2-2006) at para 50.

¹⁹⁷ S 4(1)(a) of Act 89 of 1998.

¹⁹⁸ S 5(1)(a) of Act 89 of 1998.

Chapter 4

Restraint of trade clauses and competition law in South Africa

4.1 Introduction

Competition, all over the world, amongst companies fosters productivity and innovation as well as economic growth and development however, while competition in the market sector might operate well most of the time, effective competition is not always guaranteed and automatic due to inappropriate government policies and anti-competitive practices.¹⁹⁹ Manning and Kaplinsky opine that the correct and effective response to anti-competitive behaviour in the market is not to focus on the structure of the market, but rather on the potential tendency of 'dominant firms' to participate in anti-competitive practices.²⁰⁰ Anti-competitive practice involves a number of acts, such as manipulation of prices, market allocation, to fix prices and, for the purposes of my thesis, to "divide markets" which Ramahlo describes as entering into a contract that contains a non-compete or restraint of trade clause.²⁰¹ Rekkie explains that anti-competitive behavior is a restriction of competition and is therefore a form of 'restrictive practice' and describes it as follows:²⁰²

'Restrictive practice means;

- any business practice or method of trading, including any method of fixing prices, whether by the supplier of any commodity or otherwise; or
- any act or omission on the part of any person, whether acting independently or in concert with any other person; or
- any situation arising out of the activities of any person or class or group or persons which restricts competition directly or indirectly by having or being likely to have the effect of –
 - restricting the production or distribution of any commodity; or
 - limiting the facilities available for the production or distribution of any commodity; or
 - preventing the production or distribution of any commodity by the most efficient and economical means; or

¹⁹⁹ N Godfrey 'Why is competition important for growth and poverty reduction?' *OECD Global Forum on International Investment* 1(3) 2008 3.

²⁰⁰ R Kaplinsky & C Manning 'Concentration, competition policy and the role of small and medium-sized enterprises in South Africa's industrial development' (1998) 35(1) *The Journal of Development Studies* 140.

²⁰¹ A Ramalho 'Anti-competitive practices' *Price Waterhouse Coopers* 1-2.

²⁰² W Rekkie 'A view on the treatment of collusive and restrictive practices in competition policy' (1998) *SAJEMS NS* 1(1) (1998) 2.

- preventing or restricting the entry of new producers or distributors into any branch of trade or industry.’

If a business incorporates a restraint of trade in its sale of business agreement it has the effect of restricting competition, as Rekkie mentions above, and can result in being anti-competitive and contravene the Act in that the Act allows for companies to participate and trade freely in the market and also promotes competition amongst companies. Ramahlo further states that restraints have the potential of contravening the law albeit, some willingness has been displayed by the Competition Tribunal to accept certain normal commercial restraints.²⁰³ This chapter will comprehensively discuss whether or not the enforcement of a restraint of trade is anti-competitive and contravenes the Competition Act South Africa.

4.2 Competition law and restraint of trade clauses in the employment context

In the workplace, restraints of trade have become treasured equipment in the hands of employers,²⁰⁴ and although they are aimed at protecting a legitimate interests of the employer, they also have the effect of restricting competition and limiting the employee’s right to participate in the market freely. Kroon J²⁰⁵ stated that, ‘skills in the public domain become attributes of the employee and do not belong to the employer in any way, hence the use of such skills cannot be subjected to limitation by a restraint of trade. Courts have seldom analysed²⁰⁶ the effects of restraint of trade clauses in the context of anti-competitive behaviour and if whether or not they are in conformity with the Act’s purpose.’²⁰⁷ Stegmann J stated that information may become the employee's own knowledge and skill which he is afterwards entitled to use in competition with his former employer.²⁰⁸ This was further the case in in *Highlands Park Football Club v Viljoen*,²⁰⁹ which dealt with an application for an interdict that was brought by the applicant to restrain the respondent from playing for any other football club within the Republic for a period of 3 years. Focusing on a man's skill and expertise, the court held that a man can't be shackled by a restraint

²⁰³ Ramahlo (note 202 above; 1-2).

²⁰⁴ *Strike Productions (Pty) Ltd v Bon View Trading 131 (Pty) Ltd and Others* 2011 (1) SA ZAGPJHC at para 1.

²⁰⁵ *Aranda Textile Mills (Pty) Ltd v Hurn and Another* 2000 (4) SA 183 SA (E) at para 33.

²⁰⁶ *Velvet Cake Company (Pty) Ltd v Niehaus and Another* 2016 (4) SA 134 (ZAWCHC) para 4.

²⁰⁷ Section 2 of the Competition Act.

²⁰⁸ *Meter Systems Holdings Ltd V Venter And Another* 1993 (1) SA 409 (W) at para 429.

²⁰⁹ 1978 (3) SA 191 (W).

of trade agreement, because his 'skills, aptitude and manual ability are his own and not the employers.'²¹⁰

Kroon J stated that nobody should be denied the chance to work, sell their skills and to be in competition with others in an open market, even against their former employer, when utilising the knowledge and skills obtained whilst still employed because in a society of freedom there must be open competition and therefore it is important to guard against allowing major companies special protection.²¹¹ When starting their own business that will be in competition with the former employer, one must also consider the former employee's right to utilise their knowledge and skills.²¹²

In *Kopano Copier Company (Pty) Ltd t/a Nashua Kopano v Gibson*,²¹³ Madima AJ²¹⁴ refused to enforce a restraint of trade clause stating that it would be unreasonable and unrealistic to expect the respondent (who was the former employee) to 'un(learn)' or pretend not to have the knowledge and skills that he had acquired. In addition to the latter, Madima AJ further stated that to expect a former employee not to operate in a similar industry as that of their former employer and to compete with it can amount to unreasonableness.²¹⁵

Madima AJ's statement shows a departure from the traditional assessment of enforceability of restraint of trade clauses where only the employer's interests are evaluated, and based his *ratio* on the need to realise that a former employee will not always be a threat to the employer and create unfair competition if a restraint of trade clause is enforced. Kroon J's notion regarding the protection of the former employee's interests and knowledge in regards to enforcement of restraint of trade clauses was supported by Madima J²¹⁶ whereby he stated the following:

²¹⁰ Ibid 198.

²¹¹ Kroon J's remarks in *Gentech Engineering Plastics CC v Reddy and Others* 2008 (8) SA 128 ZAEHC at para 6. See *Ntsanwisi v Mbombi* 2004 (3) SA 58 T and *Knox D'arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 A at 528.

²¹² *Mullane And Another V Smith And Others* 2015 BIP 474 GJ para 22.

²¹³ 2013 SA 233 (ZAGPJHC).

²¹⁴ Ibid 23.

²¹⁵ Ibid 23.

²¹⁶ Ibid, 24.

'I am in total agreement with Mr Whitcutt in his submission that the applicant's attempt to restrain the first respondent from using his aptitude and proficiency, knowledge and skill that he acquired during his employ with applicant is *contra bonos mores*. The proposition that the first respondent's skills do not belong to the applicant is correct. Applicant's attempt to prevent him from using them for a period of one year is clearly intended to eliminate competition...there is little doubt that the customer connection and the competition which the applicant seeks to protect must be unlawful.'

The above statement from Madima J reflects the notion that where employers, through the use of restraint of trade clauses, prohibit their former employees from utilising their own knowledge, skills and competency to compete with their former employers and start their own businesses can be tantamount to unlawful and unfair competition, however this is not always the case.

In *Bergh NO v Van der Vyver*²¹⁷ the former employee started its own business specialising in beauty therapy that was in direct competition with its former employer's business. Plasket J stated that the applicant had a right to be protected against the respondent setting up business that is in opposition to it since the interest it wish to protect was a legitimate one, and that if a restraint of trade's only purpose is to eliminate competition then such a restraint will be held to be unreasonable and anti-competitive.²¹⁸ The court further looking at the three requirements a restraint of trade which are, is there a legitimate interest worthy of protection, is the restraint contrary to public policy, and is the restraint reasonable. The court held that since the employee had attempted to entice the former employer's customers away, it was a violation of a legitimate interest that had existed and that was worthy of being protected. The above analysis reveals that in certain circumstances such as the above where the three requirements are met a restraint does not promote anti-competitive nor does it eliminate competition.

Another case where a former employee started his own business that was in direct competition with its former employer was *Freepak BK v Duraan*.²¹⁹ In this case, after having resigned the employee and his wife opened up a packaging company that was in direct competition with its former employer. The court once again looked at the legitimate interests of the applicant and held that since the respondents had been managing the applicant's business for more than a decade

²¹⁷ 2010 (3) SA 526 (EL).

²¹⁸ *Ibid at para* at para 57 and 63.

²¹⁹ 2013 SA ZANCHC.

they had become privy of the applicant's customer base, thus "the risk of harm to the applicant's customer connections could not be discounted." The court once against came to the conclusion that if a restraint has a legitimate interest that can be protected in law, such will take preference regardless of any existence of necessary competition.

In that same month in an unreported case *Omnirapid Mining and Industrial Supplies (Pty) Ltd v Engelbrecht*,²²⁰ the respondent who had been employed by the applicant which operated in the valves industry to supply valves for over 20 years, resigned and started her own business in direct competition with its former employer in procuring and supplying valves. In reaching its decision, the court acknowledged that the enforcement of the restraint could violate the respondent's right to choose her own occupation, however the court chose to recognise the applicant's right to fair trade during the period of restraint and thus enforced it. In light of the above, this judgement, amongst many others including the previously discussed judgments, illustrates that restraint of trade clauses in South Africa remain enforceable even in instances whereby possible competition is inhibited. In addition to the aforementioned, South African case law on restraint of trade seem to support the notion that the enforcer of the restraints interests should take preference above the need for competition in our country which is supported by the Act.²²¹

The enforcement of a restraint has always been analysed with the burden of proof being on the employer to establish a protectable interest, thus only the interests of the employer²²² and its right to its business have been taken into consideration. The only requirements that are relevant in the analysis and enforcement of restraint of trade clauses have only been: whether the restraint is reasonable, whether there is a legitimated protectable interest by the employer and whether the restraint is contrary to public policy, however not competition law principles nor the Act itself.

²²⁰ *Omnirapid Mining and Industrial Supplies (Pty) Ltd v Engelbrecht* (ZALCJHB) unreported case no 290 of 31 October 2013 para 18.

²²¹ Act 89 of 1998.

²²² T Woker 'Franchising and restraints of trade- restraining ex-franchisees from competing with the franchise network' (2005) *OBITER* 17.

Steenkamp J²²³ stated that as a general principle, everyone is permitted to use their own trade or profession in competition with others however, the latter entitlement is not absolute, as the competition must remain within lawful bounds. Adding to this, Cachalia J²²⁴ stated further that if the restriction intended by the former employer on the former employee's activities serves to protect a proprietary interest relied upon by the former employer the restraint will be upheld and thus competition remains restricted lawfully.

I submit this aforementioned statement because competition may remain in lawful bounds such as in the previously discussed cases *Omnirapid Mining and Industrial Supplies (Pty) Ltd v Engelbrecht*,²²⁵ *Freepak BK v Duraan*²²⁶ and *Bergh NO v Van der Vyver*,²²⁷ however as Cachalia J states and the judges in the above cases have held, that where the interest of the employer is proved in order to justify the restriction the restraint will be upheld, but lawful competition is also allowing an employee to compete with the employer. This thus leaves a gap of when will competition law and the need and its importance, as articulated by the Act, be taken into consideration in instances such as the above where a former employee leaves their employment to start their own business in competition with their employer.

A case that supported the notion that restraint of trade should be analysed carefully and not be used as a tool to stifle competition,²²⁸ which would result in unfair market competition, was *Velvet Cake Company (Pty) Ltd v Niehaus and Another*.²²⁹ Limited by the precedent before him, thus lack of development of our law of contract, Davis J²³⁰ held that:

'It is correct, as Van der Merwe *et al* General Principles of Contract (4th ed) at 186 remark 'a restriction intended to exclude competition as such without also protecting some legitimate interest will normally be against the public interest.'...But what conception of competition is envisaged and how that is then evaluated against other so called legitimate interests is not made clear in any of our jurisprudence. For this reason, our jurisprudence dictates that freedom of contract is a preferred value and that patrimonial interests such as business and trade

²²³ *Mullane and Another v Smith and Others* 2015 (3) 230 (GJ) at para 14.

²²⁴ *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) at para 9.

²²⁵ *Omnirapid Mining and Industrial Supplies (Pty) Ltd v Engelbrecht* (ZALCJHB) unreported case no 290 of 31 October 2013 para 18.

²²⁶ 2013 SA ZANHC.

²²⁷ 2010 (3) SA 526 (EL).

²²⁸ *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 T at 289 para 4.

²²⁹ (4) SA 134 (ZAWCHC).

²³⁰ *Ibid* 4.

connections, clientele and trade secrets are to be protected and hence these considerations must trump any claim to freedom of trade. Accordingly, and notwithstanding the pressing need to investigate the core concepts which underline these enquiries, I am bound by precedent and accordingly am required to determine this application to enforce the restraint of trade within the framework of this precedent. Suffice to say that, were I sitting as a Court with a free jurisprudential hand of an appellate court, questions of competition and its determining features and implications insofar as unlocking the problem of the enforceability of a restraint of trade agreement are concerned would be an exercise to be undertaken. Nonetheless, certain of these issues do emerge from the present dispute and will be treated accordingly, but within the framework of the precedent which I am obliged to follow.'

Davis J's judgment demonstrates that restraint of trade clauses and competition should be evaluated against each other, as there is relevance between the two. Further, the latter judgement illustrates the need for the development of our law of contract, particularly in the case of restraint of trade clauses and competition law, because it is evident that the protection of legitimate interests seem to always prevail over the needs and interests of the employee, even if an employee who wishes to start their own business, but is prevented from doing so due to a signed restraint of trade and,²³¹ also the principle of *pacta sunt servanda* is still regarded as the cornerstone²³² of the law of contract in South Africa. Davis J's attempt at evaluating the enforcement of restraint of trade was unsuccessful due to lack of precedent and development thereof, and thus restraints remain a 'contentious issue for competition law'.²³³

A restraint of trade clause is a necessary tool that ensures that an employer's legitimate interest is not utilised unfairly against them, therefore not resulting in being anti-competitive, as long as it remains reasonable. Incorporation of restraint of trade clauses in employment agreements have been held to be enforceable by our courts on numerous occasions provided that they remain reasonable and that they are aimed at protecting a legitimate interest. Case law has provided, as illustrated above, that where competition law and restraint of trade clauses overlap, the employer's interests and the restraint of trade clause will prevail, especially, for the purposes of

²³¹ *Freepak BK v Duraan and Another* 2013 ZANHC 42. Mr and Mrs Duraan had been employed by Freepak for more than 15 years. They ran the applicant's Kimberly branch, and when negotiations failed between the parties to purchase the Kimberly branch, Mr and Mrs Duraan decided to start their own business which sold packaging material analogous to that of the Applicant. Although The Duraans had contended that should the restraint of trade be enforced against them, they stand to be excluded from participation in the economic activities, the restraint was enforced and Mr Duraan and Mrs Duraan were interdicted from engaging in business similar to the Applicant.

²³² M Kruger 'The role of public policy in the law of contract, revisited' 2011 SALJ 736.

²³³ U Jakuda 'Not all restraints fall foul of the Competition Act' *De Rebus* 1 October 2018, available at <http://www.derebus.org.za/not-all-restraints-of-trade-fall-foul-of-the-competition-act/>, accessed on 4 October 2018.

this research, even in instances where a former employee endeavours to start their own company which is something that is promoted by the Act.

4.3 Competition law and restraint of trade clauses in sale of business agreements

The link between competition law and the restraint of trade doctrine as a common law rule becomes relevant when a restraint of trade clause prohibits one from operating or running their business that is going to be a competitive force in the market. Access to the market in South Africa is already a very complex issue,²³⁴ and when a restraint of trade clause is enforced this can amplify the complexity of the issues faced by business owners who are trying to access the markets. Competition law aims at guaranteeing the best competition possible in the market and therefore, the objective the restraint of trade doctrine pursues does not differ from the rules of competition law.²³⁵

In *WNS Global Services v Hayes*,²³⁶ referring to the overarching case on restraint of trade clauses in South Africa, *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,²³⁷ the court held that a restraint will be unreasonable and unenforceable if it fails to protect a legitimate interest, in other words, a restraint's main purpose cannot be to only eradicate competition.

In assessing the term 'to eliminate competition', Davis J²³⁸ stated that competition is the advancement and promotion of a competitive process, and if the purpose of competition is to maximize consumer welfare, it may be submitted that contracts that have restraint of trade clauses achieve precisely the opposite result. Having restraint of trade clauses in sale of business agreements is important in order to protect a company's goodwill and its business from unfair and unlawful competition by its competitors, however restraint of trade clauses do overlap with competition and Davis J,²³⁹ in assessing the arguments of competition put before him, stated that:

²³⁴ 'Why is there such a spectacular failure rate in the SMME Sector?' *Business Report* 25 April 2018, available at <http://fasa.co.za/fasablog/spectacular-failure-rate-smme-sector/>, accessed on 3 May 2018.

²³⁵ C Kolonko *Restraints of trade in sport: An international and South African perspective* (Unpublished LLM thesis, University of Western Cape, 2006) 15.

²³⁶ 2018 SA 175 ZALCJHB at para 21.

²³⁷ (4) SA 874 (A).

²³⁸ 2016 (4) SA 134 (ZAWCHC) at para 2.

²³⁹ *Ibid* 2 to 4.

‘Given the context of competition, the notion of abuse of dominance may prove useful in the development of a sufficiently nuanced concept of contractual freedom which would be fit for purpose. Unfortunately, none of these concepts are properly analysed in South African law. The jurisprudence with regard to an agreement in restraint of trade has been determined in general by way of a poorly reasoned adherence to the concept of the sanctity of contract which represents more of a ritual incantation of a jurisprudential war cry than it does a sustained intellectually interrogated enquiry as to the meaning of the sanctity of contract and its value insofar as a competitive economy is concerned. Unfortunately, the precedent that confronts me in the determination of this matter hardly deals with the meaning of the concept of competition, but what conception of competition is envisaged and how that is then evaluated against other so called legitimate interests is not made clear in any of our jurisprudence.’

Davis J’s statement seems to support the notion that restraint of trade clauses have the corollary of promoting anti-competitive behavior as they do not ensure consumer welfare and competitiveness in the market. A restraint of trade clause that is intended solely to suppress competition is not enforceable.²⁴⁰

In *K2017136283 v Crabtree Electrical Accessories*,²⁴¹ before the Competition Tribunal, the matter involved K2017, a company owned by Siemens, purported to acquire Crabtree Electrical Accessories, a company owned by Powertech, and in their sale of business was a restraint of trade clause that prohibited Powertech from engaging in the same business as its subsidiary upon selling it to K2017. The Competition Tribunal held that the sale of business and its restraint of trade clause was unlikely to contravene the Act and prevent or lessen competition in the market. This judgment by the Competition Tribunal, as the experts in competition law, analysed and decided to uphold the restraint of trade clause as it had not effect to violate competition in the market. This judgement allowed for the evaluation of not just the three requirements discussed in chapter two, but also competition law.

In however, *Nedschroef Johannesburg (Pty) Ltd v Teamcor*²⁴² Manoim J²⁴³ stated that the restraint of trade clause in the sale of business agreement operated to divide the market in which Nedschroef operated in because it precluded it from trading in the industry. The court thus held that the restraint of trade was not only unreasonable in its duration in that it operated for more than 10 years, but also

²⁴⁰ *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* 2008 (3) SA 78 (C) at 10 para 20.

²⁴¹ Competition Commission findings in K2017136283 *supra* note 21 above at 11.

²⁴² *Nedschroef Johannesburg Supra* note 19 above at 41.

²⁴³ *Ibid* 41.

that it contravened section 4(1) of the Act.²⁴⁴ This is evident that a restraint of trade can be found to be contrary to the Act if it has the consequence of promoting anti-competitive behaviour, which was the case in *Nedschroef*. However, the latter was held to be incorrect in the case of *Replication Technology Group (Pty) Ltd v Gallo Africa Limited*.²⁴⁵ In this case a sale of business agreement had a restraint of trade clause which precluded the applicant from engaging in the same market as its subsidiary after it had sold it to the respondent. The Applicant lodged a complaint with the Competition Commission stating that the clause contravened sections 4(1) and 5(1) of the Act.²⁴⁶ The court, upholding the restraint stated that with its limited nature, there was no reason to believe that the applicant would not be able to enter the restricted portion of the market after the 8 month period had elapsed.

Another case, a recent competition tribunal case, decided on the enforcement of a restraint of trade in conjunction with competition law was *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission*.²⁴⁷ This case dealt with a restraint of trade clause which provided that Dawn Consolidated Holdings and its subsidiaries would not compete with Sangio, and that the restriction would prevail for as long as Dawn Consolidated Holdings continued to be in partnership with Sangio.²⁴⁸

The Competition Appeal Court's analysis of the enforcement of a restraint of trade clause, based on Jakunda's article,²⁴⁹ stated that the appeal court will allow the enforcement of the restraint provided that it does not go against the purpose of the Act and it is not designed at limiting competition. Rogers J²⁵⁰ stated that in the framework of transactions, where a restraint of trade is 'commercially reasonable' it will not be held to be in violation of section 4(1) of the Act.²⁵¹ In reaching its decision the Competition Appeal Court made reference to the *European Commission's Guidelines* which states that 'restrictions of competition by object

²⁴⁴ S 4(1)(a) of Act 89 of 1998.

²⁴⁵ *Replication Technology Group Supra* note 89 above.

²⁴⁶ *Ibid* 5.

²⁴⁷ *Dawn Consolidated Holdings Supra* note 245.

²⁴⁸ Facts provided by: U Jakuda 'Not all restraints fall foul of the Competition Act' *De Rebus* 1 October 2018, available at <http://www.derebus.org.za/not-all-restraints-of-trade-fall-foul-of-the-competition-act/>, accessed on 4 October 2018.

²⁴⁹ *Ibid*.

²⁵⁰ *Dawn Consolidated Holdings Supra* note 245 at 28.

²⁵¹ S 4(1) of Act 89 of 1998.

are those that by their very nature have the potential to restrict competition within the meaning of article 101(1).²⁵² Rogers J²⁵³ went on to establish ‘an appropriate test which states:

- ‘(a) is the sale of business agreement or partnership agreement between the companies (not including the restraint) harmless in terms of competition ?
- (b) If so, is the restraint of trade clause a reasonable necessity for the main agreement?;and
- (c) If so, is the requirement in the main agreement served in a reasonably proportionate manner by such restraint of trade clause?’

The Competition Appeal Court concluded that the restraint of trade clause in question did not inhibit competition as it was ‘commercially reasonable.’²⁵⁴ In *Van der Watt v Jonker*²⁵⁵ Supreme Court of Appeal, looking at the legitimate interest in question, which was the goodwill of the company, stated that where the appellant, Van der Watt sold its goodwill and thereafter decides to trade against it or compete, it will be against Jonker’s right to trade freely in terms of the restraint of trade clause. The court held that Jonker had the right to ‘assert it right to goodwill in terms of the sale of business agreement.’²⁵⁶ It is clear that recent judgments support the notion that where the restraint of trade is commercially reasonable and contains a valid legitimate interest such as goodwill, which is the personality of the driving force behind the business,²⁵⁷ such restraint will be supported by the court.

4.4 Conclusion

The above analysis illustrates that restraint of trade clauses are still supported by courts and the Competition Tribunal, however in the 2005 case of *Nedschroef Johannesburg (Pty) Ltd v Teamcor*²⁵⁸ the court held that the restraint in question divided the market thus resulting in preventing competition, and the restraint of trade was thus not supported and upheld by the court. Cases subsequent to *Nedschroef* such as *Replication Technology Group (Pty) Ltd v Gallo Africa*

²⁵² *Dawn Consolidated Holdings Supra* note 245 at 30. See also *European Commission’s Guidelines on the applicability of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* 2011/C 11/01 para 24.

²⁵³ *Dawn Consolidated Holdings Supra* note 245 at 32.

²⁵⁴ *Ibid* 35.

²⁵⁵ 2011 SA 140 ZASCA.

²⁵⁶ *Ibid* 12.

²⁵⁷ *Thompson & Griffiths* (note 16 above; 1).

²⁵⁸ *Nedschroef Johannesburg Supra* note 19 above at 42.

*Limited*²⁵⁹ and *K2017136283 v Crabtree Electrical Accessories*²⁶⁰ supported restraint of trade clauses on the basis that they remained commercially reasonable and that their effect did not prevent competition. Further to this, the recent judgement from the Competition Commission, Supreme Court of Appeal and the Competition Appeal Court in *Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission*²⁶¹ unequivocally approved the enforcement of a restraint of trade in light of the Act by stating that commercial reasonableness was necessary in order for it to be enforceable. Therefore, their enforcement seem to not be a tool that *prima facie* promotes anti-competitive behaviour, but one that is seen as more necessary to protect a company's goodwill or any other legitimate interests, however provided that it is 'commercially reasonable'²⁶² and that it meets the former mentioned requirements.

Restraint of trade clauses are used by employers to ensure that their interests are protected where the employee chooses to leave their employment to be in competition with them, even where competition law and the Act itself becomes relevant courts will still look to uphold the contract as long as the three requirements discussed in detail in chapter two have been proved. The case law I have analysed above seem to indicate that where a restraint of trade clause is aimed at protecting a legitimate interest of the employer and it is not contrary to public policy and is reasonable, such a clause will be held to enforceable by the courts and not anti-competitive regardless of the Act supporting competition. The law as it stands now is that an employer can enforce a restraint of trade provided that it is aimed at protecting a legitimate business interest, and this will be allowed by the courts without further inquiry into the purpose of the Act and/or whether if the restraint of trade will contravene the relevant provisions²⁶³ of the Act if enforced against the entrepreneurial employee.

²⁵⁹ *Replication Technology Group Supra* note 89 above at 41.

²⁶⁰ Competition Commission findings in *K2017136283 supra* note 21 above at 11.

²⁶¹ *Dawn Consolidated Holdings Supra* note 245.

²⁶² *Ibid* 24.

²⁶³ S 4(1)(a) and s 5(1)(a) of Act 89 of 1998.

Chapter 5

Conclusion and Recommendations

5.1 Analysis of findings

An employer will have a restraint of trade clause in an employment contract only to protect their interests such as trade secrets and goodwill.²⁶⁴ The important requirement thereof is that the restraint of trade clause must be aimed at protecting an interest worthy to be protected.²⁶⁵ This was also supported in *Omnirapid Mining and Industrial Supplies (Pty) Ltd v Engelbrecht*,²⁶⁶ *Freepak BK v Duraan*²⁶⁷ and *Bergh NO v Van der Vyver*,²⁶⁸ where all three cases dealt with employees who had been restrained after leaving their employment to start their own businesses and the court upheld the interests of the employers without critical analysis of the implications of competition law and the Act.

While every employee is entitled to trade and work freely in the occupation and profession of their choice and also with the support of the Act to start their own businesses, our law supports the enforcement of restraint of trade clauses provided that the three requirements of reasonableness of the restraint, the restraint not being contrary to public policy and where an interest of the employer is established, are met, and this, notwithstanding the relevance of the Act, will be sufficient to deem a restraint of trade clause in a contract of employment not to be anti-competitive.

The other aspect this research critically analysed was what if the restraint of trade clauses or agreement is enforced by one company against another that is a competitor, do we then ignore the need for competition? The latter was answered in *Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission*²⁶⁹ where the court clearly indicated that a commercially reasonable restraint will be

²⁶⁴ L Dumisa *The enforceability of the restraint of trade agreement in the context of an unlawful termination of an employment agreement* (Unpublished LLM paper, University of Pretoria, 2015) 48.

²⁶⁵ S Writer 'Restraint of trade-What you need to know' (2018)1 *Business Tech* available at <https://businesstech.co.za/news/business/243849/restraints-of-trade-what-you-need-to-know/>, accessed on 11 June 2018.

²⁶⁶ (ZALCJHB) unreported case no 290 of 31 October 2013 para 18.

²⁶⁷ 2013 SA ZANCHC.

²⁶⁸ 2010 (3) SA 526 (EL).

²⁶⁹ *Dawn Consolidated Holdings Supra* note 245 at 30

justifiable and enforceable. Therefore this judgement addressed the contentious issue of restraint of trade clauses surrounding competition law.

However, it is important to note that in a sale of business agreement a restraint of trade clause can be seen as a tool that restricts competition, thus indirectly promoting anti-competitive behaviour or unfair competition, resulting in contravening the Act. This was decided in *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd*²⁷⁰ where the court found the restraint of trade that restrained Nedschroef to be a contravention of section 4(1) of the Act.²⁷¹

5.2 Suggestions and Recommendations

This research has shown that in certain circumstances a restraint of trade clause can result in anti-competitive behaviour, however there is still a need to formulate a properly developed competition law that will reconcile it with restraint of trade where competition law is at risk of being prevented or lessened by such restraint. Although there has been clarity from the *Dawn Consolidated Holdings* judgement on the uncertainty of whether or not restraint of trade clauses contravene the Act, restraint of trade clauses in employment contracts still fall behind in terms of development.²⁷² Calitz²⁷³ states that the employees' unequal bargaining positions have not been taken into regard when determining the enforceability of restraint of trade clauses and this is due to courts not allowing competition law to be developed in order to allow its analysis and evaluation in restraint of trade disputes.

The law on restraint of trade in South Africa is inadequate and requires development, and one of the ways this can be achieved is by ensuring that courts analyse restraints of trade clauses together with the principles of competition law and the Act. Further, as Davis J states that the development of competition law in South Africa is a necessity particularly where restraint of trade disputes are concerned one of the ways competition law can be developed together with the restraint of trade doctrine is for courts to allow the Act, where necessary, to be evaluated as one of the requirements of a valid restraint of trade clause instead of restricting it to the three

²⁷⁰ *Nedschroef Johannesburg Supra* note 19 above at 41.

²⁷¹ S 4(1)(a) of Act 89 of 1998.

²⁷² K CALITZ 'Restraint of trade agreements in employment contracts: Time for pacta sunt servanda to bow out?'(2011) *STELL LR* 1 70.

²⁷³ *Ibid* 70.

requirements discussed in chapter two. Davis J²⁷⁴ stated that the laws regarding restraint of trade has been determined in a poorly reasoned observance of the concept of the sanctity of contract which does not result in a sustained intellectually interrogated analysis of the sanctity of contract and its value insofar as a competitive economy is concerned.

In addition to the latter, as Davis J²⁷⁵ said, regarding the issues of competition and its implications insofar as enforceability of restraint of trade clauses is concerned, the restraint of trade doctrine could further be regulated just like the Consumer Protection Act²⁷⁶ in order to address the unequal bargaining positions in the employment relationship. This can be achieved by developing a legislation that provides more clear and impartial guidelines for restraint of trade, whilst upholding the values enshrined in the Constitution and the Competition Act as well as the interests of the employer, but not eliminating those of the employee, particularly the need for competition in South Africa.

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²⁷⁴ 2016 (4) SA 134 (ZAWCHC) at para 2.

²⁷⁵ *Ibid*, 4.

²⁷⁶ Act 68 of 2008.

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