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Recent case law on the Influence of the Constitution on the Enforceability of Restraint of Trade Agreements

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CHAPTER 1

INTRODUCTION

1.1 Agreements in restraint of trade

1.1.1 What is a restraint?

A restraint of trade is a contractual term that is often included in an employment contract, a sale of a going concern, a partnership and a franchise agreement. In the matter of *Petrofina (Great Britain) Ltd v Martin and Another*¹ Diplock LJ defined a restraint of trade as '[a] contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract, in such manner as he chooses.'² Restraint of trade agreements are not governed in general by any specific legislation and are regulated solely by common law principles.

At common law, a contract is illegal and unenforceable if it is contrary to good morals or public policy. Restraint of trade agreements are in essence valid and enforceable in our law, unless they impose an unreasonable restriction on a person's freedom to trade. In this instance, they will probably be held to be against public policy and therefore illegal and unenforceable.

1.1.2 Legality of agreements in restraint of trade

Prior to the decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,³ South Africa followed the English law authorities and treated restraint of trade agreements as contrary to public policy and therefore void. In the English case of *Nordenfelt v Maxim Norden-felt Guns and Ammunition Co Ltd*,⁴ the court held that the public had an interest in every person

¹ 1965 (2) All ER 176.

² *Petrofina* Ch 146.

³ 1984 (4) SA 874 (A).

⁴ 1894 AC 535 (HL).

carrying on his trade freely, as indeed did the specific individual.⁵ As a result, all restraints of trade were contrary to public policy and therefore void. In *Magna Alloys and Research*, Rabie CJ held that agreements in restraint of trade had to be treated as *prima facie* valid and enforceable as long as they are not contrary to public policy.⁶ The court found that although the sanctity of contract principle is fundamental to South African law, public policy also requires, generally, that everyone should be free to seek fulfilment in the business and professional world.⁷ The court pointed out that an unreasonable restriction of a person's freedom of trade would be contrary to public policy and could therefore not be enforced.⁸ The court held further that a party alleging that the contract in restraint of trade is against public policy bears the burden of proof of proving it.⁹ The current view is that restraints of trade are *prima facie* enforceable unless they are contrary to the public interest.¹⁰

1.2 The Principle of *pacta servanda sunt*

When one deals with the issue of a restraint of trade, two principal policy considerations come into play, namely the principle of the sanctity of contract (*pacta sunt servanda*), and the principle of the freedom of trade. The principle of sanctity of contracts dictates that restraint of trade agreements, like all others which are not unlawful or *contra bonos mores*, must be performed and if necessary be enforced by a court of law. In *Roffey v Catterall, Edwards & Goudre (Pty) Ltd*,¹¹ the court held that “there is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts.”¹² The maxim *pacta sunt servanda* can be said to reflect the interest of society in ensuring that contractual parties keep their promises. However the clash between the need for free trade and the public interest in holding parties to their contracts came to a head in *Roffey v Catterall*, where Didcott J said, “I am satisfied that South African law prefers the sanctity of contracts. That principle is firmly entrenched in our system, where it shows its’ head in so many places. Freedom of trade does not vibrate nearly as strongly through our jurisprudence.”¹³

⁵ *Nordenfelt* 565.

⁶ *Magna Alloys* 874.

⁷ *Magna Alloys* 892-893.

⁸ *Magna Alloys* 893A-B.

⁹ *Magna Alloys* 893 A-B.

¹⁰ *Interpark (SA) Ltd v Joubert & Another* 2010 JOL 25521 (GSJ).

¹¹ 1977 (4) SA 482 (N).

¹² *Roffey* 492.

¹³ *Roffey* 493.

During the 1980s, the freedom to trade principle took precedence over the principle of the sanctity of contracts. There was a shift however in the 1990's when the interim Constitution came into effect. The first to consider s 26(1) of the interim Constitution in the context of the enforceability of a restraint of trade was Edeling J in *Waltons Stationery Co (Edms) Bpk v Fourie en 'n Ander*.¹⁴ Edeling J opined that in terms of common law, it had been repeatedly emphasised that it was in the public interest that people be held bound by agreements entered into by them. This view was confirmed when the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "Constitution") came into effect. In *Barkhuizen v Napier*¹⁵ Ngcobo J said, "I do not understand the Supreme Court of Appeal as suggesting that the principle of contract *pacta sunt servanda* is a sacred cow that should trump all other considerations." The Supreme Court of Appeal¹⁶ did accept that the constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions is before the court. In concluding, Ngcobo J settled the issue by stating that "All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control."¹⁷

It is to be noted that recent case law seem to favour a balanced approach. In *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & Another*,¹⁸ the High Court emphasised that the principle of *pacta sunt servanda*, that agreements freely entered into must be honoured, although important, must be balanced against public policy considerations that seek to encourage gainful employment, and against the constitutional right to be employed and to trade freely. It is thus settled that the principle of the sanctity of contract must be applied simultaneously with the values enshrined in the Constitution.

1.3 Competing values

The second important principle is that each person should be free to practice the trade of his choice. This is a right which is protected by the Bill of Rights.¹⁹ A restraint of trade agreement restricts or limits that freedom by preventing a person from practicing a trade in a

¹⁴ 1994 (4) SA 507 (O).

¹⁵ 2007 (5) SA 323 (CC).

¹⁶ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

¹⁷ 2007 (7) BCLR 691 (CC) 691.

¹⁸ 2009 (3) SA 78 (C).

¹⁹ Section 22 of the Constitution of the Republic of South Africa 1996.

particular industry, usually within a specified geographical area for a specified time. The freedom of trade is a component of the freedom of competition. In *Payen Components CC v Boviv Gaskets CC*,²⁰ according to Van Zyl J, “[c]ompetition is a characteristic, and indeed the natural outflow, of the capitalistic free market economy which pertains in South Africa and other Western countries. The nature of the competition is that the competitors have the same or similar goals, chief among which, at least in the field of trade and industry, is to attract the same clients or group of clients.”²¹

1.3.1 Conflict between the sanctity of contract and the need for free trade

The chief policy considerations of sanctity of contract and free trade can easily clash. If a clause in a restraint of trade agreement is upheld because of the policy consideration of *pacta sunt servanda*, one may ask whether this does not prevent free trade. Hence, when considering the conflict between freedom of trade and the sanctity of contract, it is important to decide which should take precedence when deciding on the enforceability of restraints of trade. In *Brisley v Drotsky*²² the court held that the *pacta servanda sunt* underlies the law of contract. The importance of the principle of sanctity of contract was further highlighted in *Barkhuizen v Napier*,²³ where the court held that the question of fairness involved the weighing-up of two considerations. On the one hand the consideration of public policy as informed by the Constitution, which required in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken (*pacta sunt servanda*), and on the other hand, the consideration that all persons have a right to seek judicial redress.²⁴

Furthermore, it can be emphasised that the need for free trade is paramount in maintaining an effective and robust economic environment. It is submitted that although the need for free trade is vital for our economy, the sanctity of contract principle is absolutely essential for the protection and enforcement of contracts. In *Roffey v Catterall, Edwards and Goudre (Pty) Ltd*,²⁵ Didcott J said the following when referring to the conflicting need for free trade, and the public’s interest in holding parties to their contract, “there is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which

²⁰ 1994 (2) SA 464 (W) 473G.

²¹ *Payen Components* 227.

²² 2002 (12) BCLR 1229 (SCA).

²³ 2007 (5) SA 323 (CC).

²⁴ *Barkhuizen v Napier* 25.

²⁵ 1977 4 SA (N) 505N.

is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts.”²⁶ This view is in line with the fundamental general principle of South African law that contracts entered into in all seriousness by parties with the capacity to do so, are enforced in the interests of the public.

1.4 Protectable interests

1.4.1 Introduction

An employer who attempts to enforce a restraint must have an interest that is worthy of protection. In *Oasis Group Holdings (Pty) Ltd and another v Bray*²⁷ the court held that there can be no *numerus clausus* of protectable interests. Restraints of trade are entered into to protect trade or customer connections, trade secrets or confidential information or else goodwill that is sold as part of the sale of a business or corporation.²⁸ An employee faced with enforcement of a contractual obligation, has to prove that his former employer, who is seeking to enforce the restraint, has no trade connection nor trade secrets or other interests to protect.

1.4.2 The nature of protectable interests

The requirement of the presence of a protectable interest is to safeguard legitimate interests. Our courts have often ruled that trade secrets were not always worthy of protection.²⁹ In *Kwik Copy SA (Pty) Ltd v Van Haarlem*³⁰ the court found that the applicant referred to its protectable interest as confidential information, trade secrets and generally the know-how relating to the franchise. In this case, no mention was made of the applicant’s trade connections or customer base. The court therefore declined to enforce the restraint agreement.

In *Basson v Chilwan*³¹ the court held that a restraint would be against public policy if it prevented the employee, at the termination of employment, from freely participating in the profession or industry – provided the protectable interests of the employer were not violated. The court accepted that a person is entitled to take his skills with him, even if those skills

²⁶ *Roffey* 505F-G.

²⁷ 2006 (4) All SA 183 (C).

²⁸ *Oasis Group Holdings* 195.

²⁹ *Vermeulen en 'n Ander v Africa Steel and Timber en Andere* 1998 (2) SA 543.

³⁰ 1999 (1) SA 472 (W).

³¹ 1993 (3) SA 742 AD.

were acquired through his former employer's training, and that he is free to earn his living in his chosen occupation. In *Vermeulen en 'n Ander v Africa Steel and Timber en Andere*³² the court found that the restraint was in this case introduced simply to avoid competition, and that the applicants did not have any secrets worthy of protection. The court held that the restraint was enforceable because it was unreasonable and contrary to public policy.

1.5 The Constitution of the Republic of South Africa 1996.

The influence of the Constitution on the enforceability of contracts remains a controversial topic in both literature and jurisprudence. Section 26 of the interim Constitution, the predecessor to section 22 of the final Constitution read as follows, 'Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.' The position under the interim Constitution was enshrined in the case of *Waltons Stationery Co (Edms) Bpk v Fourie*³³ where the court held that covenants in restraint of trade were not excluded by section 26 of the interim Constitution. In *Knox D'Arcy Limited and Another v Shaw and Another*³⁴ the first respondent relied on 26(1) of the Constitution and contended that the common law required to be re-assessed in the light of the Constitution. The court held that section 26(1) does not require the common law as laid down in *Magna Alloys and Research* to be re-assessed. In *Kotze en Genis (Edms) Bpk v Potgieter en Andere* the court held that the purpose of section 26(1) is to protect the principle of freedom of trade against legislative inroads, it has no bearing on the incidence of onus in cases where a party seeks to enforce a restraint of trade agreement.

Subsequently, section 22 of the final Constitution, under the heading 'Freedom of trade, occupation and profession', provides that 'every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

1.5.1 Impact of the Constitution on the freedom to contract

The right to trade freely is protected by the Constitution. It is further accepted that once the parties in a contractual relationship have agreed on the contractual terms that govern their relationship, these terms should be honoured unless they are contrary to the law, public

³² 1998 (2) SA 543 (O).

³³ 1994 (4) SA 507 (O).

³⁴ 1995 (12) BCLR 1702 (W).

policy, or public interest.³⁵ As discussed above, prior to South Africa becoming a constitutional state, Rabie CJ, in *Magna Alloys and Research*, held that agreements in restraint of trade had to be treated as *prima facie* valid and enforceable. Although the sanctity of contract principle is fundamental to South African law, public policy also requires, generally, that everyone should be free to seek fulfilment in the business and professional world.³⁶

In *Knox D'Arcy Limited and Another v Shaw and Another*³⁷ the court held that the restraint was reasonable and enforceable on the basis that it sought to restrain the former employee from utilising information received in the course of his employment for the benefit of his new employer. Counsel for the respondents argued that in light of the fact that section 26 of the interim Constitution gave individuals the right to freely engage in economic activity, the *Magna Alloys* case should be re-evaluated. In dismissing the argument, Van Schalkwyk J remarked as follows, 'The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy which is violated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage.'³⁸

After 1996, in *Kotze en Genis (Edms) Bpk v Potgieter en Andere*³⁹ the court stated that the purpose of the Constitution was to guard individuals against legislative encroachment and not from the common law. The court was of the view that section 26(1) of the interim Constitution had no effect on the individual's right to contract, and that there was no reason why section 26 would protect the covenantor instead of the covenantee. The court concluded that the fundamental rights provisions were silent on the issue of burden of proof in matters like applications to enforce agreements in restraint of trade, and further that the principle of freedom to trade entrenched in the Bill of Rights does not necessitate a change of approach.⁴⁰ A different approach was however followed in *Coetzee v Comitis and Others*.⁴¹ Traverso J held that the rules violated the basic values underlying the Constitution,

³⁵ Kerr AJ *The Principles of the Law of Contract* 6th ed (2002) 181.

³⁶ *Magna Alloys* 892-893.

³⁷ 1995 (12) BCLR 1702 (W).

³⁸ *Knox D'Arcy* 1710 I-J.

³⁹ 1995 (3) BCLR 349 (K).

⁴⁰ *Kotze en Genis* 350.

⁴¹ 2001 (1) SA 1254 (C).

including the freedom to trade.⁴² It was further held that the burden of proof lay with the *National Soccer League* (the respondents) to show the court that the compensation regime amounted to a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.⁴³ The court concluded that the burden of proof had not been discharged and consequently the restraint was held to be unreasonable.

In *Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*⁴⁴ the court held that section 22 of the Constitution reverses the common law burden of proof. Kondile J held that the applicant who sought to restrict a fundamental right of the first respondent had to do more than invoke the provisions of the contract in restraint of trade, and had to prove the breach.⁴⁵ In terms of section 36 of the Constitution it had to show that the restraint was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁴⁶ However, Kondile's decision has been criticised by Saner⁴⁷ as incorrect in that it is premised on a misunderstanding of how to weigh up the principle of sanctity of contract and the corollary that parties should in general be bound by contractual undertakings and by section 22 of the Constitution.

⁴² *Coetzee v Comitis* 1274A.

⁴³ *Coetzee v Comitis* 1273F.

⁴⁴ 2005 (3) SA 205 (N).

⁴⁵ 2004(1) BCLR 39.

⁴⁶ *Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation* 2005 (3) SA 205 (N).

⁴⁷ Saner J *Agreements in Restraint of Trade in South African Law* (2011) 14-14.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF RESTRAINTS IN SOUTH AFRICAN LAW

2.1 The position before *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*

Prior to the decision of the Appellate Division in *Magna Alloys and Research*, the courts followed a traditional approach developed under the influence of English law that contracts in restraint of trade were *prima facie* void and therefore unenforceable. The restraint was however enforced if it was reasonable between the parties and was not contrary to the public interest.⁴⁸ In 1957, for example, in *Spa Food Products Ltd and Others v SARIF*⁴⁹ the Rhodesian court stated that “the principles on which the validity or otherwise of a contract in restraint of trade will be decided have been borrowed largely from the English law.”⁵⁰ These principles may be broadly stated as follows: *prima facie* all contracts in restraint of trade are void on the ground of being contrary to public policy, but that the presumption of invalidity may be rebutted by proof of special circumstances showing that the contract is reasonable in the interests of the parties and consistent with the public interest.” This decision was confirmed in 1977 in the South African judgment of *Roffey v Caterall, Edwards and Goudre (Pty) Ltd*⁵¹ and was followed by our courts until 1984.

2.2 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*

2.2.1 Facts

Ellis commenced litigation by claiming outstanding commission from his former employer, Magna Alloys and Research (SA) (Pty) Ltd. Magna Alloys instituted a counterclaim for damages in terms of clause 6 of its agreement with Ellis, and requested an interdict restraining him from continuing to act in breach of this clause. In terms of clauses 6(b) and (c) of the agreement between the parties, Ellis undertook that for a period of two years

⁴⁸ *Van de Pol v Silbermann* 1952 (3) SA 1 (A).

⁴⁹ 1952 (2) All SA 141 (SR).

⁵⁰ Wessels JW *Law of Contract* 2nd ed (1951) 177 par 539.

⁵¹ 1977 (4) SA 482 (N).

following the termination of the agreement for any cause, and within a radius of 10 kilometres of the perimeter of a defined area, he would not:

- “(i) directly or indirectly, as a partner, employee, agent, salesman or representative enter into or engage in any business in competition with Magna Alloys;
- (ii) sell any other thing, substance or material, the function, use or purpose of which was similar to or the same as the function, use or purpose of the products defined in an annexure to the restraint;
- (iii) seek or solicit customers or business for the sale of such product, substance or material within the defined area; or
- (iv) promote or assist financially or otherwise any person, firm, association or corporation engaged in a business which competed with the business of Magna Alloys.”⁵²

Clause 6(d) provided that:

- “(a) if the respondent breached the terms of the provisions of the agreement, the appellant would suffer damages at the rate of R250 per week for the period during which the respondent violated the provisions of clauses 6(b) and (c); and
- (b) this sum would constitute a genuine pre-estimate of the damages which the appellant would suffer as a result of the respondent’s breach of the provisions of the restraint.”⁵³

When Ellis’s employment with Magna Alloys ended, Ellis went to work for a company called Welding Advisory Services (Pty) Ltd. This was in breach of the provisions of clause 6 of his restraint of trade agreement with his former employer, Magna Alloys and Research. At the trial for Ellis’s claim for commission, the court *a quo* rejected Magna Alloys’ counterclaim for an interdict to stop Ellis from breaching the restraint of trade, on the basis that clause 6 of the agreement between the parties constituted an unenforceable agreement in restraint of trade. The appellant in the court *a quo* was ordered to pay the costs, including the fees of two counsel on an attorney and client scale. Magna Alloys appealed against this decision and the matter came before the Appellate Division.

⁵² *Magna Alloys* 882 – 883.

⁵³ *Magna Alloys* 883.

In *Magna Alloys*, the Appellate Division stated that the approach followed by the South African courts that restraints of trade are *prima facie* invalid and unenforceable was incorrect.⁵⁴ The court examined old Roman-Dutch authorities and came to the conclusion that the position in South African law is that restraints of trade are *prima facie* valid and enforceable. The court held that the sanctity of contract principle is fundamental to South African law, yet that public policy also requires, generally, that everyone should be free to seek fulfilment in the business and professional world.⁵⁵ The court pointed out that an unreasonable restriction on a person's freedom of trade would be contrary to public policy and would not be enforced.

2.2.2 Conclusions reached by the court

The Appellate Division confirmed the following new principles:

- (1) There is nothing in our common law, which states that a restraint of trade agreement is invalid or unenforceable.
- (2) The view taken in numerous South African judgments that a restraint of trade is *prima facie* invalid or unenforceable was taken over from English law.
- (3) In English law restraints of trade are *prima facie* unenforceable and the party seeking to enforce the restraint must prove that it is reasonable *inter partes*. The further rule is that the party alleging the restraint to be against the public interest must prove this.
- (4) It is a principle of our law that agreements, which are contrary to the public interest, are unenforceable. It may therefore be said that a restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest.
- (5) It is in the public interest that agreements entered into freely should be honoured. It is also, generally speaking, in the public interest that everyone should, as far as possible, be able to operate freely in the commercial and professional world. It may be accepted that a restraint of trade, which is unreasonable, would probably also prejudice the public interest, where the person concerned would be held to it.
- (6) In our law the enforceability of a restraint should be determined by asking whether enforcement would prejudice the public interest.

⁵⁴ *Magna Alloys* 891 B–C.

⁵⁵ *Magna Alloys* 892–893.

- (7) Acceptance of the view set out in (6) above entails certain consequences, *inter alia* that when someone alleges he is not bound by a restraint to which he had assented in a contract –
- (a) he bears the onus of proving that enforcement of the restraint is contrary to the public interest;
 - (b) that the court should have recourse to the circumstances existing at the time the enforcement is being sought;
 - (c) that the court is not constrained to hold that the restraint as a whole is enforceable or unenforceable, but is also empowered to rule that a part of the restraint is enforceable or unenforceable.⁵⁶

2.2.3 The criterion of public policy

In *Magna Alloys*, the court held that restraint of trade agreements are valid and enforceable as long as they are not contrary to public policy. This leads to the question as to what public policy actually is, and when can it be said that an agreement is contrary to public policy. Public policy is defined as, “the principles, often unwritten, on which social laws are based.”⁵⁷ In other words, public policy dictates which social laws are acceptable in society. Therefore, restricting an individual’s freedom to trade or to secure alternative employment can be said to be against public policy. The acceptance of public policy as a criterion in the *Magna Alloys* decision means that the onus now rests on the party seeking to avoid the restraint clause to prove that its enforcement would be contrary to the public interest.

2.2.4 Burden of proof

Prior to the *Magna Alloys* decision, South Africa followed English law in that restraint of trade agreements were *prima facie* illegal and void. The onus rested on the employer to prove the reasonableness of the contract as between the parties, before the contract could be enforceable. The decision in *Magna Alloys* settled a long debate about the burden of proof. It was settled that the party who wishes to escape the restraint clause, bears the onus of proving, on a balance of probabilities that the restraint conflicts with the public interest. In *Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*⁵⁸ the court held that section 22

⁵⁶ Schoombie JT “Agreements in Restraint of Trade: The Appellate Division confirms new principles” *THRHR* 1985 (48) 127.

⁵⁷ Wikipedia online dictionary at <http://www.org/wikipedia.org> (last accessed on 23 August 2011).

⁵⁸ 2005 (3) SA 205 (N).

of the Constitution reverses the common law burden of proof. Kondile J held that the applicant who sought to restrict a fundamental right of the first respondent had to do more than invoke the provisions of the contract in restraint of trade and prove the breach. In terms of section 36 of the Constitution, he had to show that the restraint was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁵⁹

⁵⁹ *Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation 209D – G (SA, 42C – F (BCLR)).*

CHAPTER 3

SUMMARY OF LEADING CASE LAW AFTER THE DECISION IN *MAGNA ALLOYS AND RESEARCH (SA) (PTY) LTD v ELLIS*

3.1 *Sasfin (Pty) Ltd v Beukes* 1989

3.1.1 Facts

In *Sasfin v Beukes*,⁶⁰ Sasfin was a company that carried on business as a financier. Beukes was an anaesthesiologist. On the 13th February 1985, the parties entered into a discounting agreement in terms of which Beukes was obliged to sell Sasfin any book debts he wished to sell. The purchase of the book debts by Sasfin was governed by the discounting agreement. On the same date Beukes executed a deed of cession in favour of Sasfin, Sassoons and Simplex. A dispute arose between the parties. Sasfin claimed that Beukes had breached certain warranties contained in the discounting agreement and purported to cancel the agreement. Beukes disputed any breach on his part as well as Sasfin's right to cancel. He further contended that Sasfin, on the other hand, had breached certain of the terms of the discounting agreement. Sasfin instituted motion proceedings in the Witwatersrand Local Division. The court dismissed Sasfin's application with costs on the ground that the deed of cession was contrary to public policy and therefore invalid and unenforceable. Sasfin appealed this decision.

3.1.2 *Ratio Decidendi*

In his majority judgment, Smalberger JA held that the interests of the community or public are of paramount importance in relation to the concept of public policy.⁶¹ The court carefully weighed fairness against legal certainty, and held that no court should shrink from the duty of declaring a contract contrary to public policy when the occasion so demanded.⁶² The court however cautioned that the power to declare contracts contrary to public policy should be

⁶⁰ 1989 1 All SA 347 (A).

⁶¹ *Sasfin v Beukes* 8C-D.

⁶² *Sasfin v Beukes* 8C-D.

exercised sparingly and only in the clearest of cases.⁶³ The court concluded that one must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.⁶⁴

In *SA Forestry Company Ltd v York Timbers Ltd*,⁶⁵ the court referred to *Brisley v Drotsky*⁶⁶ and *Afrox Healthcare Beperk v Strydom*⁶⁷ when it considered the issue of public policy. The court held that within the protective limits of public policy, constitutional values such as dignity, equality and freedom must be considered. The court stated that striking down or declining to enforce contracts that parties have freely concluded must be done with perceptive restraint. In *Botha (now Griessel) and another v Finanscredit (Pty) Ltd*,⁶⁸ the court held that the courts should declare contracts contrary to public policy only in the clearest cases.

3.1.3 Conclusion

The decision in *Sasfin v Beukes* confirmed the view as held in *Magna Alloys*, that the courts would not enforce an agreement that is contrary to public policy. Although the court held the opinion that public policy favoured the utmost freedom of contract, the court cautioned that one should be prudent when declaring a contract contrary to public policy.

3.2 *Basson v Chilwan* 1993

3.2.1 Facts

In *Basson v Chilwan and others*,⁶⁹ the Chilwans were the owners of Chilwan's Bus Service, which operated about 100 buses in South Africa. The appellant ("Basson") was an expert in the design and construction of bus and coach bodies. The parties initiated a joint venture to construct buses on a large scale. A close corporation Coach-Tech was formed for this purpose, in terms of which the four Chilwans and Basson had equal interest. The parties entered into an agreement in 1989, which set out the rights and obligations of the parties to the agreement. Clause 11 of the agreement, which dealt with "Confidentiality and restraint,"

⁶³ *Sasfin v Beukes* 8C-D.

⁶⁴ *Sasfin v Beukes* 8C-D.

⁶⁵ 2005 JOL 12937 (SC).

⁶⁶ 2002 (4) SA 1 (SCA).

⁶⁷ 2002 (6) SA 21 (SCA).

⁶⁸ 1989 (2) All SA 401 (A).

⁶⁹ 1993 2 All SA 373 (A).

provided that Basson was restrained from associating with any competitor of Coach-Tech for a period of five years. In 1990, Basson left Coach-Tech's employ and resumed working for Engineering Agencies as a supervisor. Chilwan's attorneys sent a letter of demand to Basson reminding him of the terms of the agreement and that he was in breach of clause 11. Basson ignored the letter of demand, which resulted in the current application.

3.2.2 *Ratio Decidendi*

The court held that a contract in restraint of trade would be unreasonable and contrary to public policy if it prevented a party, at the termination of a contractual relationship, from freely participating in the commercial and professional world without serving the protectable interests of the other party.⁷⁰ The court ruled that the mere elimination of competition was not an interest deserving of protection by restricting freedom of trade on the termination of the employment contract. The court accepted that a person is entitled to engage in useful economic activity, and in so doing will contribute to the welfare of society by the exercise of their wills.⁷¹

3.2.3 Conclusion

The decision in *Basson v Chilwan* echoed the views held in both *Magna Alloys* and *Sasfin v Beukes* with respect to the criterion of public policy. However, the court placed special emphasis on the importance of proving the existence of a protectable interest. The court identified four questions that should be asked when considering the reasonableness of a restraint. In *Basson v Chilwan and Others*,⁷² the court held that where a party challenges enforcement of a restraint, the court must ask the following four questions:

1. Did one party have an interest worthy of protection on termination of the contract?
2. Was the interest being prejudiced by the other party? If so, did the interest of the party complaining weigh up, both qualitatively and quantitatively, against the interest of the other party so as to justify the fact that the latter would become economically inactive and unproductive?

⁷⁰ *Basson v Chilwan* 743.

⁷¹ *Basson v Chilwan* 744.

⁷² 1993 (2) SA 373 (A).

3. Is there some other consideration of public policy that requires enforcement?
4. Does the restraint go further that is necessary to protect the interest of the party seeking enforcement?

The court remarked that if there were no recognisable interests to protect, and the restraint merely seeks to exclude or eliminate competition, it will be considered to be unreasonable, contrary to public policy and unenforceable. In essence, whilst the court acknowledged that public policy was an important criterion in restraint of trade disputes the court was of the view that proving a protectable interest was more important.

3.3 *Coetzee v Comitis* 2001

3.3.1 Facts

In *Coetzee v Comitis*,⁷³ the rules of the National Soccer League (“NSL”) provided that any footballer wishing to play professional football had to register with the NSL. They provided further that a professional footballer was required to obtain a clearance certificate from his club before he could be registered by the NSL as a player of a new club. If such a player concluded a contract with a new club, his former club was entitled to compensation. If a player stopped playing competitive football upon the expiry of his contract he remained registered as a player of the club with which he was last employed for a period of 30 months, after which the club was no longer entitled to compensation. An arbitrator would calculate the amount of the compensation payable (in the event that the two clubs could not agree upon the amount of compensation), in terms of a pre-set formula. This formula did not take into account factors personal to the player. The player was unable to register with the new club before the compensation was set and paid.

The applicant was a professional footballer. He applied for an order declaring that the NSL's constitution, rules and regulations relating to the transfer of professional soccer players were contrary to public policy and unlawful. He further requested an order that NSL's constitution, rules and regulations be declared inconsistent with the provisions of the Constitution and therefore invalid. The applicant brought the application both in his personal capacity and as a class action on behalf of other players. The NSL opposed the application and, *inter alia*, contended that the applicant lacked *locus standi* to bring the application. It further contended

⁷³ 2001 (1) SA 1254 (C).

that the applicant had entered into the contract with his previous club freely and voluntarily and thus the contract, which was in terms of the NSL's rules, did not violate his rights to freedom of movement, the right to choose a profession or occupation freely and the right to dignity in terms of section 21, section 22 and section 10 of the Constitution.

3.3.2 *Ratio Decidendi*

The court held that the compensation regime constituted a restraint of trade, which was unreasonable. Public policy required that it be declared unlawful and inconsistent with the provisions of the Constitution, and therefore invalid.⁷⁴

3.3.3 Conclusion

The crux of the court's view was in line with the decision in *Magna Alloys*, in that the court found that the compensation regime constituted a restraint of trade which was unreasonable and against public policy. The court thus held the compensation regime to be inconsistent with the provisions of the Constitution and therefore invalid.

3.4 ***Automotive Tooling Systems v Wilkens 2006***

3.4.1 Facts

*In Automotive Tooling Systems v Wilkens*⁷⁵ the appellant's business was in a specialised technological field relating to the design, manufacture and/or customisation of special purpose machines and tooling. It produced pressed tools and 'marking machines' used predominantly to manufacture automotive parts. The first and second respondents had been employed in the appellant's business as skilled toolmakers. Several years into their employ, and at the instance of the appellant, they concluded agreements with the appellant styled 'independent contractor agreements' which contained restraint of trade and confidentiality clauses. When the respondents resigned from their employment with the appellant and took up employment with the third respondent, doing the same work for the third respondent that they did for the appellant, the appellant sought to invoke the restraint of trade and confidentiality clauses and to interdict them from doing so. The appellant claimed to have a proprietary interest in the know-how acquired by the first and second respondents during their employment, as to how the components of the appellant's machine were put together.

⁷⁴ *Coetzee v Comitis* par 41.

⁷⁵ 2007 JOL 19046 (T).

The respondents denied the proprietary interest and contended that the relevant know-how was neither confidential nor specific to the appellant's business, but was commonly available to artisans and technicians. Consequently, it formed part of the first and second respondents' stock of general knowledge, skill and experience with which they were entitled to earn their living in any other business.

3.4.2 *Ratio Decidendi*

The court held that an agreement in restraint of trade was unenforceable if it were unreasonable, and it was unreasonable, and thus contrary to public policy, if it did not protect some legally recognisable interest of the employer, but sought merely to exclude competition. Further, a legally recognisable interest of the employer was an interest, which belonged to the employer, rather than to the employee.⁷⁶ The court further held that the facts established that the know-how acquired by the first and second respondents was no more than a specialist skill in manufacturing machines. Those skills did not belong to the appellant, but to the first and second respondents as part of their general stock of skill and knowledge, which they could not be prevented from exploiting.⁷⁷ The court held accordingly, that the appellant therefore had no proprietary interest worthy of protection: the restraint was inimical to public policy and unenforceable.⁷⁸

3.4.3 Conclusion

In *Automotive Tooling Systems*, the court determined the issue to be whether the employer had a proprietary interest worthy of protection. The court followed the dictum in *Basson v Chilwan* and concluded that the restraint of trade against the two former employees was inimical to public policy and unenforceable, as the appellant had no proprietary interest that was worthy of protection. The determination of whether a proprietary interest exists will depend on the facts and circumstances of each case.

⁷⁶ *Automotive Tooling Systems* 277G-278A and C.

⁷⁷ *Automotive Tooling Systems* 282E-F.

⁷⁸ *Automotive Tooling Systems* 282G.

3.5 *Reddy v Siemens Telecommunications (Pty) Ltd 2007*

3.5.1 Facts

Reddy, the applicant, was employed by Siemens as a systems engineer for seven years. Whilst so employed, Reddy had agreed in his employment contract that he would refrain from being employed by a competitor for a period of one year after the termination of his employment. He also undertook not to disclose trade secrets and confidential information belonging to Siemens. He resigned from Siemens and resumed working for Ericsson as a solutions integrator. Whilst in the employ of Ericsson, Siemens applied to the High Court for an order interdicting and restraining Reddy from taking up employment with one of its competitors, Ericssons. The appellant resisted the application on the ground that the common law principle that a party seeking to avoid a restraint of trade bore the *onus* of showing that it was unreasonable, and was in conflict with the right freely to engage in the trade, occupation or profession of one's choice as intended in section 22 of the Constitution. He argued that restraints limited that right and that the party seeking to enforce the restraint had to bear the *onus* of showing that it was reasonable and justifiable as intended in section 36(1) of the Constitution. The court granted the interdict, holding that it was sufficient that there was a risk that the appellant might use the respondent's trade secrets and confidential information in his new employment, if he so chose, and that it was not necessary for the court to find that he would in fact do so.

3.5.2 *Ratio Decidendi*

The court held that the law was that agreements in restraint of trade were valid and enforceable unless the party seeking to escape their workings showed that they were unreasonable and thus contrary to public policy.⁷⁹ Furthermore, as to the constitutional challenge to the incidence of the *onus* that if the rule were to be reversed as contended for the result would be the same. The assessment of the reasonableness of the restraint required a value judgment, and the incidence of the *onus* played no role in that assessment. Moreover, that value judgment comprehended the considerations referred to in section 36(1) of the Constitution, since it necessarily required determining whether the restraint was 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁸⁰ That since the appellant had taken up employment with a rival

⁷⁹ *Reddy v Siemens* 493G-494A.

⁸⁰ *Reddy v Siemens* 495E-496D and 498D-E.

company in a position similar to the one he had occupied with the respondent, the disclosure of confidential information presented an obvious risk to the respondent. It was sufficient for purposes of granting the interdict sought that the appellant could disclose that information if he so chose, which was the very risk against which the respondent had sought to protect itself by means of the restraint clauses. In these circumstances, enforcement of the restraint was neither unreasonable nor contrary to public policy.⁸¹ That public policy required contracts to be enforced and the appellant was required to honour the agreement he had entered into voluntarily and in the exercise of his own freedom of contract. The appeal was accordingly dismissed.⁸²

3.5.3 Conclusion

The court in *Reddy v Siemens* left the question open in respect of the onus in restraint of trade cases. This is in direct contrast to the decision in *Magna Alloys* where the court emphatically stated that the person restrained, such as an employee, bears the onus in restraint of trade cases. The court in the *Reddy* case referred to *Basson v Chilwan* and enquired whether the restraint went further than necessary to protect the interest. The court held that Reddy was in possession of confidential information which, when assessed objectively, was at risk of being exposed to a competitor if he commenced employment there. It should be noted that although the court evaded dealing with the issue of onus, the court arrived at an equitable decision by considering the principles of freedom of trade, public policy and Constitutional values.

3.6 *Barkhuizen v Napier 2007*

3.6.1 Facts

In *Barkhuizen v Napier*⁸³ Barkhuizen had insured his motor vehicle with Napier. The vehicle was involved in an accident, and Barkhuizen timeously lodged a claim with Napier. Napier repudiated the claim. Two years later, Barkhuizen instituted action against Napier. Napier raised a special plea alleging that he had been released from liability because Barkhuizen had failed to serve summons within 90 days of being notified of the repudiation of his claim. The special plea was based on a clause in the contract - the 'time-limitation clause' - which

⁸¹ *Reddy v Siemens* 499G-500C.

⁸² *Reddy v Siemens* 500E-F.

⁸³ 2007 (5) SA 323 (CC).

provided that '(I)f we reject liability for any claim made under this policy we will be released from liability unless summons is served . . . within 90 days of repudiation...'

Barkhuizen argued that the time-limitation clause was unconstitutional and unenforceable because it violated his right under section 34 of the Constitution to have the matter determined by a court. The High Court upheld Barkhuizen's contention. On appeal to the Supreme Court of Appeal (SCA), the SCA found that section 34 of the Constitution did not prevent time-limitation clauses or provisions in contracts that were entered into freely and voluntarily, but that it could not be determined on the evidence whether the clause under consideration had been entered into freely and voluntarily. The SCA accordingly upheld the appeal and the special plea. Barkhuizen approached the Constitutional Court for leave to appeal against the decision of the SCA.

3.6.2 *Ratio Decidendi*

In the majority judgment as delivered by Ngcobo J, the Constitutional Court explained that section 34 not only reflected the foundational values that underlie the constitutional order, but also constituted public policy. Therefore, public policy had to be determined with reference to the Constitution. In the present case, it had to be determined whether the time limitation clause was contrary to public policy as evidenced by the constitutional values found in section 34. Ngcobo J took into consideration that public policy tolerated time-limitation clauses, subject to the considerations of reasonableness and fairness. Also, the Constitution recognised that the right to seek judicial redress⁸⁴ could be limited in circumstances where it was sanctioned by a law of general application and the limitation was reasonable and justifiable.⁸⁵ Ngcobo J explained that the test for reasonableness was whether the contract contained a time-limitation clause that afforded a contracting party an adequate and fair opportunity to seek judicial redress and have disputes arising from the contract resolved by a court of law. Therefore, if a contractual term provided for an impossibly short time for the dispute to be referred to a court of law, it would be contrary to public policy and unenforceable.

⁸⁴ Section 34 of the Constitution.

⁸⁵ Section 36 of the Constitution.

As to the requirement of fairness, Ngcobo J said that there were two questions to be asked: The first was whether the clause itself was unreasonable; secondly, if the clause was reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause. The first question involved the weighing-up of two considerations. On the one hand public policy as informed by the Constitution, required in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken (*pacta sunt servanda*). The other consideration was that all persons had a right to seek judicial redress. The second question involved an inquiry into the circumstances that prevented compliance with the clause. If the clause did not violate public policy, the claimant had to prove that in the circumstances of the case there was a good reason why there was a failure to comply. In determining fairness, Ngcobo J also pointed out that the relative equality or inequality of the bargaining position of the parties would be a relevant consideration. In the present case, Ngcobo J concluded that the 90-day time limitation was not manifestly unreasonable, nor was it manifestly unfair. There was no evidence that the contract had not been freely concluded, that there was unequal bargaining power between the parties or that the clause was not drawn to Barkhuizen's attention. In the circumstances, Ngcobo J found that the enforcement of the clause would not be contrary to public policy. Furthermore, Barkhuizen had not furnished the reasons for his non-compliance with the time-limitation clause. Ngcobo J was therefore unable to say whether the enforcement of the clause against Barkhuizen would be unfair and contrary to public policy. In the result, the court concluded that enforcement of the clause would not be unjust to Barkhuizen. The appeal was therefore dismissed.

3.6.3 Conclusion

The Constitutional Court, in my view, rightfully opined that the test of public policy had to be considered in light of the Constitution. The court furthermore stated that the onus of proof lies upon the party seeking to avoid the enforcement of the time limitation clause. This view is in line with the decision in *Magna Alloys* and subsequent decisions, where the court confirmed that the onus of proof in restraint of trade disputes lies with the party who wishes to escape the restraint in question.

3.7 *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008

3.7.1 Facts

In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another*,⁸⁶ the applicant ("Advtech"), a personnel recruitment agency, employed Kuhn as a personnel contracting consultant in the area of IT recruitment. She left the employ of the applicant some four months later, taking up employment with the second respondent, a competitor of the applicant. The restraint of trade clause incorporated in her contract of employment with the applicant was, as is not uncommon, wide in its scope, seeking to restrain the applicant for a period of twelve months from effectively doing anything for anyone considered to be a competitor. Advtech did not seek a partial enforcement of the restraint.

3.7.2 *Ratio Decidendi*

The court held that at common law a restraint of trade was *prima facie* valid, and the party seeking to avoid the restraint bore the onus of proving that it was unreasonable and therefore contrary to public policy. The principle of *pacta sunt servanda* thus enjoyed supremacy over the competing policy considerations.⁸⁷ Furthermore, those contractual terms were, however, subject to constitutional rights. The courts had in the past invalidated and refused to enforce agreements that were contrary to public policy, on constitutional grounds.⁸⁸ Furthermore, that in the context of the right freely to choose one's trade, occupation or profession⁸⁹ and the right to dignity⁹⁰ the position had to be that an employer was required to justify a restraint. The employer thus bore the onus of proving the reasonableness of a restraint.⁹¹ The concept of contractual autonomy had to mean something distinct from *pacta sunt servanda*, particularly if the concept of ubuntu was to play any role in our law, but that it was not, however, necessary to decide the issue.⁹² The court concluded that every component of the restraint clause in question was, judged on its wording, unreasonable in scope.⁹³ Secondly, that a party was not entitled to draft so all-encompassing a contract which, on its own wording, was plainly unenforceable for being

⁸⁶ 2007 (4) All SA 1368 (C).

⁸⁷ *Advtech Resourcing (Pty) Ltd* 383B-D.

⁸⁸ *Advtech Resourcing (Pty) Ltd* 386E.

⁸⁹ S22 of the Constitution.

⁹⁰ S10 of the Constitution.

⁹¹ *Advtech Resourcing (Pty) Ltd* 387A-B.

⁹² *Advtech Resourcing (Pty) Ltd* 388H-389A.

⁹³ *Advtech Resourcing (Pty) Ltd* 391B and 392H-I.

overbroad, too wide in scope, and then, under the guise of a severability clause, to request a court to develop what was, in effect, an entirely different contract. The clause under consideration could in this case not be salvaged by the severability clause contained in the contract. The application was therefore dismissed.⁹⁴

3.7.3 Conclusion

This decision is in line with *Automotive Tooling Systems* where the court held that a contract in restraint of trade can only be enforced if it protects some proprietary interest for the person who seeks to enforce it. The court further opined that contractual terms are subject to constitutional rights, which seems to follow other decisions like *Napier v Barkhuizen*. The court confirmed the view as per *Magna Alloys* that courts would invalidate and refuse to enforce agreements that are contrary to public policy.

3.8 *Den Braven SA (Pty) v Pillay 2008*

3.8.1 Facts

In *Den Braven SA (Pty) Limited v Pillay and another*⁹⁵ the first respondent was interdicted and restrained from acting in breach of the restraint of trade to which he bound himself when he took up employment with the applicant. The applicant sought only partial enforcement of the restraint, by prohibiting the first respondent from taking up employment with its competitor, the second respondent, in KwaZulu-Natal, and from soliciting the applicant's customers. In both instances, this was for some period less than the two years specified in the restraint. The protectable interest relied upon by the applicant was the risk of damage to its customer connections. According to the evidence, the first respondent was an excellent sales representative who built up and maintained a large customer base for the applicant during his eight years of employment. In the financial year preceding his resignation, he was responsible for R5 million of the applicant's R12 million annual turnover for the area of KwaZulu-Natal. The first respondent resisted the application on the basis, that firstly, the restraint was so extensive as to render its enforcement unconstitutional (as breaching the right freely to choose one's trade, occupation or profession, as enshrined in section 22 of the Constitution), and thus contrary to public policy; and secondly, it was not possible to sever the good from the bad aspects of the restraint as that would be to make a contract for the parties.

⁹⁴ *Advtech Resourcing (Pty) Ltd* 392B-E.

⁹⁵ 2008 (3) All SA 518 (D).

3.8.2 *Ratio Decidendi*

The issues were distilled to two questions. The first was whether, as contended by the first respondent, the restraint was so wide and far-reaching as to be against public policy. Secondly, in the context of the reasonableness of the restraint, the court had to ask whether one party had an interest that deserved protection after termination of the agreement; whether such interest weighed qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive; and whether there was an aspect of public policy having nothing to do with the relationship between the parties that required that the restraint be maintained or rejected.

As a starting point, the court emphasised that contractual obligations are enforceable unless they are contrary to public policy, which is to be discerned from the values embodied in the Constitution and in particular in the Bill of Rights. The crucial question to be asked was whether the applicant had a protectable interest. The applicant showed that trade connections through customer contact existed and could be exploited by the first respondent if employed by a competitor. The restraint would therefore be upheld unless the first respondent's argument on the breadth of the restraint was upheld. The court found that the applicant was entitled to relief, but on narrower terms than those contained in the restraint agreement.

3.8.3 Conclusion

It is clear from the decision in *Den Braven SA* that in restraint of trade disputes, the employer must want to protect a proprietary interest, and must be able to demonstrate that there indeed is a proprietary interest worth protecting, before the restraint of trade will be enforceable. The court, in referring to *Advtech Resourcing*, held that an applicant seeking to enforce the provisions of a restraint of trade agreement not only had to prove the breach or threatened breach of that agreement but had to show that the restraint was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

3.9 *Digicore Fleet Management v Steyn* 2009

3.9.1 Facts

In *Digicore Fleet Management v Steyn*⁹⁶ the first respondent had signed a restraint of trade agreement during her employment with the appellant. When she assumed employment with the second respondent after leaving the appellant, the latter attempted to enforce the restraint agreement. The court *a quo* refused the relief sought, finding that the undertaking in restraint of trade was unenforceable. The present appeal was noted against this decision.

3.9.2 *Ratio Decidendi*

The court held that provisions in restraint of trade are enforceable unless the person wishing to escape an undertaking that it is unreasonable and hence contrary to public policy shows it. Thus, the first respondent had to show that the appellant had no proprietary interest that was threatened by her working for a competitor. Contrary to the allegations made by the appellant, the first respondent testified that she received no training by the appellant, was given no confidential client information save for the details of about 20 clients, and had brought her own contacts with her. The court concluded that it could not be found that the appellant had any proprietary right that was in jeopardy when the first respondent left to work for a competitor. The appeal was dismissed with costs.⁹⁷

3.9.3 Conclusion

In *Digicore Fleet Management*, the court agreed with the view held in *Magna Alloys* with respect to the incidence of onus. The court once again attempted to establish whether the employer had a proprietary interest that was being threatened by Steyn working for a competitor. The court applied the fourfold test enunciated by Nienaber JA in *Basson v Chilwan*, and concluded that Digicore did have a proprietary interest in its client base and information about it, that deserved protection. However, Steyn presented no threat to that interest in that she was using her own contacts and information, acquired before joining Digicore, and not making improper use of information that is confidential to Digicore.

⁹⁶ 2009 (1) All SA 442 SCA.

⁹⁷ *Digicore Fleet Management* 445.

3.10 *Interpark (SA) Ltd v Joubert & Another* 2010

3.10.1 Facts

In *Interpark (SA) Ltd v Joubert & Another*,⁹⁸ Interpark employed Joubert as an Operations Manager. His contract of employment contained a 12 page standard form restraint in which he recognized that he had access to trade secrets and confidential information. He was prohibited from becoming involved in any undertaking that carried on the 'prescribed business' or provided the 'prescribed services' anywhere in the 'prescribed area'. Prescribed business and prescribed services were widely defined and were supposed to be detailed in an annexure, which was never attached to the restraint. The prescribed area was in fact each province of South Africa, Swaziland and any other country where Interpark conducted business.

Joubert took up employment with Easipark, which was a direct competitor of Interpark. Joubert contended that the park management business is not sophisticated, the same suppliers are used, there is little to differentiate between the two modes of operation and other parking management companies also use the equipment and software used by Interpark. If there was proprietary information which was unique to Interpark, Joubert claimed that he was not privy to this. In response, Interpark conceded that Joubert did not have access to the actual management programmes, but argued that he was exposed to unique procedures. Interpark alleged that it could not divulge the exact details of these unique procedures, as this would defeat the application and the restraint. The court took a dim view of this approach. It held that Interpark's allegations could not be tested properly, and its failure to make use of the procedures to ensure that sensitive information was provided to the court without risk of it being revealed, should be held against it.

3.10.2 *Ratio Decidendi*

The court held that the restraint was to endure for two years, and the application came before the court more than a year after the restraint period commenced. The respondent contended that there was no protectable interest that had survived by the time the case was argued. A restraint of trade agreement is enforceable unless it is contrary to public policy. The principle enquiry is whether or not the party seeking to enforce the restraint has a

⁹⁸ 2010 JOL 25521 (GSJ).

protectable interest, and if so, whether that interest outweighs public interest considerations. The court found that the applicant had struggled to identify precisely what constituted its protectable interests. It concluded that the restraint was unenforceable, and dismissed the application.⁹⁹

3.10.3 Conclusion

The court referred to *Magna Alloys* but preferred not to deal with the incidence of onus. The court furthermore referred to the principles established in *Basson v Chilwan*. In the end, the court opted to follow the approach in *Mozart Ice-cream Franchises (Pty) Ltd v Davidoff and Another*¹⁰⁰ as in the opinion of the court, *Mozart Ice-cream Franchises* was more in line with *Reddy v Siemens*. The court held that Interpark could not precisely define what constituted its protectable interest. The court thus followed the similar approach as that of *Digicore Fleet Management*.

⁹⁹ *Interpak 1*.

¹⁰⁰ 2009 JOL 24236 (C); see par 1.2 above, and chapter 4 below for a discussion of this case.

CHAPTER 4

BURDEN OF PROOF

4.1 Incidence of onus to prove: Before *Magna Alloys*

Before the *Magna Alloys* decision, our courts treated restraint of trade agreements as contrary to public policy, regarding them as *prima facie* void and unenforceable. As a result, the onus rested on the party seeking to enforce the agreement to show that it was reasonable and therefore in the public interest to enforce it. It appears that in some earlier cases, there were already indications of a shift of the incidence of onus. In *Empire Theatres Co Ltd v Lamor*,¹⁰¹ the court held that the onus of proving that a covenant in restraint of trade was unreasonable rested upon the person seeking to avoid the restraint. Thereafter in *African Theatres Ltd v D'Oliveira*,¹⁰² Krause J stated, "It seems to me that it is an ordinary principle of law that he who wishes to rely upon any special circumstances whereby he claims exemption from his obligations should state the special circumstances and prove them."

In *Super Safes (Pty) Ltd v Voulgarides*,¹⁰³ for example, Nicholas J said, "An agreement in restraint of trade is *prima facie* unenforceable. It will only be enforced if it is reasonable as between the parties and not contrary to the public interest. The onus of proving the reasonableness of a restraint of trade is upon the person who relies upon it." Arthur Suzman QC in criticising South African courts for following English law with respect to the rule that the onus is on the party seeking to enforce the restraint stated that, "This rule as to onus... is, it is submitted, in conflict with the basic principles of our law that an agreement seriously and deliberately entered into is binding, unless the party seeking to escape from its provisions can set up some specific ground vitiating his undertaking."¹⁰⁴

¹⁰¹ 1910 WLD 289 291.

¹⁰² 1927 WLD 122.

¹⁰³ 1975 (2) SA 783 (W) 785D-F.

¹⁰⁴ *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) All SA 482 (N).

Subsequently the *Magna Alloys* decision effectively led to a shift in the onus and presently, the party who is seeking to escape the effects of an agreement bears the onus of proof. He needs to show on a balance of probabilities that enforcement of the agreement would be contrary to public policy.¹⁰⁵

4.2 Shift of the onus after *Magna Alloys*

The *Magna Alloys* decision has been referred to as a ‘landmark’ decision in that there has been significant change to the approach of the courts to agreements of restraint of trade.¹⁰⁶ In *Magna Alloys*, the acceptance of public interest as the true test for enforceability led the court to the following further conclusions: the party alleging that he is not bound by the restraint bears the onus of proving that enforcement would be contrary to public interest; a court may have recourse to the circumstances existing at the time that enforcement is requested and a court is empowered to rule that the restraint is partially enforceable.¹⁰⁷ *Magna Alloys* has thus settled the question as to the incidence of the onus in South African law. The onus now rests on the employee to show that it would be unreasonable and hence contrary to public policy to enforce the restraint. When deciding whether a restraint of trade is contrary to public policy, regard must be had to two policy considerations, firstly, agreements freely entered into should be honoured and secondly, everyone should be free to enter the business or professional world.¹⁰⁸

In *Powertech Industries (PTY) Ltd v Jamneck*,¹⁰⁹ the court whilst referring to *Magna Alloys*, held that it is now clear that the party who contends that the enforcement of the restraint against him would be contrary to the public interest must prove his contention. The court further held that as long as enforcement of a covenant would be contrary to public policy, it would not be enforced. Hattingh J opined that to determine whether it is indeed unreasonable regard must be had to the circumstances of the case. Such circumstances according to the court, are not limited to those that existed when the parties entered into the

¹⁰⁵ *Magna Alloys* 893B-D.

¹⁰⁶ Christie RH *The Law of Contract in South Africa* 5th ed (2005) 361.

¹⁰⁷ *Magna Alloys* 897F-898D.

¹⁰⁸ *Magna Alloys* 893-4.

¹⁰⁹ 1993 (1) All SA 119 (O).

covenant, but also include those which came into being since then and, in particular, of the situation prevailing at the time enforcement is sought.¹¹⁰

In *Reddy v Siemens Telecommunications (Pty) Ltd*,¹¹¹ the court dealt with the issue of the impact of the Constitution on the incidence of onus. Counsel for Reddy sought to challenge the constitutionality of the *Magna Alloys* decision by submitting that the rule that was laid down in *Magna Alloys*, has the effect of casting the onus upon a party seeking to avoid a restraint to allege and prove that the restraint is unreasonable. It is in conflict with section 22 of the Constitution which guarantees every citizen the right to choose his or her trade, occupation or profession freely.¹¹² Counsel further submitted that a restraint limited that right and is enforceable only if it is alleged and proved by the person seeking to enforce it that the limitation is reasonable.¹¹³ The court held that the substantive law, as laid down in *Magna Alloys*, is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an onus on the person who seeks to escape it.¹¹⁴ According to Malan J, “If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed, if on the other hand those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.”¹¹⁵

4.3 The Constitution: The reversal of the common law onus?

After *Magna Alloys*, the courts applied the principles enunciated in *Magna Alloys* in respect of restraint of trade disputes even after the final Constitution came into effect. Judicial opinion is conflicting on the issue of the incidence of onus, especially after the enactment of section 26 of the interim Constitution and subsequently section 22 of the final Constitution. In *Waltons Stationery Co (Edms) Bpk v Fourie*,¹¹⁶ the covenantor contended that the particular restraint was illegal because it infringed section 26 of the Constitution. Edeling J, however

¹¹⁰ *Powertech Industries* 120.

¹¹¹ 2006 JOL 18829 (SCA).

¹¹² *Reddy v Siemens* 9.

¹¹³ *Reddy v Siemens* 9.

¹¹⁴ *Reddy v Siemens* 10.

¹¹⁵ *Reddy v Siemens* 11.

¹¹⁶ 1994 (4) SA 507 (O).

concluded that covenants in restraint of trade are not excluded by section 26 and consequently that *Magna Alloys* still reflected the positive law.¹¹⁷

In *Knox D'Arcy Ltd v Shaw*,¹¹⁸ counsel for the respondents argued that in light of the fact that section 26(1) gave individuals the right freely to engage in economic activity, the *Magna Alloys* case should be re-evaluated. In dismissing this argument, van Schalkwyk J held that the Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their foolhardy or rash decisions. As long as there is no overriding principle of public policy which is violated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his advantage.¹¹⁹

In *Kotze en Genis (Edms) Bpk v Potgieter*,¹²⁰ a former employee's main defence was that the restraint was unreasonable, contrary to public policy and in conflict with the Constitution. The court's view was that section 26(1) of the Constitution protected an individual against legislative inroads and not the common law. The court held that the section had no bearing on the individual's right to contract and that there was no reason why section 26(1) would protect the covenantor rather than the covenantee.¹²¹ The court finally concluded that the fundamental rights provisions are neutral as regards the incidence of the onus in a matter such as the application to enforce a restraint and, further, that the fact that the Constitution had now entrenched the principle of freedom of trade did not imply a change of approach.¹²²

A different approach was followed however in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,¹²³ where the court held that it would be unreasonable, unjust and against the public interest to enforce the restraint and in so doing prevent the respondent from earning a living. The court found this to be the case on the facts even on the assumption that the applicant did establish an interest deserving of protection and also assuming that the onus was on the respondent to establish the unenforceability of the

¹¹⁷ *Walton Stationery* 511B-F.

¹¹⁸ 1996 (2) SA 651 (W).

¹¹⁹ *Knox D'Arcy* 1710I-J.

¹²⁰ 1995 (3) BCLR 349 (K).

¹²¹ *Kotze en Genis* 352E-F.

¹²² *Kotze en Genis* 350.

¹²³ 2005 (3) SA 205 (N).

restraint.¹²⁴ The court specifically discussed the issue of where the onus of proof lies.¹²⁵ The court referred to *Magna Alloys and Basson v Chilwan*¹²⁶ and reaffirmed that the position under the common law was that the onus rested on the party wishing not to have the restraint of trade provision enforced.¹²⁷

The court referred to section 39(2) of the Constitution and the duty of every court, tribunal and forum to promote the spirit, purport and objects of the Bill of Rights when developing, amongst others, the common law, the court *in casu* summarily concluded as follows, “The restraint of trade clause in the contract constituted a limitation on the first respondent’s fundamental right to freedom of trade, occupation and profession. It was inconsistent with the Constitution to impose the onus to prove a constitutional protection on the first respondent. Accordingly, the applicant, who wanted to restrict first respondent’s fundamental right, had the duty of establishing that first respondent forfeited his right to constitutional protection.”¹²⁸

The *Canon* decision has been criticised for being incorrect. The decision to enter into a restraint of trade agreement and thereby decide to restrict one’s ability to trade or contract in specified circumstances in return for something, is an exercise of the right to trade in itself and is not a limitation.¹²⁹ In *Coetzee v Comitis and others*,¹³⁰ Traverso J held that the contractual rules and regulations concluded with any person who wanted to play professional soccer were akin to treating players as goods and chattels and at the mercy of their employer once their contract had expired. According to Traverso J, these rules, ‘violate the most basic values underlying the Constitution’ and therefore constitutes a restraint of trade which is unreasonable.¹³¹ The court thus concluded that consequently public policy required that the compensation regime be declared unlawful and invalid because the Constitution imposes an obligation on this court to declare unconstitutional conduct invalid.

In interpreting and deciding matters subject to contractual disputes, it is imperative that the Constitution be considered in order to ensure that the parties’ constitutional rights are

¹²⁴ *Canon KwaZulu-Natal* 46B-C.

¹²⁵ *Canon KwaZulu-Natal* 41G.

¹²⁶ 1993 (3) SA 742 (A).

¹²⁷ *Canon KwaZulu-Natal* 41G-42A.

¹²⁸ *Canon KwaZulu-Natal* 42D-E.

¹²⁹ Tait M “Who should bear the onus in restraint of trade disputes?” *Obiter* (2004) 488.

¹³⁰ 2001 (1) All SA 1254 (C).

¹³¹ *Coetzee v Comitis* 1273.

protected. This constitutional approach amounts to a bold statement that a restraint was invalid for offending section 22 of the Constitution unless the limitation of this right was reasonable and justified in the circumstances.¹³² Malan J, whilst referring to *Napier v Barkhuizen*,¹³³ held that all agreements including agreements in restraint of trade, are subject to constitutional rights obliging courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution.¹³⁴ Kerr is also of the view that “the positioning terms of the Constitution may now be that the onus will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution.”¹³⁵ The question then is, must non-enforcement of a contract be decided along constitutional lines or in terms of the common law?

There are convincing arguments in favour of both the constitutional and common law approaches. According to the constitutional approach, a covenant in restraint of trade is invalid (as it offends section 22 of the Constitution) and unenforceable unless it is shown to be reasonable in the circumstances (in accordance with section 36(1) of the Constitution). In this instance the onus would be on the covenantee to prove that the restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. In terms of the common law approach, a covenant in restraint of trade is valid and enforceable and the onus rests on the covenantor to prove that the restraint offends public policy. The view is held that the enquiry into whether the constitutional or alternatively common law approach should be favoured is broadly an enquiry into the balancing of the values of freedom of trade and sanctity of contract.¹³⁶

It is submitted that the ideal situation would be the marrying of the two opposing approaches, which would ensure an equitable balance between the values of freedom of trade and sanctity of contract. The question is how one can ensure that a party’s constitutional right of freedom of trade remains intact whilst upholding the principle of sanctity of contract. In *Napier v Barkhuizen*,¹³⁷ Cameron JA warned that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly

¹³² Pretorius C-J “Covenants in restraint of trade: A synthesis of traditional, common law and constitutional approaches” *Obiter* (2009)154.

¹³³ 2006 (4) SA 1 (SCA) para 6.

¹³⁴ *Reddy v Siemens* 7.

¹³⁵ Kerr AJ *The Principles of the Law of Contract* 5th ed (1998) 200.

¹³⁶ Pretorius C-J 154.

¹³⁷ 2006 (4) SA 1 (SCA) 8.

when it requires them to impose their individual conceptions of fairness and justice on parties ‘individual arrangements’.

It is submitted that the best approach thus far appears to be *Reddy v Siemens Telecommunications (Pty) Ltd*,¹³⁸ where the court avoided the issue as to where the burden of proof lies. Malan AJA held that since the facts concerning reasonableness or otherwise of the restraint had been fully explored in the evidence, the assessment of the reasonableness of the restraint required a value judgment in which the incidence of the burden of proof played no role.¹³⁹ The court concluded that the outcome of the value judgment would be the same irrespective of whether the burden rested on the covenantor or the covenantee.¹⁴⁰ It is suggested that the approach by Malan AJA should be followed in future when dealing with restraint of trade disputes and that the courts should ensure that all relevant aspects are considered especially the values of freedom of trade and the sanctity of contract.

¹³⁸ 2007 (2) SA 486 (SCA).

¹³⁹ *Reddy v Siemens* 495-6.

¹⁴⁰ *Reddy v Siemens* 495-6.

CHAPTER 5

PUBLIC POLICY AND REASONABLENESS

5.1 Introduction

The court in *Magna Alloys* held that our common law does not recognise agreements that are contrary to public policy.¹⁴¹ Although the court did not go into what the term ‘public policy’ entails, it is evident by the case law discussed previously that this term is difficult to define and highly contentious.

In a much-quoted old English case, Burrough J put it best when he said, “I, for one, protest, as my Lord has done, against arguing too strongly upon public policy. It is a very unruly horse, and when you once get astride it you never know where it will carry you.”¹⁴² Regarding the aspect of reasonableness, the court in *Magna Alloys* found that a restraint of trade that is unreasonable would probably also prejudice the public interest.¹⁴³ In *Magna Alloys* the court did not adequately deal with the issue as to what constitutes ‘unreasonableness’ in the context of restraint of trade clauses.

In 1994 in *Nordenfelt v Maxim Norden-felt Guns and Ammunition Co Ltd*,¹⁴⁴ Lord Macnaghten stated, “It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.”¹⁴⁵

¹⁴¹ *Magna Alloys* 891G.

¹⁴² *Richardson v Mellish* (1824–34) All ER Rep 258.

¹⁴³ *Magna Alloys* 894D 898A-B.

¹⁴⁴ 1894 AC 535-565.

¹⁴⁵ *Nordenfelt* 535-565.

5.2 The criterion of public policy

The essential criterion derived from the *Magna Alloys* decision is that the public interest or public policy is paramount in determining whether a restraint of trade agreement is valid and enforceable. This criterion is twofold in that it requires that agreements freely entered into be honoured and secondly that generally everyone be free to seek fulfilment in the business and professional world.¹⁴⁶ On the other hand, any unreasonable restriction on such freedom should generally be regarded as contrary to public policy.¹⁴⁷ It is submitted that each restraint of trade agreement should be examined as to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable.

In *Basson v Chilwan*,¹⁴⁸ the court expressly approved the following dictum of Harms J in *Sibex Engineering Services (Pty) Ltd v van Wyk*,¹⁴⁹ "I would venture to suggest that the effect of *Magna Alloys* is that the question whether a covenant is contrary to public policy is a factual issue and that there are no *priori* rules which decree that certain clauses are per se unenforceable."

5.2.1 The position as held in *Magna Alloys*

In *Magna Alloys*, the court held that "Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced."¹⁵⁰ The court concluded that "Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy."¹⁵¹ It is submitted that the court rightfully weighed the valuable principles of freedom of trade and sanctity of contract before arriving at its conclusion.

¹⁴⁶Landis H & Grossett L "Restraint of trade: What effect does it have today?" *Management Today* 2006 55.

¹⁴⁷ *Magna Alloys* 762C-F.

¹⁴⁸ 1993 (2) All SA 373 (A).

¹⁴⁹ *Sasfin v Beukes* 350.

¹⁵⁰ *Magna Alloys* 875H-I.

¹⁵¹ *Magna Alloys* 875H-I.

5.2.2 Test of public policy

The test of public policy is well known in the contractual and legal arena. A contract is illegal or unenforceable if it is against good morals or against public policy, the two expressions being interchangeable.¹⁵² Public policy requires that a contract should not be inimical to the interests of the community, nor contrary to law or morality, and that it should not run counter to social or economic expedience.¹⁵³

The advent of the Constitution has had a positive influence on the test of public policy in our law. It is accepted that public policy is now rooted in the Constitution and the fundamental values that underlie it.¹⁵⁴ These values include human dignity, equality, human rights and freedoms, non-racialism, and non-sexism. In applying the criterion of public policy, the court must attempt to achieve a balance between unacceptable excesses of contractual “freedom”, and securing a framework within which contracting enhances rather than diminishes self-respect and dignity.¹⁵⁵ It is submitted that the correct approach is to determine public policy in accordance with the values enshrined in the Constitution.

The test of public policy further entails taking into account the principle of sanctity of contract. Sanctity of contract can even be said to be the essence of public policy in contract law. As a result, the courts are not keen to declare a restraint contrary to public policy and void. In *Sasfin (Pty) Ltd v Beukes*,¹⁵⁶ the court stated the following in this regard, “The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.”¹⁵⁷

The mere fact that the clause may be unreasonable inter partes is not normally a ground for attacking its validity, since the public interest demands that parties to a contract be held to the terms of their agreement.¹⁵⁸ The courts reluctance in declaring contracts contrary to

¹⁵² *Sasfin v Beukes* 350.

¹⁵³ *Sasfin v Beukes* 350.

¹⁵⁴ Law of South Africa vol.5(1) 2nd ed 411.

¹⁵⁵ Law of South Africa vol.5(1) 2nd ed 411.

¹⁵⁶ 1989 (1) SA 1 (A).

¹⁵⁷ *Sasfin v Beukes* 767G-H.

¹⁵⁸ *Magna Alloys* 893H-I.

public policy is welcomed and is proof that the test of public policy is applied holistically by our courts.

In *Magna Alloys*, the court held that since ideas in respect of what was considered to be in public interest, or what public interest demanded, differed and could change from time to time, it was impossible to have a *numerus clausus* of the types of agreement that were regarded as being contrary to the public interest.¹⁵⁹

Since the consideration of public policy is constantly changing, the question arises as to the method in assessing the test of public policy. In *Coetzee v Comitis*¹⁶⁰ Traverso J held, “I am firmly of the view that considerations of public policy cannot be constant. Our society is ever changing one. We have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights. One can think of many situations which would prior to 1994, have been found not to offend public policy which would today be regarded as inhuman.”

It is safe to say that the appropriate method in evaluating the test of public policy is by considering the circumstances of the case in light of the convictions of society at the time the matter is in dispute as well as the principles enshrined in the Constitution.

5.3 Reasonableness

The essential criterion in determining whether a restraint of trade clause is contrary to public policy is reasonableness. In *Basson v Chilwan*, and as reformulated and expanded in *Nampesca (SA) Products (Pty) Ltd v Zaderer*,¹⁶¹ it was stated that reasonableness must be determined with reference to the following considerations:¹⁶²

- (a) Is there an interest deserving of protection (“protectable interest”) at the termination of the agreement?
- (b) Is that interest being prejudiced?

¹⁵⁹ *Magna Alloys* 898D.

¹⁶⁰ 2001 (1) SA 1254 (C).

¹⁶¹ 1999 ILJ 549 (C).

¹⁶² *Nampesca (SA) Products* 16.

- (c) If so, how does that interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- (d) Is there another facet of public policy not having anything to do with the relationship between the parties, which requires that the restraint should either be enforced or disallowed?
- (e) Is the restraint wider than is necessary to protect the protectable interest?
- (f) To the above the following question may be added, namely, whether the restraint is consistent with section 22 of the Constitution.

5.3.1 Current South African position

In *Magna Alloys*, Rabie CJ focused on the public interest. However, this had little effect on the courts since they generally continued to apply reasonableness as the primary criterion just as they had done prior to 1984.¹⁶³ The court in *Magna Alloys* did not address the issue of what constitutes reasonableness in the context of restraint clauses, and furthermore what effect unreasonableness would have on their enforcement. It is suggested that since Rabie CJ apparently referred to the protectable interests of the covenantee in the context of unreasonableness, it might suggest that reasonableness should still be primarily determined with reference to the protectable interests of the covenantee.¹⁶⁴

However in *Reddy v Siemens*,¹⁶⁵ the court held that a restraint is enforceable unless it is shown to be unreasonable. A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint.¹⁶⁶

5.3.2 Factors affecting reasonableness

The following are some of the important factors identified by the courts that affect the reasonableness of a restraint:

¹⁶³ Neethling J “The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants – A Need for Exercising Restraint” *SA Merc LJ* (2008) (20) 90.

¹⁶⁴ Pretorius C-J “Covenants in restraint of trade: an evaluation of the positive law” *THRHR* (1997) (60) 8.

¹⁶⁵ 2006 JOL 18829 (SCA).

¹⁶⁶ *Reddy v Siemens* 1.

5.3.2.1 Protectable interest

In general, the main reason why restraints of trade are entered into is to preserve trade secrets, confidential information or trade or customer connections. The courts have even held that a contract in restraint of trade must protect some proprietary interest for the person who seeks to enforce it before it will be enforced.¹⁶⁷ In *Advtech Resourcing (Pty) Ltd t/a The Communication Personnel Group v Kuhn & Another*,¹⁶⁸ the court stated that proprietary interests may take the form of trade secrets, confidential information, goodwill or trade connection. The court dismissed the application finding that there were no proprietary interests to justify the restraint. In *Digicore Fleet Management (Pty) Ltd v Steyn*,¹⁶⁹ the court stated that Steyn had acquired no confidential information while in the employ of Digicore, and had taken with her no more than she had brought to Digicore in the first place – her own experience, expertise and contacts. The court concluded that the restraint was not reasonable and thus unenforceable. And in the recent decision of *Reddy v Siemens*¹⁷⁰ the court had to enquire whether the restraint went further than necessary to protect the interest.

5.3.2.2 Inequality of bargaining power

The question as to whether the parties, when they concluded the agreement in restraint of trade, were on an equal footing, is one of the factors which will be taken into account by a court in determining the reasonableness or otherwise of a covenant in restraint of trade.¹⁷¹ With the public interest as the touchstone, the court will be called upon to decide whether in all the circumstances of the case it has been shown that the restraint clause should properly be regarded as unreasonable.¹⁷² In *CTP Ltd and Others v Argus Newspapers Ltd and Another*,¹⁷³ the court stated that “It must be remembered that these restraints were negotiated by astute businessmen who were not in an unequal bargaining position. They had legitimate reciprocal interests to protect and the restraints which they fashioned are not to be declared unenforceable simply because one of the parties no longer wishes to remain a party to the business relationship which gave rise to the restraints.”

¹⁶⁷ *Advtech Resourcing (Pty) Ltd t/a The Communication Personnel Group v Kuhn & Another* 2007 JOL 20680(C).

¹⁶⁸ 2007 JOL 20680 (C).

¹⁶⁹ 2009 (1) All SA 442 SCA.

¹⁷⁰ 2006 SCA 164 RSA (2007) 28 ILJ 317 (SCA).

¹⁷¹ Saner J *Agreements in Restraint of Trade in South African Law* (2010) 6-22.

¹⁷² *Basson v Chilwan* 386.

¹⁷³ (215/95) 1996 ZASCA 145.

If it is clear that parties contracted on an equal footing, a court will more easily conclude that the restraint is reasonable and thus enforceable.¹⁷⁴ The Consumer Protection Act¹⁷⁵ has, however, introduced provisions that relate to the equal bargaining power of the parties. This is discussed in the next chapter.

5.3.3 Time for the determination of reasonableness

The time for making a determination of the reasonableness of a restraint is at the time when a court is requested to enforce that restraint.¹⁷⁶ It is submitted that although this may be the norm, there will be instances where circumstances require that the determination of the reasonableness a restraint be required at a different time.

¹⁷⁴ *CTP Limited v Argus Holdings Ltd* 1995 (4) SA 774(A).

¹⁷⁵ Act 68 of 2008.

¹⁷⁶ *Magna Alloys* 894G, 896C-E, 898D.

CHAPTER 6

THE CONSUMER PROTECTION ACT 2008

6.1 The scope and purpose of the Consumer Protection Act

The Consumer Protection Act,¹⁷⁷ which came into effect on 31 March 2011,¹⁷⁸ has been hailed as affording South African consumers the best consumer protection in the world. The main purpose of the Act is to protect consumers against exploitation and unfair marketing practices and to empower consumers to make wise purchasing decisions. The Act regulates:

- (i) every transaction between a supplier and a consumer involving the supply of goods and/or services in the ordinary course of business within the Republic of South Africa; and
- (ii) the promotion of such goods and services that could lead to the transaction being entered into; and
- (iii) to the goods and services themselves after the transaction is completed.¹⁷⁹

6.2 The impact of the Consumer Protection Act on restraint of trade agreements

Many franchise agreements contain restraint of trade provisions for protection of the franchise system. Previously there was no definition of “franchise agreement” in South African law. The Consumer Protection Act is the first legislation in South Africa that refers specifically to franchise agreements.¹⁸⁰ In terms of the Act,¹⁸¹ franchisees are deemed to be consumers and are therefore entitled to protection under the Act.¹⁸² The Act lays down various minimum requirements franchisors have to comply with, which must be reflected in the franchise agreement.¹⁸³ One of the more important requirements reflected in the

¹⁷⁷ Act 68 of 2008.

¹⁷⁸ Government Gazette 34116, 14 March 2011.

¹⁷⁹ Section 5 of the Consumer Protection Act.

¹⁸⁰ Section 5, 6, 7 of the Act.

¹⁸¹ Consumer Protection Act 68 of 2008.

¹⁸² Section 1 of the Act.

¹⁸³ Section 7 of the Act.

Consumer Protection Act is that franchise agreements must be in writing.¹⁸⁴ It is submitted that the purpose of the inclusion of franchise agreements in the Consumer Protection Act is as a result of the strong bargaining position previously held by franchisors.

Like restraint of trade provisions in employment contracts, restraint of trade provisions in franchise agreements must be reasonable to be enforceable. The restraint of trade provisions must be reasonable with respect to territory, nature of activity and period. In *U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd and Another*,¹⁸⁵ the court held that the restraint was too wide and that it must be confined to the area of competition.¹⁸⁶ In *Pam Golding Franchise Services (Pty) Ltd v Douglas*¹⁸⁷ a franchisor was held to have no protectable interest in restraining an ex-franchisee from carrying on business in the same area under a different business name. And in *Kwik Copy (SA) (Pty) Ltd v van Haarlem*,¹⁸⁸ the information imparted by the franchisor to the franchisee, in respect of which an interdict was sought, was of insufficient substance to justify an interdict. It is thus clear that the courts are inclined to treat restraint of trade provisions in franchise agreements in a similar way as restraint of trade provisions in employment contracts.

Although it is now established that public policy is the criterion in restraint of trade disputes,¹⁸⁹ it is evidenced in cases post *Magna Alloys* that the courts consistently used the test of unreasonableness to determine public policy.¹⁹⁰ The test of reasonableness is primarily applied in restraint of trade disputes in the franchise arena.

In restraint disputes relating to franchise agreements, the onus of proof is on the franchisee to prove that the restraint is unreasonable. In *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff*,¹⁹¹ the court held that the onus to establish that a restraint is unreasonable and that it ought not, as a matter of public policy be enforced, rests clearly on the franchisee. The court went on to state that as a result, unreasonable restraint of trade clauses are contrary to

¹⁸⁴ Section 7(1) of the Act.

¹⁸⁵ 1976 (1) All SA 336 (D).

¹⁸⁶ *U-Drive Franchise Systems* 347.

¹⁸⁷ 1996 (4) SA 1217 (D).

¹⁸⁸ 1999 (1) SA 472 (W) 468E–487I.

¹⁸⁹ *Magna Alloys* 891G.

¹⁹⁰ Neethling J “The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants – A Need for Exercising Restraint” *SA Merc LJ* 90 2008 (20).

¹⁹¹ 2009 (3) SA 78.

public policy and unenforceable.¹⁹² After a consideration of the facts, the court found that the franchisor, Mozart, had failed to establish a case that customer connections existed to justify the enforcement of the restraint or prevention of the use of trade secrets.¹⁹³

The Consumer Protection Act does not specifically address these two crucial aspects that affect franchise agreements, namely the incidence of onus, and the criteria employed to determine whether a restraint of trade clause is contrary to public policy. However, the courts will continue to apply the current *status quo* with respect to the incidence of onus, as well as the criteria of reasonableness when it comes to the determination of restraint of trade disputes in franchise agreements.

What the Consumer Protection Act does do however, is to provide protection to a franchisee who is in a very poor bargaining position. Franchise agreements are lengthy documents and can often be between fifty and seventy-five pages long. The Consumer Protection Act comes to the rescue of the franchisee in that it prescribes that the franchise agreement must be drafted in plain language.¹⁹⁴ A franchisee who is not sophisticated will thus be in a position to take note of the salient provisions in the franchise agreement, especially the provisions dealing with restraints of trade.

¹⁹² *Mozart Ice Cream* 78.

¹⁹³ *Mozart Ice cream* 78.

¹⁹⁴ Section 22.

CHAPTER 7

SEVERANCE AND PARTIAL ENFORCEMENT

7.1 Severability: the historical position

South African courts have consistently reiterated that a court cannot make a contract for the parties. In *National Chemsearch (SA) (Pty) Ltd v Borrowman*,¹⁹⁵ the court stated that, “The root of the problem, it seems to me, lies in the avowed refusal of the English courts to make an agreement for the parties that they themselves did not make, or to ‘re-write’ their agreement for them.” In effect, the courts are enforcing the principle of *pacta servanda sunt*, which means that contracts properly entered into must be given effect to.

However, there are instances where it is necessary to enforce part of a contract and alternatively to discard part of a contract. The courts have addressed this problem by applying the doctrine of severability and partial enforcement.¹⁹⁶ The practical effect is that where part of a contract is contrary to public policy and unenforceable, provided it is severable, it should be removed from the rest of the contract, thus leaving the remainder to be enforced.¹⁹⁷

In the past, the courts have refused to enforce one of the covenants in a restraint of trade that was held to be unreasonable where two covenants existed.¹⁹⁸ In *African Theatres Ltd v D’Oliveira*,¹⁹⁹ the ‘blue pencil’ test was established where the court drew a line with a blue pencil through a phrase that was unreasonable thus rendering the restraint reasonable.²⁰⁰ Greenberg J however, was not keen in applying the ‘blue pencil’ test labelling it as not conclusive.²⁰¹ The court held that “It will not make a contract for the parties as the act of

¹⁹⁵ 1979 (3) SA 1092 (T).

¹⁹⁶ Saner J *Agreements in Restraint of Trade in South African Law* (2010) 8-3.

¹⁹⁷ Saner J 8-3.

¹⁹⁸ *Empire Theatres Co Ltd v Lamor* 1920 WLD 289 292.

¹⁹⁹ 1927 WLD 122.

²⁰⁰ *African Theatres* 128.

²⁰¹ *New United Yeast Distributors (Pty) Ltd v Brookes* 1935 WLD 75.

severance must be the act of the parties and not of the court, but...it will sever where the covenant is not really a single covenant but is in effect a combination of several distinct covenants.”²⁰²

In his judgment in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd*,²⁰³ Didcott J expressly avoided rendering an opinion on the applicability of the earlier approach to severability. The court opined that the blue pencil test could only apply when specific words could be cut out of the agreement leaving substance with regard to what the parties themselves had agreed.²⁰⁴

7.2 The current position in South African law

The *Magna Alloys* decision, which has settled many aspects of the law relating to restraint of trade disputes, has further settled the issue of severability and partial enforcement.²⁰⁵ As per the *Magna Alloys* decision, a court may declare an agreement in restraint of trade either wholly or partially enforceable.²⁰⁶ The court is now obliged to have regard to what portions of the agreement are reasonable and unreasonable and therefore against public policy.²⁰⁷ However, Christie²⁰⁸ warns that courts should be cautioned in dealing with the enforceability of restraint agreements, which are partly reasonable and partly unreasonable. It is, however, clear that the courts are divided on this issue.

In *Sunshine Records (Pty) Ltd v Frohling*,²⁰⁹ the court rejected the argument of enforceability after the contract had been reduced to a reasonable state. In *Turner Morris (Pty) Ltd v Riddell*,²¹⁰ the court followed the principle applied in *Magna Alloys* and rendered the clause in question enforceable.

The court in *Magna Alloys* did not pronounce on whether the earlier tests like the ‘blue pencil’ test could be used to determine severability. On the other hand the court did not state

²⁰² *New United Yeast Distributors* 80-81.

²⁰³ 1977 (4) SA 494 (N).

²⁰⁴ *Roffey* 507A-G.

²⁰⁵ Saner J 8-7.

²⁰⁶ *Magna Alloys* 1984 (4) SA 874 (A).

²⁰⁷ Saner J 8-7.

²⁰⁸ *The Law of Contract in South Africa* 4ed 425.

²⁰⁹ 1990 4 SA 782 (A).

²¹⁰ 1996 4 SA 397 (E).

that the new test propounded in *Magna Alloys* should be exclusively used in future. What is clear though is that the courts should exercise caution when faced with the possibility of a partial enforcement of a contract in restraint of trade.

In *Arrow Altech Distribution (Pty) Ltd v Byrne and Others*,²¹¹ the court held that, “An unreasonable restraint will not be partially enforced if it would require major plastic surgery, in the form of a drastic re-casting of its provisions, to make it reasonable. I am not prepared to embark on such a venture. The court is therefore not obliged in all cases to whittle down an unreasonable restraint of trade until it eventually becomes reasonable.” The decision in *Arrow Altech Distribution (Pty) Ltd v Byrne and Others* is welcomed as it confirms the age old principle of sanctity of contract which is entrenched in our Constitution.

²¹¹ 2008 (1) All SA 356 (D).

CHAPTER 8

CONCLUSION

The decision in the *Magna Alloys* case has heralded a complete change with respect to the incidence of onus. The party alleging that he is not bound by the restraint bears the onus of proving that enforcement would be contrary to public interest.²¹² However, the legal development in terms of the judgment in *Magna Alloys* occurred before the enactment of the Bill of Rights in South Africa. Section 22 of the Constitution under the heading 'Freedom of trade, occupation and profession', provides that, 'every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.' The Constitution thus grants an individual the freedom to choose and practice his trade. However, in terms of the *Magna Alloys* decision, a restraint of trade is regarded as valid and enforceable. The question that remains is then whether the right of freedom to choose and practice one's trade, occupation or profession requires the rejection or limitation of the principles in the *Magna Alloys* decision.

The courts have considered whether the advent of the Constitution had any effect on the *Magna Alloys* decision. In *Knox D'Arcy Limited and Another v Shaw and Another*,²¹³ counsel for the respondents argued that in light of the fact that section 26 of the *interim Constitution* gave individuals the right to freely engage in economic activity, the *Magna Alloys* case should be re-evaluated. In dismissing the argument, van Schalkwyk J remarked as follows, "The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy which is violated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage."²¹⁴ The court in *Knox D'Arcy Limited* concluded that the principle of sanctity of contract is invaluable in contract law. It is submitted that this

²¹² *Magna Alloys* 1984 (4) SA 874 (A).

²¹³ 1995 (12) BCLR 1702 (W).

²¹⁴ *Knox D'Arcy* 1710 I-J.

view encapsulates the correct position, as parties to a contract must appreciate the consequences of their actions when contracting with each other.

Another controversial issue is whether the introduction of the Constitution has possibly shifted the incidence of onus as confirmed in *Magna Alloys*. This necessitates an examination of the purpose of the Constitution and the effect it has on contract law. In *Kotze en Genis (Edms) Bpk v Potgieter en Andere*²¹⁵ the court stated that the purpose of the Constitution was to guard individuals against legislative encroachment and not from the common law. The court held the view that section 26(1) of the interim Constitution had no effect on the individual's right to contract, and that no reason exists why section 26 would protect the covenantor instead of the covenantee. The court concluded that the fundamental rights provisions were silent on the issue of burden of proof in matters like applications to enforce agreements in restraint of trade and further that the principle of freedom to trade entrenched in the Bill of Rights does not necessitate a change of approach.

However a different approach was followed in *Coetzee v Comitis and Others*,²¹⁶ where Traverso J held that the National Soccer League's rules violated the basic values underlying the Constitution, including the freedom to trade. Counsel for the respondent argued that since the applicant entered into the contract with Hellenic freely and voluntarily, it did not violate these rights. The court retorted that any person who wants to pursue a career in professional soccer is subject to the rules and regulations of the National Soccer League. Therefore it can hardly be said that the applicant agreed to these terms out of his own free will. The court held that the burden of proof lay with the National Soccer League (the respondents) to show the court that the compensation regime amounted to a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.²¹⁷ This approach in *Coetzee v Comitis* is evidence of a reversion of the onus to the covenantee.

Subsequently, in the case of *Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*²¹⁸ the court opined that although the *Magna Alloys* decision was binding on every South African court, the fact that the Constitution was now the supreme law meant that courts had

²¹⁵ 1995 (3) BCLR 349 (K).

²¹⁶ 2001 (1) SA 1254 (C).

²¹⁷ *Coetzee v Comitis* 1273F.

²¹⁸ 2005 (3) SA 205 (N).

to take into account the provisions of the Constitution, particularly the Bill of Rights. Kondile J found that Canon (the covenantee), which sought to restrict the covenantor's fundamental right, had the duty to establish that the covenantor had forfeited his right to constitutional protection. The court held that Canon had to prove that the restraint was reasonable as opposed to Booth proving its unreasonableness. However, Kondile's decision has been criticised as incorrect in that it is premised on a misunderstanding of how to weigh up the principle of sanctity of contract and the corollary that parties should in general be bound by contractual undertakings and also by section 22 of the Constitution.

In *Reddy v Siemens*²¹⁹ the Supreme Court of Appeal had to consider whether the common law position with respect to restraint of trade agreements had changed in light of the Constitution. The court avoided the issue of where the onus of proof lies but made a value judgment after assessing the reasonableness of the restraint.²²⁰

The recent cases on restraint of trade disputes seem to be dominated by constitutional issues. It is submitted that although the Constitution must be taken into account when dealing with rights of parties, one cannot lose sight of important principles like the sanctity of contract. The principle of sanctity of contract ensures that once parties duly enter into a contract, they must honour their obligations under that contract. In *Reddy v Siemens* the court's approach led to an equitable outcome without requiring a determination on who bore the onus of proof. This approach is sustainable provided the court takes a holistic view whilst simultaneously ensuring the enforcement and protection of contracts.

Word count 17 521

²¹⁹ 2007 (2) SA 486 (SCA).

²²⁰ *Reddy v Siemens* 495-6.

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