

**THE ENFORCEABILITY OF THE RESTRAINT OF TRADE  
AGREEMENT IN THE CONTEXT OF UNLAWFUL TERMINATION  
OF AN EMPLOYMENT AGREEMENT**

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This dissertation is dedicated to St John's Apostolic faith Mission Church of Southern Africa, to the youth of Katlehong and the CCMA community.

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## **Chapter 1**

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## Chapter 1

### Research Proposal

#### 1.1 Research problem

This proposal aims to investigate the enforceability of the restraint of trade clause incorporated within the framework of the unlawful termination of the employment contract.

#### 1.2 Assumptions

The assumption is that the restraint of trade clause incorporated in an employment contract is not enforceable on the ground that the employer committed an unlawful termination of the employee's employment contract. This assumption is based on the principle that a party should not legally benefit from its own unlawful acts. This assumption reflects the common law principle of *ex turpi causa* and was confirmed by the court in *Info DB Computers v Newby & Another*.<sup>1</sup>

#### 1.3 Research questions

The question that this research aims to answer is whether the unlawful termination of an employment contract results in a *de jure* cancellation of a restraint of trade clause incorporated in an employment contract in view of section 22 and section 23 of the Constitution.<sup>2</sup>

#### 1.4 Motivation

##### 1.4.1 Background

A contract of employment encompasses the employment agreement between the employer and the employee. Contractual rights and duties emanate from a valid employment

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<sup>1</sup> (1996) 17 *ILJ* 32 (WLD).

<sup>2</sup>The Constitution of the Republic of South Africa, 1996.

contract based on consensus between the aforementioned parties.<sup>3</sup> The contract contains the terms and conditions governing the employment relationship between the parties and serves as evidential material in a conflict of interests between parties. The employment contract is between the parties.<sup>4</sup> This means that the contract is binding between the parties and they are expected to honour their agreement. The sacredness of the employment contract and the enforceability of the restraint of trade clause in South Africa were emphasised in *Magna Alloys and Research (SA) Pty Ltd v Ellis*.<sup>5</sup>

The restraint of trade clause is one of the terms and conditions which may be contained in an employment contract. According to the Roman-Dutch law principle of *pacta sunt servanda*, parties are bound by their agreement which means that the restraint of trade clause is binding based on its inclusion in the contract. A restraint of trade clause can be considered as a valid and enforceable agreement unless it can be shown that its contents are against public policy and its objective is not to protect the legitimate interests of the employer.<sup>6</sup>

Public policy demands that for a restraint of trade to be enforceable, it should be aimed at protecting the legitimate interests of the employer. The protectable interests of the employer encompass its trade secrets and customer connections.<sup>7</sup> Public interest requires that the enforceability of the restraint of trade aimed to protect the employer's interests should not unreasonably restrict an erstwhile employee's freedom of trade. Unreasonable restriction is considered when comparing the employer's interest in need of protection against the employee's restricted freedom of trade with regard to two important elements, namely its geographic restriction, as well as the period or duration of the restriction.<sup>8</sup>

The purpose of a restraint of trade clause in an employment contract aims to restrict the employee from being economically active, after the termination of the employment contract by not engaging in his or her trade or profession in competition with the

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<sup>3</sup>Van Jaarsveld "The Validity of a Restraint of Trade in an Employment Contract" (2003) *SAMLJ*326.

<sup>4</sup>Van Jaarsveld *et al Principles and Practice of Labour Law* (2012) at par 260.

<sup>5</sup>1984 (4) 874 (A).

<sup>6</sup>*Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* (2007) 2 SA 282 at E-G.

<sup>7</sup>*Reddy v Siemens Telecommunications (Pty) Ltd* (2007) SA 491 at A-C.

<sup>8</sup>*Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* (1991) 2 SA 482 at D-E.

employee's former employer.<sup>9</sup> The contents and purpose of the restraint of trade clause should not be against the public policy and should be considered to protect the employer's legitimate interests. This is inconsistent with section 22 of the Constitution which affords everyone the right to engage in any profession or trade of his or her choice. However, the Constitution recognises the agreements entered into by the parties as *prima facie* valid and enforceable. Moreover the employer and employees' rights are not absolute in terms of the Constitution<sup>10</sup>. The Constitution acts as the countervailing force between the competing interests of the employer and employee. The two competing interests are the employer's protectable interests as opposed to the employee's interests and freedom to engage in economic activities by using his or her knowledge and skills in advancing his or her trade and/or profession.<sup>11</sup>

The analysis focuses on whether the Constitutional rights in sections 22 and 23 abolish the Roman-Dutch law principle of *pacta sunt servanda* that provide contracts freely entered into are enforceable<sup>12</sup> and revives the English common law principle of *ex turpi causa* which infers that the restraint of trade clause is invalid and unenforceable where the employer had unlawfully terminated the employee's services. The *ex turpi causa* principle therefore prevents the employer from relying on the agreement of restraining the employee where the employer proved to have acted wrongfully in terms of an unfair dismissal. The Constitution permits the limitation of rights provided that such limitation is in accordance with the principle of an open democratic society based on human dignity, equality, and freedom.<sup>13</sup> The Constitution is the supreme law of South Africa and therefore any law or conduct that is inconsistent with it is considered invalid and unenforceable.<sup>14</sup>

#### **1.4.2 Literature review**

When analysing the constitutionality and enforceability of a restraint of trade clause on account of an unlawfully terminated contract of employment, the writings of other scholars

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<sup>9</sup> Landman "Restraint of Trade in Employment contracts Safeguarding Intangible Property" (2001) *CLL* 112.

<sup>10</sup> See S 36 of the Constitution.

<sup>11</sup> *David Crouch Marketing CC v Du Plessis* (2009) 30 *ILJ* 1828 (LC) at 19.

<sup>12</sup> Van Der Merwe *et al Contract: General Principles* 4<sup>th</sup> ed (2012) at 9.

<sup>13</sup> S 36 of the Constitution.

<sup>14</sup> S 2 of the Constitution.

in the field of employment contracts containing the restraint of trade will be considered. Another source of law directing the general development of the application of a restraint of trade is case law and the development of the common law in this regard. Landman is of the view that the public policy notion seeks to balance the conflicting interests of the parties.<sup>15</sup> The employer with a restraint of trade clause wants to protect its protectable interest, for example, the trade secrets which are not of public knowledge, whereas it limits the employee's right to engage in economic activities.

This research aims to investigate the effect of public policy and the contractual rights of the employer and the employee in an unlawfully terminated contract of employment having a restraint of trade clause, based on the aforementioned conflicting interests.

### **1.5 Approach and method**

A Literature survey is employed in addition to reference to primary sources of case law in order to formulate the justifiable principle which will guide future development in terms of enforceability of restraint of trade incorporated in unlawfully terminated employment contracts.

This is done through a comparative study and the development of legal principles in other legal systems regarding the importance of the interests that are sought to be protected against the restrained employee's right to freely enter into his or her trade, occupation and profession due to a restraint of trade clause incorporated in an unlawfully terminated employment contract. Foreign jurisdiction is examined and compared with the South African jurisdiction and finally, the restraint of trade clause will be examined in light of the Constitution of South Africa. The United Kingdom (UK) may be considered as the country which had a profound legal influence to the South African legal system.<sup>16</sup> Australia may be similarly considered as it is a democratic country that also practices the English common law system as a former colony of the UK. Furthermore, both these countries hold the presumption that a restraint of trade clause is invalid and unenforceable where the employer proved to have acted wrongfully in terms of an unfair dismissal. This is

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<sup>15</sup>Landman (2001) *CLL* 115.

<sup>16</sup>SA History online <http://www.sahistory.org.za/topic/britain-takes-control-cape> (Date of use 21.May.2014).

juxtaposed with the South African Roman Dutch law approach which presumes that restraint of trade is enforceable regardless of the conditions associated with the termination of employment due to the recognized sanctity of the contract.<sup>17</sup>

## **1.6 Provisional structure of chapters**

1. Introduction

2. The effect of an unlawful termination on a restraint of trade clause

I. The common law position

II. The English common law position

III. The influence of public policy on the restraint of trade clause

3. Comparative analysis in the context of unlawful termination of employment

I. England

II. Australia

4. Remedies

5. Conclusion and recommendations

## **1.7 Planning of the timeline**

(a). Introduction: 30.06.2014

(b).The effect of an unlawful termination on the restraint of trade: 01. 08. 2014

I. The position of common law

II. The position of English common law

III. The influence of public policy

(c). Comparative analysis in the context of unlawful termination of employment:  
05.09.2014

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<sup>17</sup>*Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 771 at C-E.

I. England

II. Australia

(d). Remedies: 30.09.2014

(e). Conclusion and recommendations: 10.10.2014

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## Chapter 2

### The effect of an unlawful termination of employment on a restraint of trade clause

#### 2.1 Introduction

The contract of employment is the foundation of employment relationships, and is based on mutual consensus between the employer and the employee.<sup>18</sup> The employer and the employee in an employment contract can agree on a restraint of trade clause which goes beyond the duration of the employment relationship. The purpose of a restraint of trade clause, in this context, is to protect the legitimate interest of the employer from manipulation by an ex-employee in competing with the employer post the employment relationship. The employee, by agreeing to a restraint of trade clause being made part of the employment contract, acknowledges the desire of the employer to protect its legitimate interest against manipulation post the employment relationship.

The effect of a restraint of trade clause is to sterilize an employee's freedom to engage in a trade or profession which is in competition with the employer. In English law, the jurisdiction of a restraint of trade clause is *prima facie* invalid and unenforceable unless the party that seeks to enforce the restraint of trade clause can show that the restraint of trade clause is reasonable between the parties and is not contrary to public policy.<sup>19</sup>

A restraint of trade clause in South Africa is *prima facie* valid and enforceable, unless it is shown that it is not directed to protect the employer's legitimate business interests and is contrary to public policy. This legal certainty was confirmed by the Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.<sup>20</sup> The onus to prove that the restraint of

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<sup>18</sup> Hock "Covenants in Restraint of Trade: Do They Survive the Unlawful and Unfair termination of Employment by the Employer?" (2003) *ILJ* 1231.

<sup>19</sup> Pretorius "Covenants in Restraint of Trade: A Synthesis of Traditional, Common law and Constitutional Approaches" (2009) *Obiter* 156.

<sup>20</sup> 1984 (4) 874 (A) at 875 H-I.

trade is unenforceable and contrary to public policy is on the party that seeks to escape the restraint of trade clause.<sup>21</sup>

In determining the enforceability of a restraint of trade clause the important circumstances are those prevailing when the enforcement is sought.<sup>22</sup> The court, in *Magna Alloys, supra*, further noted that every agreement in restraint of trade should be decided on its own merits to ascertain whether the enforcement of a restraint of trade agreement would be contrary to public policy and consequently unenforceable.<sup>23</sup>

This chapter investigates the effect that an unlawful termination of an employment contract by an employer has on the enforceability of a restraint of trade clause. This will be explored firstly with the position of common law rule *pacta sunt servanda* on an unlawfully terminated contract of employment. Secondly, Constitutional provisions will be considered. Thirdly, the position of English common law rule *ex turpi causa*. Fourthly, the protectable interests of the employer will also be considered. Fifthly, the influence of public policy on the enforceability of a restraint of trade clause as the principle will be considered. Sixthly, the effect that a breach of contract by the employer has on the enforceability of a restraint of trade clause will also be examined.

## 2.2 The position of common law

The common law rule of *pacta sunt servanda* supports the notion of freedom of contract which supposes that the parties in a contract may agree to include any term in their contract as long as there is consensus between the parties.<sup>24</sup> This principle requires that the contract concluded by the contracting parties is binding and enforceable as it carries what the contracting parties have expressed in exercising their freedom of contract, provided it is not contrary to public policy.<sup>25</sup> The consequence of this is to create a binding contract of employment together with its terms. The Court in *Magna Alloys* held in favour of

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<sup>21</sup> *David Crouch Marketing CC v Du Plessis* (2009) 30 *ILJ* 1828(LC) at 15.

<sup>22</sup> *Idem* at 875 I.

<sup>23</sup> *Idem* at 875 G-H.

<sup>24</sup> *Van der Merwe et al* (2012) at 9.

<sup>25</sup> *Ibid.*

sanctity of the contract and reasoned that the public interest requires that agreements that are freely entered into should be enforced.<sup>26</sup>

This rule makes the contract valid and enforceable as long as it is not against public policy.<sup>27</sup> An unlawfully terminated contract of employment containing a restraint of trade is valid and enforceable unless it is shown that its purpose is not to protect the employer's legitimate interests and is against public policy.<sup>28</sup> The employer who concluded a restraint of trade clause seeks to protect its protectable interests while the employee seeks to exercise his or her discretion to conduct a business or to render a service to an employer of their own choice.<sup>29</sup> If an employer unlawfully terminates the contract of employment such a breach of contract would amount to an unfair dismissal. The employee's right not to be unfairly dismissed as an extension of the right to fair labour practice, is thus violated when the contract of employment is unlawfully terminated.<sup>30</sup>

The unlawful termination of the employee's contract of employment triggers public policy. In pursuit of protecting the employer's protectable interests a restraint of trade clause should balance the competing interests of the employer and the employee's rights to engage in economic activities by using its trade or profession and to fair labour practice.<sup>31</sup> The employee who feels that a restraint of trade is unenforceable in the context of unlawfully terminated contract of employment bears the onus of showing that the enforcement of a restraint of trade is contrary to public policy. There is a view that the principle of sanctity of contract does not mean that the law should not interfere with agreements freely entered into, however it means that the interference could only take place if based on sound reason.<sup>32</sup> The sound reason could be if the agreement's enforcement would be contrary to public policy at the time enforcement is sought such agreement in restraint should not be enforced. The public policy is captured well in the

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<sup>26</sup> 1984 (4) 874 (A) at 877 G-H.

<sup>27</sup> Du Plessis and Davis "Restraint of Trade and Public Policy" (1984) *SALJ* 88.

<sup>28</sup> *Reeves & Another v Marfield Insurance Brokers CC* 1996 (3) 771 at C-E.

<sup>29</sup> See S 22 of the Constitution.

<sup>30</sup> See S 185 of the Labour Relations Act 66 of 1995 (LRA) and s 23 of the Constitution.

<sup>31</sup> Hock " (2003) *ILJ* 1234.

<sup>32</sup> Du Plessis and Davis (1984) *SALJ* 89.

Constitution as the supreme law of South Africa and any law or conduct inconsistent with it is deemed to be invalid.<sup>33</sup>

## 2.3 Constitutional provisions

The Constitution protects everyone's rights to freedom of trade<sup>34</sup> and right to fair labour practise.<sup>35</sup> These rights are fundamental rights which are enshrined in the Bill of Rights.<sup>36</sup> These rights can only be limited in terms of law of general application only to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity and freedom.<sup>37</sup>

The courts in limiting the rights enshrined in the Bill of Rights, should take all relevant factors into account, particularly the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means of achieving the purpose.

The court, in *Fidelity Guards v Pearmain*,<sup>38</sup> confirmed that the restraint of trade is the limitation of the right to freedom of trade and is in compliance with section 36(1) of the Constitution. The Court reasoned that common law as developed by the courts, complies with the requirements set down in section 36(1) of the Constitution.

The court, in *David Crouch Marketing CC v Du Plessis*,<sup>39</sup> on the impact of the Constitution on restrictive covenants noted that:

“the Constitution forms the value system against which the tension between the ex-employer, who wishes to enforce the restraint of trade, and the employee, who wishes to escape the restrictive effect of a restraint of trade clause, has to be resolved. In determining whether a restraint of trade is unreasonable or not, the court has to

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<sup>33</sup>S 2 of the Constitution.

<sup>34</sup>S 22 of the Constitution.

<sup>35</sup>S 23 of the Constitution.

<sup>36</sup>Chapter 2 of the Constitution.

<sup>37</sup>S 36 of the Constitution.

<sup>38</sup>(2001) 2 SA 853.

<sup>39</sup>(2009) 30 *ILJ* 1828 (LC).

exercise a value judgment against the framework of the Constitution and weigh up the competing values –the one being the requirement that contracting parties are bound by their agreement (*pacta sunt servanda*) and the other being the value which requires individuals to be able to participate freely in trade, or to work and earn a living”.<sup>40</sup>

The court therefore highlighted the important role which the Constitution plays in the balancing of the competing interests of the employer and the employee. In the event of balancing the competing interests of the employer and the employee the court should make a value judgment of determining which interest qualitatively and quantitatively outweighs the other.

The court in *Knox D’arcy Ltd v Shaw*,<sup>41</sup> confirmed that the restraint of trade is not *per se* violating the employee’s right to freedom of trade and it is enforceable unless there is an overriding principle of public policy which is violated.<sup>42</sup> This means that the violation of the right to fair labour practice by the employer will be an overriding public policy principle which might render a restraint of trade unenforceable. The courts will find in favour of the employee not to be bound by the restraint of trade when taking into account the circumstances prevailing when enforcement of a restraint of trade is sought to be enforced by the employer. This should be so on the strength of public policy.

The Constitution carries the principles, policies, and values which reign in South African society. These underlying values, provide for the protection of the individual freedom of trade, right to fair labour practice, dignity, equality and democratic society.

## **2.4 The English common law position**

The English common law position prevailed in South African law as early as before 1980.<sup>43</sup> The English common law provided that agreements in restraint of trade were *prima facie*

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<sup>40</sup>*Idem* 19.

<sup>41</sup>(1996) 2 SA 651.

<sup>42</sup>*Idem* 660 at C-D.

<sup>43</sup>*Magna Alloys and Research (SA) (Pty)Ltd v Ellis* (1984) 4 874 (A).

invalid and unenforceable, unless the contract enforcer could show that the restraint was reasonable between the parties and not against public policy.<sup>44</sup>

The reason for this contention is that public interest demands that everyone should be allowed to practise his or her trade freely. Effectively this meant that all agreements in restraint of trade were *prima facie* invalid and unenforceable. But the English common law position in South Africa has since been rejected by the appellant division in *Magna Alloys* where the court confirmed that agreements in restraint of trade are *prima facie* valid and enforceable in South Africa, unless they are shown to be against public policy and therefore unenforceable.

The common law principle of *ex turpi causa* is not against the freedom of contract however, it provides that no one should legally benefit from his or her unlawful act or omission. This means that an employer who had unlawfully terminated a contract of employment cannot enforce a restraint of trade against an unlawfully terminated employee. The high court in *Arrow Altech Distribution (Pty) Ltd v Byne*<sup>45</sup> refused to restrain the respondents on the basis that the applicant did not approach the court with clean hands. This could mean that the employer who had unlawfully terminated an employee's contract of employment should not be able to hold the employee to a restraint of trade. The *ex turpi causa* principle is a defence that an employee can raise within the context of unlawful termination of employment contract by an employer.

The onus is still on the employee to prove on a balance of probabilities that the employer is not entitled to enforce a restraint of trade in light of the unlawful termination of employment contract, since its enforcement would be contrary to public policy.<sup>46</sup> This would be on the basis that the employer had violated the employee's right to fair labour practice and consequently cannot legally benefit from its unlawful act. The benefit that the employer would forfeit is the protection of its interests with a financial value from potential use by the employee, to either further his or her own interests, or that of a

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<sup>44</sup>Pretorius (2009) *Obiter* 156.

<sup>45</sup>(2008) 29 *ILJ* 1391 (D) at 1409 E-H.

<sup>46</sup>Du Plessis and Davis (1984) *SALJ* 98.

potentially new employer in competition with the old employer. Whether the breach of contract by the employer absolves the employee from the restraint of trade remains to be seen.

## 2.5 Protectable interest of the employer

The freedom of contract gives the employer an opportunity to safeguard its legitimate protectable interests after the termination of employment relationship. The employer does this by concluding a contract of employment containing a restraint of trade clause. Without a restraint of trade clause, it is difficult for the employer to restrain a former employee from entering into employment with a competitor or from establishing a competitor business.<sup>47</sup>

A restraint of trade clause is the best mechanism of protecting the employer's legitimate interests which the employee could use in competition against the employer post-employment relationship. A restraint of trade is restrictive on the employee's right to freedom of trade.<sup>48</sup>

It is so because it allows the employee to enter into any other trade or profession but save for the one which will put the employee in competition with the erstwhile employer.<sup>49</sup> Competition is encouraged, the employer can only restrain the employee from competing with it when the employee is using or could potentially use the employer's legitimate protectable interests.<sup>50</sup> The Court noted that not every information that is obtained by an employee during his employment amounts to confidential information to be deemed protectable interests of the erstwhile employer.<sup>51</sup> The employer who seeks to protect the information must show that the technological know-how and methods involved are unique to its business and that the information is not in the public domain and is not accessible to

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<sup>47</sup> *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another* (J1990/2014) [2014] ZALCJHB 353 at par 78.

<sup>48</sup> *Idem* at par 85.

<sup>49</sup> Van Jaarsveld (2003) 330.

<sup>50</sup> *David Crouch Marketing v Du Plessis* (2009) 30 ILJ 1828 (LC) at 17.

<sup>51</sup> *Idem* 19.

the public.<sup>52</sup> The example of the employer's protectable interest is the customer goodwill and trade connections which the employer has built.<sup>53</sup>

The employer with a restraint of trade clause should not merely restrain an employee's freedom of trade to stifle fair competition.<sup>54</sup> A restraint of trade aimed at excluding competition without also protecting any legitimate business interest, will be held against public policy.<sup>55</sup> The court in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* held that:

“the conflict between the two principles, *both based on public policy*, of freedom of contract and freedom of trade, should, in every case where it is shown clearly that the restraint in fact causes sterilisation of services without any justification for the protection of the covenantee's business interests, be resolved in favour of the servant as covenantor. In such cases *pacta sunt servanda* must yield to considerations of public policy, for it is against the public interest that the public should be deprived of the opportunity to do business with the respondent. And it is equally unfair that the right of any person should, in the circumstances of the present case, be taken away to freely earn his livelihood”.<sup>56</sup> For the restraint of trade to be enforceable it should be directed at protecting a legitimate interest and it should not be against public policy. This means that if a restraint of trade is used only as a tool to stifle competition and not to protect any legitimate interest the restraint of trade will not be enforceable.<sup>57</sup> Where the restraint of trade is not directed at protecting the employer's legitimate protectable interests, but for an ulterior purpose, on this ground alone the restraint of trade will not be enforceable. The Court in *David Crouch Marketing v Du Plessis*<sup>58</sup> held that the employer who wishes to enforce a restraint of trade bears the

onus of showing that it has the protectable interest that it seek to protect with a restraint of trade.<sup>59</sup> The court in *Den Braven SA (Pty) Ltd v Pillay*<sup>60</sup> held that it is enough if the erstwhile

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<sup>52</sup> *Idem* 21.

<sup>53</sup> *Idem* 22.

<sup>54</sup> Pretorius “Covenants in Restraint of Trade: An Evaluation of the Positive law” (1997) 60 *THRHR* 20.

<sup>55</sup> *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA (SCA) 282 E-G.

<sup>56</sup> (1984) 4 874 (A) at 880 H-881 A.

<sup>57</sup> *Mozart Ice Creams Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 *ILJ* 1750 (C) at 1751 A-B.

<sup>58</sup> *David Crouch Marketing v Du Plessis* (2009) 30 *ILJ* 1828 (LC) at 19.

<sup>59</sup> *Ibid.*

<sup>60</sup> (2008) 6 SA 229.

employer can show that trade connections through customer contact existed and that they could be exploited if the former employee were employed by the competitor.<sup>61</sup> In this instance the employer need only to show that the erstwhile employee by virtue of taking up employment with a competitor poses a serious prejudice to its customer connection or legitimate protectable business interests. Put differently, the employer needs to show that the employee, by taking up employment with a competitor or by establishing a competing business, is more likely to manipulate the employer's legitimate business interest. There is no need to show that the former employee has manipulated the protectable business interests of the employer. Whether the protection of the employer's trade secrets survives the unlawful termination of the employment contract by the employer remains the issue of contention.

## 2.6 The influence of public policy on the restraint of trade clause

Contracts in restraints of trade are *prima facie* valid and enforceable subject to the fact that they are not against public policy. The court in *Magna Alloys and Research (Pty) Ltd v Ellis*<sup>62</sup> held that the party seeking not to be bound by the restraint of trade clause incorporated in a contract of employment bears the onus of proving that the enforcement of a restraint of trade would be contrary to public policy. The court further held that each restraint of trade should be determined on the basis of its circumstances in order to establish whether the enforcement of the agreement in restraint of trade would be against public policy.<sup>63</sup> According to this judgment, the important circumstances are those which prevail when the enforcement is sought, and not those which existed prior to when the enforcement is sought. The reason for this is that circumstances may have changed from the time of conclusion of an agreement in restraint of trade to the time of enforcement of the restraint of trade.<sup>64</sup>

When the court faces a case in which enforcement of a restraint of trade clause is sought, it will have to consider the unlawful termination of the employment contract and the interest

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<sup>61</sup>*Den Braven SA (Pty) Ltd v Pillay and Another* at 230 G.

<sup>62</sup>(1984) 4 874 (A).

<sup>63</sup>*Idem* 879 A-G.

<sup>64</sup>*Idem* 881 G-H.

which the employer seeks to protect.<sup>65</sup> This exercise requires the court to balance the two conflicting principles which are based on public policy, namely, freedom of contract and freedom of trade. As it would be against public policy to deprive an erstwhile employee an opportunity to do business with any other person whom he chooses within the trade he knows best.

The public policy notion serves as the dominant guide on whether a contract which is unlawfully terminated could be enforced.<sup>66</sup> Public policy dictates that the freedom of a person to enter into a trade of his choice should not be limited without a just cause and no person should legally benefit from his unlawful conduct. Moreover, the *pacta sunt servanda* principle where there is an unlawful termination of the employment contract by the employer should bow to the public policy consideration of freedom of an erstwhile employee to exercise his right to freedom of trade.<sup>67</sup> And the public interest requires that the public not be deprived the services of the erstwhile employee. The court, in *Den Braven SA (Pty) Ltd v Pillay*, held that the enforceability of a restraint of trade agreement is dependent on public policy.<sup>68</sup>

## 2.7 The effect of breach of contract on a restraint of trade

The purpose of a restraint of trade clause is to protect the legitimate interest of the employer and in so doing it should not be contrary to public policy.<sup>69</sup> The restraint of trade is necessary to protect the employer's legitimate interests from manipulation by the employee once the employment relationship has come to an end.

There are two different views one being that a restraint of trade clause is an ancillary contract which exist independently from the main contract.<sup>70</sup> The other being that it is an ancillary contract which is inextricably linked to the main contract.<sup>71</sup> These views support

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<sup>65</sup>Hock (2003) *ILJ* 1234.

<sup>66</sup>Van der Merwe and Van Huyssteen "The Force of Agreements: Valid, Void, Voidable, and Unenforceable?" (1995) 58 *THRHR* 560.

<sup>67</sup>*Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (7351/60) [2006] ZAKZHC 10 at 25.

<sup>68</sup>2008 (6) SA 299 D.

<sup>69</sup>*Dickinson Holdings Group and Others v Du Plessis* at 25.

<sup>70</sup>*Drewtons (Pty) Ltd v Carlie* (1981) 4 SA 305 (C).

<sup>71</sup>*Info BD Computers v Newby* (1996) 17 *ILJ* 32 (W).

two different propositions, the first view supports the proposition that the breach of contract by either party, does not *per se* put an end to the restraint of trade, a restraint of trade is usually better classified as a collateral agreement since the parties intended it to have an existence after the main contract has ceased.<sup>72</sup> The restraint of trade is enforceable unless after the unlawful termination of the employment the enforcement of the restraint of trade will be contrary to public policy. Whereas the second view supports the proposition that the breach by a party that seeks to benefit from the restraint of trade puts an end to the restraint of trade without the other party proving that in addition to the breach of contract enforcement of a restraint of trade would be against public policy.

When an employee breaches the contract of employment and the employer terminates it, the employee will be bound by the restraint of trade incorporated in a contract of employment; meaning that the employee will not be able to escape the enforcement of a restraint of trade clause. The party that has caused the breach of contract is not entitled to legally benefit from its conduct even if there is a subsequent breach by the other party. The court in *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another*<sup>73</sup> held that the party seeking to escape the enforceability of a restraint of trade should not have breached the restraint of trade agreement, before relying on the subsequent breach by the other party seeking to enforce the restraint of trade agreement.<sup>74</sup> The court meant that the party who had first repudiated a restraint of trade agreement cannot rely on the subsequent breach of the other party to avoid its contractual obligations. The restraint of trade will be enforced provided that the enforcement of a restraint is aimed at protecting the legitimate interest of the employer and is not contrary to public policy.

This criterion was confirmed by the court in *Magna Alloys and Research (Pty) Ltd v Ellis*<sup>75</sup> when the court held that the South African legal position is that a restraint of trade clause is valid and enforceable unless it is shown that it is not aimed at protecting the legitimate business interests of the employer and is contrary to public policy. The court

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<sup>72</sup>*Drewtons (Pty) Ltd v Carlie* (1981) 4 SA 305 (C) at 460.

<sup>73</sup> (J1990/2014) [2014] ZALCJHB 353.

<sup>74</sup> *Idem* 51.

<sup>75</sup> (1984) 4 874 (A)

further held that in such cases the *pacta sunt servanda* principle must yield to considerations of public policy.<sup>76</sup>

### 2.7.1 Breach by an employer

However, when the employer had unlawfully terminated the contract of employment containing a restraint of trade clause the employee will not be bound by the restraint of trade because of the *ex turpi causa* principle and public policy.<sup>77</sup> This applies in terms of the English law rule as imported into South African law by the courts. The court, in *Drewtons (Pty) Ltd v Carle*,<sup>78</sup> held that an employer who had repudiated his obligation under the contract cannot claim to enforce the restraint of trade. This decision supports the second proposition alluded to above, which provides that a restraint of trade is an ancillary contract which is inextricably linked to the main contract. According to this decision, the employer who had unlawfully terminated the employee's contract of employment is not entitled to enforce the restraint of trade against the employee. The public policy considerations militate against the enforcement of a restraint of trade in such circumstances.

The court again was presented with the same challenge in *Info DB Computers v Newby*.<sup>79</sup> In this case, the applicant had downgraded the respondent's position of employment. As a result of the applicant's action, the respondent resigned. The court held that:

"both on the ordinary principles of our law and the strong English and American authorities, unless there are terms to the contrary, a party which has *wrongfully* caused the termination of a contract of employment cannot rely upon the existence of a restraint of trade clause forming an integral part of such contract".<sup>80</sup> (My emphasis). This interpretation applies to dismissal envisaged by the Labour Relations Act (hereinafter the LRA),<sup>81</sup> particularly the dismissal where the employee initiated termination of his/her

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<sup>76</sup> *Idem* 880 H-I.

<sup>77</sup> Hock (2003) *ILJ* 1231.

<sup>78</sup> (1981) 4 SA 305.

<sup>79</sup> (1996) 17 *ILJ* (WLD).

<sup>80</sup> *Idem* at 35 E.

<sup>81</sup> Labour Relations Act 66 of 1995.

employment contract. Because the employer had made the continuation of employment to be intolerable and as a result the employee resigned.<sup>82</sup> The employee resigned because the new employer, after the transfer of the business in terms of the provisions of the LRA<sup>83</sup> provided terms and conditions of employment which were less favourable than prior to the transfer. This decision made it clear that the party who had unlawfully terminated the employee's contract of employment cannot *de jure* benefit from its unlawful conduct.<sup>84</sup> The *ex turpi causa* rule also in its application will not allow an employer who had unlawfully terminated the employee's contract of employment to benefit from a restraint of trade by depriving an employee its right to freedom of trade in light of breach of contract by the employer.

The breach of contract by the employer is equivalent to an unfair labour practice which is contrary to public policy considerations of fairness. The relevant public policy consideration is that of freedom of trade. Moreover, the court, in *Magna Alloys and Research v Ellis*,<sup>85</sup> held that each agreement in restraint of trade, should be examined on its own merits to determine whether its enforcement would not be against public policy. This decision provides the general rule that all agreements in restraint of trade are valid and enforceable, unless it can be shown by the party that seeks to escape the enforcement of a restraint that the enforcement of a restraint of trade would be contrary to public policy.

In determining the enforceability of a restraint of trade circumstances which are important are those which prevail at the time when enforcement is sought. According to the court in *Info DB Computers v Newby*<sup>86</sup>, unlawful termination of the contract of employment by the employer cancels the restraint of trade clause. Moreover, in this case the court held that it is not a requisite that the employee should prove that enforcement of the restraint of trade clause would be contrary to public policy in addition to the unlawful termination.

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<sup>82</sup> S 186 (1)(e) of the LRA 66 of 1995.

<sup>83</sup> SS 197 and 197A of the LRA 66 of 1995.

<sup>84</sup> Cohen (1998) 10 *SAMLJ* 385.

<sup>85</sup> (1984) 4 SA 874 (A) at 875H.

<sup>86</sup> (1996) 17 *ILJ* 32 (W).

The court, in *Basson v Chilwan*,<sup>87</sup> provided a multitude of factors to be considered when a question of enforcing a restraint of trade is to be answered. These factors are:

1. “Is there an interest of one party which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?”<sup>88</sup>

Therefore in light of these factors it appears that the Courts will not enforce a restraint of trade clause incorporated in an unlawfully terminated contract of employment by the employer. This is plausible because of the facet of public policy having nothing to do with the relationship between the employer and the employee. That facet of public policy is fair labour practice as captured in the Constitution.

The Appellate Division had an opportunity to consider the proposition articulated in *Info DB Computers v Newby*. The court, in *Reeves v Marfield insurance Brokers CC*,<sup>89</sup> held that the need for the protection of the proprietary interests of the employer, exist independently of the manner in which the contract is terminated and this is so, irrespective of the unlawful termination of the contract by the employer.<sup>90</sup> A restraint of trade clause may be invoked regardless of the unlawful termination of the contract of employment by the employer. The court reasoned that in the absence of fraud or wilful wrongdoing the termination of the contract of employment as a result of an unfair labour practice by the employer would not on its own render a restraint of trade clause contrary to public policy.<sup>91</sup> This suggests that

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<sup>87</sup>(1993) 3 SA 742.

<sup>88</sup>*Basson v Chilwan* at 743 H.

<sup>89</sup>(1996) 3 SA 766.

<sup>90</sup>*Idem* at 772 G.

<sup>91</sup>*Idem* at 776 F-H.

in addition of the unlawful termination, the employee should still prove that the enforcement of restraint of trade would be contrary to public policy.

The court, in *Reeves v Marfield Insurance Brokers CC*, further refused to apply the rule in *General Billposting Co Ltd v Atkinson*<sup>92</sup> which provides that unlawful termination of the employment contract by the employer frees the employee from the entire contract including the restraint of trade. Instead, the court held that it has no basis were parties agreed that the restraint is to operate in circumstances where the employer has unlawfully terminated the contract of employment.<sup>93</sup>

The court, in *Reeves* case *supra*, further held, in contrast, that in appropriate circumstances an unlawful termination of employment may serve as something that would tilt the scale towards the conclusion that the restraint of trade is unenforceable; this is so because the enforcement of such will be contrary to public policy.

Despite the decision of the *Reeves* case *supra*, the court in this case left out the possibility that where the employer's unlawful termination is characterized by fraud, the restraint of trade will not be enforced. An example of which is when an employer employs a person under the restraint of trade agreement as a trap to simply enforce it upon unlawful termination.<sup>94</sup> The court held that this ground alone will make the restraint of trade clause unenforceable.<sup>95</sup> The intention of the breach plays an influential role in determining whether under the circumstances the restraint of trade should be enforced or not. In my view a breach of contract by an employer should favour the conclusion that the restraint of trade clause should not be enforceable on the basis that its enforcement will be contrary to public policy. In line with the decision in *Reeves'* case that the unlawful termination of the employment contract should be added as one of the multitude factors as alluded to by the court in *Basson v Chilwan*.<sup>96</sup>

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<sup>92</sup>(1909) AC 118.

<sup>93</sup>*Reeves v Marfield Insurance Brokers CC* (1996) 3 SA 774.

<sup>94</sup> *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at 20.

<sup>95</sup>*Reeves v Marfield* at 775 H.

<sup>96</sup> (1993) 3 SA 742 at 743 H.

## 2.8 Burden of proof

The burden of proof in terms of the English law is placed on the person who wants to enforce the restraint of trade. This is so because according to the English common law all contracts of employment containing a restraint of trade are *prima facie* invalid and unenforceable because they are held to be contrary to public policy.<sup>97</sup> The public policy being that no one should be deprived of his or her freedom of trade including the community should not be deprived the opportunity to do business with the ex-employee. The person seeking to enforce the restraint of trade bears the burden of proof in balance of probabilities that the restraint of trade is not contrary to public policy.<sup>98</sup> The enforceability of a restraint of trade agreement in English law jurisdiction is determined by considering the factors which prevailed at the time the contract was concluded.

The court, in *Magna Alloys*, settled the question of burden of proof in contracts containing a restraint of trade in South African law. The court held that the party seeking to escape the restraint of trade bears the onus of proof. This means that all contracts of employment containing a restraint of trade clause in South Africa are *prima facie* valid and enforceable unless they are proved in balance of probabilities to be contrary to public policy. The significant change brought by the decision of *Magna Alloys* is relevancy of the circumstances which are prevalent when an enforcement of a restraint of trade agreement is sought. The important circumstances to be considered are the ones prevailing when the restraint of trade is sought to be enforced.<sup>99</sup>

The constitutional challenge of the burden of proof has shed some light. There was a question whether the constitutional dispensation brought changes to whom the burden of proof rests. The courts have confirmed that the burden of proof rests on the party that seeks to escape the restraint of trade.<sup>100</sup>

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<sup>97</sup> *Sibex Engineering Services (Pty) Ltd v Van Wyk* (1991) 2 SA 482 at 499 J.

<sup>98</sup> *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at 18.

<sup>99</sup> 1984 (4) 874 (A) at.

<sup>100</sup> *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at par 8.

In *Knox D’Arcy Ltd v Shaw*,<sup>101</sup> the question of onus was visited. The first respondent argued that the effect of section 26(1) of the interim-Constitution of the Republic of South Africa<sup>102</sup> on contracts of employment in restraint of trade requires a reversion of the burden of proof. The respondent argued that the position which was applicable before the decision in the *Magna Alloys* case should be reinstated. By this argument the respondent required that the applicant as the party seeking to enforce a restraint of trade clause, bears the onus of proof to show that the restraint of trade is reasonable and not contrary to public policy. The court rejected the respondent’s argument and held that there is no principle which would justify the reversion of the burden of proof to be placed on the party that seeks to enforce the restraint of trade. The Court further reasoned that section 26(1) of the interim-Constitution does not require the reversal of the burden of proof to the pre-*Magna Alloys* regime.<sup>103</sup> The court supported the contention that the onus of proof should remain on the party that seeks to escape a restraint of trade clause. In *Basson v Chilwa*,<sup>104</sup> the court had already confirmed the contention that the onus of proof rests upon the party that seeks to escape a restraint of trade clause to show that the enforcement of a restraint of trade clause is unreasonable or is likely to affect the public policy negatively.<sup>105</sup> It is also argued that the reversal of the burden of proof should not be adopted because a proper weighing of conflicting interest has always been considered prior the decision of *Magna Alloys*.<sup>106</sup>

## 2.9 Conclusion

The principle of *pacta sunt servanda* is vital in South African law of contract because it ensures that everyone is bound by the agreement that they have entered into. This is so irrespective of the fact that it has a term or clause in one party’s advantage and at the other party’s disadvantage.<sup>107</sup> As long as the term or clause is not contrary to public policy, since

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<sup>101</sup>(1996) 2 SA 651 (W).

<sup>102</sup>Constitution of the Republic of South Africa Act 200 of 1993.

<sup>103</sup>*Knox D’Arcy Ltd and v Shaw* (1996) 2 SA at 661 D-E.

<sup>104</sup>(1993) 3 SA 742 (A).

<sup>105</sup>*Idem* at 750 D-H.

<sup>106</sup>Neethling “The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants – A Need for Exercising Restraint” *SAMLJ* 94.

<sup>107</sup>*Sibex Engineering Services (Pty) Ltd v Van Wyk* at 500 G-I.

the public policy is the criterion of enforcing the term or clause such as the restraint of trade.<sup>108</sup>

The *ex turpi causa* principle, despite the *pacta sunt servanda* principle, comes in as the defence which the employee can use. In the event whereby the restraint of trade enforcer (employer) has breached the contract of employment and wants to enforce it, the employee can raise it since no one can legally benefit from his unlawful conduct. The enforceability of a restraint of trade clause is dependent on variety of issues which ultimately impact on public policy. If in consideration of all relevant factors it appears that the enforcement of the restraint of trade would be contrary to public policy the restraint of trade would not be enforced.

The court, in *Magna Alloys supra*, stated very clear that the factors to be considered when the restraint of trade is sought to be enforced are the ones prevailing when enforcement is sought. This means that the breach of contract by the employer will be considered when deciding whether the restraint of trade should be enforced or not. However, in light of *Reeves supra*, it shows that the fact that the employer had breached the contract of employment will have more weight against the enforcement of the restraint contract agreement incorporated in such a contract. In this decision, the court showed a favour towards the decision of the court in *Info DB Computers v Newby*. The legal position in South Africa is that the unlawful termination of the employment contract does not put an end on the restraint of trade clause. This is so because the need for the protection of the employer's trade secrets is viewed to be independent from the manner in which the contract of employment is terminated.

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<sup>108</sup> *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA (SCA) 282 E-G.

## Chapter 3

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## Chapter 3

### Comparative analysis in the context of unlawful termination of employment

#### 3.1 Introduction

In South Africa a contract of employment containing a restraint of trade clause is *prima facie* valid and enforceable unless it is shown that its enforcement will be contrary to public policy.<sup>109</sup> The employee to an employment contract who seeks to escape the enforcement of a restraint of trade clause bears the onus of proving in balance of probabilities that the enforcement of a restraint of trade is not aimed at protecting the employer's legitimate interest and contrary to public policy.<sup>110</sup>

Public policy is the criterion with which the enforceability of a restraint of trade is determined.<sup>111</sup> This means that if the restraint of trade clause is held to be against public policy it will not be enforced. Key factors to consider when evaluating public policy are those factors pertaining to the restraint of trade at the time when the restraint is sought to be enforced.<sup>112</sup> This suggests that the factors which existed when the employer and the employee entered into the contract of employment are not as relevant as the ones prevailing at the time when a restraint of trade is sought to be enforced. This is so because significant time might have lapsed between the time when the contract was concluded and the time when the restraint of trade is sought to be enforced.<sup>113</sup>

In contrast to South African jurisdiction, the United Kingdom and Australia hold the view that a restraint of trade clause is *prima facie* invalid and unenforceable unless proven that the restraint of trade is reasonable between the parties and is not contrary to public policy.<sup>114</sup> In these jurisdictions the party that seeks to enforce the restraint of trade bears

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<sup>109</sup> *Magna Alloys Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

<sup>110</sup> Pretorius (2009) *Obiter* 156.

<sup>111</sup> *Reeves v Marfield insurance Brokers CC* 1996 (3) 771 at C-E.

<sup>112</sup> Hock (2003) *ILJ* 1234. See also *Magna Alloys Research SA (Pty) Ltd v Ellis, supra*, at 896.

<sup>113</sup> *Magna Alloys Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 at 881G-H.

<sup>114</sup> Farwell "Covenants in Restraint of Trade as Between Employer and Employee" (1928) 44 *L.Q.R.* 66.

the onus of proving that the restraint of trade is reasonable *inter partes* and is not contrary to public policy.<sup>115</sup>

In these jurisdictions the relevant circumstances when a restraint of trade is sought to be enforced are those which prevailed when the contract was concluded.<sup>116</sup> The common law jurisdiction puts more emphasis in principles derived from case law judgments. Consequently precedents are elevated to a position of unqualified importance and dominance. This legal system promotes the development of legal principles through cases and judgments. This chapter explores the legitimate interest of the employer, the reasonableness of the restraint of trade and the breach of contract, particularly, a comparative study will be undertaken to determine whether a restraint of trade clause is enforceable within the context of unlawfully terminated contract of employment.

The United Kingdom (UK) is examined initially, followed by Australia. An examination of these jurisdictions could provide guidance and insight into the nature and the possible development of the law regulating the enforceability of a restraint of trade clause within the context of unlawfully terminated contract of employment.

### **3.2 Employer's legitimate interests**

The employer with a restraint of trade clause is to restrain the employee for a specified period after leaving its employment, from being employed in any business venture or from embarking on any business venture which will likely put the employee in a position where the employee might use the confidential information he acquired to the employer's disadvantage.

The employer has an interest in restricting the activities of the erstwhile employee, where that employee has acquired the employer's trade secrets or have some insight of the employer's customer connections and the know-how. The employer with a restraint of trade seeks to protect this information from manipulation by an employee in competition

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<sup>115</sup>*Globex Foreign Exchange Corp. v Kelcher* (2011) ABCA 240 (CanLII) at par 13.

<sup>116</sup>*Wallis Nominees (Computing) (Pty) Ltd v Pickett* (2013) VSCA 24.

against the employer.<sup>117</sup> For the restraint of trade to be enforceable its purpose should be to protect the legitimate business interests of the employer.<sup>118</sup> This information should not be information which is easily attainable in the public space or information which is common within the particular industry.<sup>119</sup>

The protected information should be such that if it could be used by the former employee in competition against the employer it will be unfair competition. The court, in *Globex Foreign Exchange Corp v Kelcher*,<sup>120</sup> held that the interests that the employer seeks to protect should be sufficiently unique to be regarded as protectable legitimate business interest.<sup>121</sup> English common law discourages the restraint of trade clause incorporated in an employment contract.<sup>122</sup> The English common law jurisdiction does this because it is in favour of the individual's freedom of employment.<sup>123</sup> However, where the restraint of trade is reasonable between the parties and is directed at protecting the employer's legitimate business interest and not just to stifle competition, the restraint of trade is enforceable.

### 3.3 Reasonableness of a restraint of trade

In terms of the English law a restraint of trade clause can only be enforced if it is held to be reasonable *inter partes* and not contrary to public policy. For a restraint of trade to be valid and enforceable, it should be directed at protecting the employer's legitimate business interests. In so doing it should be reasonable between the parties in that it should not be too wide in area and scope in order to protect the employer's protectable interest or trade secrets.<sup>124</sup> If the restraint of trade is too wide, it's more likely that it will be deemed unreasonable between the parties and contrary to public policy. The employer bears the onus of proving that the restraint of trade does not cover a wide area than is required to protect its legitimate interests. The reasonableness of a restraint of trade clause is considered on the geographical space, the period for which it will apply and on the interest

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<sup>117</sup>Brooks "The Limits of Competition: Restraint of Trade in the Context of Employment Contracts"(2001)24(4) *UNSW Law Journal* 381.

<sup>118</sup>Simon "Clever Compensation" *Comp.Law* (2009) 30(8) 238.

<sup>119</sup>Brooks (2001) 24(4) *UNSW Law Journal* 384.

<sup>120</sup>(2011) ABCA 240.

<sup>121</sup>*Ibid* at par 40.

<sup>122</sup>Nolan "When Principles Collide" *L.Q.R* (2009) 125(Jul) 374.

<sup>123</sup>*Ibid*.

<sup>124</sup>*Manderson M&F Consulting v Incitec Pivot Ltd* (2010) VSC 63.

it seeks to protect. In Australia for the restraint of trade to be enforceable it should specifically determine with exactness what trades secrets or information it seeks to protect.<sup>125</sup> The court, in *Globex Foreign Exchange Corp v Kelcher*, held that the restrictive covenant is unenforceable because it was too wide and ambiguous.<sup>126</sup> The restraint of trade clause in this case was not enforced because it was unreasonable on the scope and it did not specifically outline the trade secret it intended to protect. The scope of the restraint of trade clause must not go beyond what is reasonably necessary to protect the confidential information. Employees are protected from restraint of trade clauses which are unreasonable in scope. For the restraint of trade to be held valid and enforceable it should be reasonable and directed towards protecting a legitimate business interest. The reasonability of a restraint of trade clause is affected by wide scope, lack of any trade secret to be protected, and whether or not it is against public policy.

### **3.4 Enforceability of a restraint of trade within the context of breach of contract**

#### **3.4.1 Introduction**

The contract of employment between the employer and the employee is binding between the parties provided that all the requirements of a valid contract have been complied with and is not against public policy. The duly concluded contract of employment creates obligations between the parties. The restraint of trade clause creates post-employment obligations.

The contract of employment can be terminated in different ways, either lawfully or unlawfully. The breach of contract occurs when one party breaches the material aspect of the contract of employment. That is when one party repudiates a contract of employment and the other party accepts the repudiation of the contract. If the employee has repudiated the contract of employment and the employer had accepted the repudiation, the restrictive covenant will still restrict the employee. As long as the restraint of trade clause is reasonable between the parties and is not contrary to public policy. However, where the

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<sup>125</sup> Arup *What/whose Knowledge? Restraint of Trade and Concepts of Knowledge*(2012) 375.

<sup>126</sup>(2011) 240 (CanLII) at par 41.

employer has repudiated the contract of employment, the employee will not be bound by the restrictive covenant contained in the contract of employment.<sup>127</sup>

This means that the restraint of trade is unenforceable because of the unlawful termination of the employee's employment. At present this is the legal position in English common law jurisdictions. This is so because the restraint of trade is viewed as the integral part of the main contract. Furthermore, the *ex turpi causa* principle provides that the guilty party is not entitled to legally benefit from his unlawful conduct. In South Africa, the current position is that the restraint of trade is enforceable despite the unlawful termination of the employment contract.<sup>128</sup> The expressed view is that the need for the employer's protection of the trade secrets is independent from the manner in which the contract is terminated. The court, in *Reeves v Marfield Insurance Brokers CC*,<sup>129</sup> held that "words for any 'reason whatsoever' make it clear that the circumstances in which the employment relationship comes to an end or the underlying cause of its termination are irrelevant to the operation of the restraint of trade provision".<sup>130</sup>

### 3.5. United Kingdom

#### 3.5.1 Introduction

The first country that has been selected for purposes of analysis is the UK. The UK is one of the countries that South Africa has long standing political relations with. South Africa is a former British colony and has inherited English common law principles.<sup>131</sup> Among the 11 official South African languages, English is the medium of instruction and remains a widely spoken language.

In the UK, the question of whether the restraint of trade is still enforceable despite the unlawful termination of the employee's contract of employment was considered in *General Billposting Co Ltd v Atkinson*.<sup>132</sup> In this case, the respondent was employed by the appellant

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<sup>127</sup>*General Billposting Co. Ltd v Atkinson* (1909) A.C 118.

<sup>128</sup>*Reeves and Another v Marfield Insurance Broker CC and Another* 1996 (3) SA 771 at C-E.

<sup>129</sup>1996 (3) SA 771.

<sup>130</sup>*Idem* at 772 A-B.

<sup>131</sup>*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (1984) 4 874 at 875 H.

<sup>132</sup>(1909) A.C 118.

as a manager. The contract of employment between the appellant and the respondent contained a restrictive covenant and that either party should give 12 months notice. The appellant company dismissed the respondent employee without notice, which was held to be wrongful dismissal. The court held that the respondent cannot be bound by the restraint of trade clause on account of the employer's conduct.

The court invoked the *ex turpi causa* principle and reasoned that the appellants act and conduct indicated that it does not wish to be bound by the contract. The court reasoned that the employer's wrongful dismissal of the respondent supported this view.

Consequently, the respondent cannot be held liable to a restrictive covenant.<sup>133</sup> Therefore, it is held that an employer who unlawfully terminates the employment contract absolves the employee from any agreement contained therein.<sup>134</sup>

### **3.5.2 Termination of employment**

In the UK, when a restraint of trade clause is sought to be enforced, the relevant circumstances which are considered to be important are those which prevailed when the contract of employment was concluded.<sup>135</sup> This means that a contract which is concluded with a restraint of trade clause and stipulated that it will be binding to the parties irrespective of how the contract is terminated. Such contract will not be enforced. The court, in *Rock Refrigeration Ltd v Jones*,<sup>136</sup> held that it would not enforce such contracts. The court reasoned that the words "howsoever occasioned" do not cover for unlawful dismissal. The court further held as per Lord Justice Brown J that "The whole point about *General Billposting* principle is that, in cases of *repudiatory breach by the employer*, the employee is on that account released from his obligation under the contract and restrictive covenants, otherwise valid against him, accordingly, cannot be enforced. Once that principle was

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<sup>133</sup> *Idem* 122.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Rock Refrigeration Ltd v Jones* (1997) 1 All E.R

<sup>136</sup> *Ibid.*

decided, its future application necessarily postulated that such restrictive covenants upon their construction would otherwise be unenforceable against employee".<sup>137</sup> (My emphasis).

The court meant that even if the restraint of trade was considered valid and enforceable but by virtue of unlawful termination by the employer the employee cannot be restrained. This is so because of the conduct of the employer in terminating the employee's contract of employment. The repudiatory breach by the employer is regarded as absolving the employee from the post-employment restrictive covenant.

The circumstances which the employment is terminated for are also considerable. They are important in providing guidance for enforcing a restraint of trade.<sup>138</sup> In *Globex Foreign Exchange Corp v Kelcher*,<sup>139</sup> the court held that the restraint of trade is unenforceable due to the manner in which the employee's contract was terminated by the employer. The court, in *Briggs v Oates*,<sup>140</sup> held that a contract of employment under which an employee could be summarily and unlawfully dismissed but still be bound to a restrictive covenant seems to be grossly unreasonable. The court was not prepared to enforce the restraint of trade agreement contained in that contract of employment.<sup>141</sup>

### 3.5.3 Conclusion

In the UK the courts are holding the view that the breach of contract by the employer renders the restraint of trade clause contained in the contract of employment unenforceable. The courts have always maintained this principle from *General Billposting Co Ltd v Atkinson*<sup>142</sup> that unlawful termination of the contract of employment by the employer renders a restraint of trade unenforceable by virtue of the employer's conduct. The courts even held that even though the restraint of trade agreement can be held to be reasonable and enforceable the decisive factor should always be the evaluation of the employer's act of unlawfully or wrongfully terminating the employee's contract of employment. If that can be proved, the employee cannot be bound by the restraint of trade.

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<sup>137</sup> *Ibid.*

<sup>138</sup> Lowry and Sloszar" Judicial Pragmatism: Director's and Post-Resignation Conflict of Duty" 2008 (1) J.B.L 88.

<sup>139</sup> (2011) 240 (CanLII) at par 4.

<sup>140</sup> (1990) I.C.R 473.

<sup>141</sup> *Ibid.*

<sup>142</sup> (1909) A.C 118.

The courts have categorically stated that parties to a contract of employment cannot enforce a contractual term which envisages to be binding in the event of unlawful conduct of the employer.

## **3.6. Australia**

### **3.6.1 Introduction**

The second country that has been selected for purposes of analysis is Australia, as it is also a former colony of Britain. It is submitted that Australia is one of the trading partners of South Africa.

In Australia, covenants in restraint of trade are *prima facie* invalid and unenforceable and the party that seeks to enforce the restraint of trade bears the onus of proving that the restraint of trade is reasonable and not contrary to public policy.<sup>143</sup> The restraint of trade is important to protect the employer's legitimate business interests against manipulation by an erstwhile employee. The employer's protectable interests are its clients, existing employees and trade secrets. For the restraint of trade to be enforceable the public policy plays a crucial role.

It is in the interest of public policy that people should not be restrained from using their skills and knowledge that they have acquired. On the other hand it is also in the interest of public policy that an employee be restrained from being in competition with the erstwhile employer for reasons that such employee could use the confidential information it has acquired from the erstwhile employer. This could put the erstwhile employer at a detrimental position in which the employee will be manipulating the erstwhile employer's trade secrets to his advantage and against the employer.

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<sup>143</sup>*Cactus Imaging (Pty) Ltd v Peters* (2006) NSWLR 9 at par 10.

### 3.6.2 Termination of employment howsoever caused

The breach of contract by an employer has the consequences of releasing an employee from the obligation of the post-employment restraint of trade agreement. The court in *Ecolab (Pty) Ltd v Garland*<sup>144</sup> was tasked to determine whether the restraint of trade is enforceable in light of the unlawful termination of the employee's contract of employment. The employee's contract of employment was terminated on reasons of redundancy. The employee, Mr Garland had entered into a restraint of trade agreement with the employer, Ecolab.

The restraint of trade provided that the employee will not enter into competitor's employment for the whole duration of the restraint of trade after the termination of employment for whatever reason.<sup>145</sup> The employee's employment came to an end by involuntary redundancy after declining the offer of reduction from basic salary. The court considered all the circumstances for the termination of the employee's contract of employment and concluded that the restraint of trade is unenforceable with regard to restraint of trade but enforceable regarding non-solicit restraint.<sup>146</sup> In terms of the precedent rule, it was held that the courts in Australia would not enforce a restrictive post-employment agreement where the employer had unlawfully or wrongfully terminated the employee's contract of employment.

### 3.6.3 Conclusion

The courts in Australia proved to be in accordance and agreement with the judgments of the courts in the UK in their approach on the legal issue of whether or not the restraint of trade is rendered unenforceable on unlawful termination of the employee's employment, especially in terms of the effect of the words inserted in the restraint of trade such as "howsoever termination is occasioned and for whatever reason".

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<sup>144</sup>(2011) NSWSC 1095 at par 1.

<sup>145</sup>*Ibid* at par 9.

<sup>146</sup>*Ibid* at par 35.

### 3.7 A comparison between South Africa and UK

In an analysis whether a restraint of trade agreement in the context of an unlawful termination of an employment contract by an employer, will be enforced or not, it has been indicated that the position in the UK is different from decisions taken by South African courts.

The restraint of trade is enforceable in South Africa despite the unlawful termination of the employment contract by the employer. This is so because the restrictive agreement is viewed as being intended by the parties to exist independently from the contract of employment.<sup>147</sup> Consequently, the employer's trade secret requires protection despite the employer's action of unlawful termination of the employee's contract of employment. It is held to be a collateral agreement where the interest of the employer takes precedence over that of an employee.

The *pacta sunt servanda* principle in South Africa is considered as a key principle in contrast to the legal position in the UK.<sup>148</sup> This principle provides that the parties to a contract are bound by it. Therefore this effectively suggests that even if the contractual terms sought to be enforced is not favourable to an employee due to the unfair conduct of the employer at the time, the courts are prepared to enforce a restraint of trade clause. The reason for this is, that the intention of the parties is, to be bound by the contractual terms.

In the UK, the unenforceability of a restraint of trade in this context is fuelled by the fact that the employer had unlawfully terminated the contract of employment and as a result of the employer's conduct the employee is absolved from any post-employment restrictive covenant.<sup>149</sup> This is so despite the wording of the restrictive covenant. In UK restraint of trade that provides that it should be binding to the employee irrespective of how an employment contract is terminated is regarded to be contrary to public policy.<sup>150</sup>

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<sup>147</sup> *Reeves v Marfield Insurance Brokers CC* (1996) 3 SA 771J-772A.

<sup>148</sup> *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (1984) 4 874 at 877 G.

<sup>149</sup> *General Billposting Co Ltd v Atkinson* (1909) AC 118.

<sup>150</sup> *Alexandra and Osman Restrictive Covenants under Common Law* (2004) 166.

In the UK, the principle of *ex turpi causa* is highly adhered to. This principle suggests that the party to a contract who have wrongfully terminated it cannot legally benefit from such contract. Despite the fact that the employer and the employee have agreed to a restrictive clause which provides that no matter how the termination of employment is caused.<sup>151</sup>

When the enforcement of a restraint of trade is sought in the UK, the important aspects to be considered are those that prevailed at the conclusion of the contract of employment. The employee whose contract was wrongfully terminated will not be bound by the restrictive covenant irrespective of the *pacta sunt servanda* principle. This is so because it is contrary to public policy to enforce contractual provisions in the context of the unequal bargaining position of the employee and unlawful conduct by the employer. The aim of the law is to advance social justice and to protect the weaker party's rights in an employment relationship, internationally accepted as a *sui generis* one.<sup>152</sup>

### 3.8 South Africa and Australia

In Australia, the restrictive covenant which is aimed to be binding when the employment relationship had terminated is unenforceable when the employer had unlawfully terminated the contract of employment. In *DC Payments (Pty) Ltd v Lester*<sup>153</sup> the defendant resigned and gave notice. Instead the plaintiff did not allow the defendant to work his notice period but paid him for the period of notice.<sup>154</sup> The defendant construed this as repudiation of his employment contract and the restraint of trade by the plaintiff.<sup>155</sup> The defendant was subsequently employed by the competitor of the plaintiff. The plaintiff sought to enforce the restraint of trade by seeking an interlocutory injunction restraining the defendant from being employed by the competitor. The court refused to grant the plaintiff the sought relief, the court only restricted the defendant from soliciting and exploiting the plaintiff's trade secrets.

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<sup>151</sup> *Rock Refrigeration Ltd v Jones* (1997) 1 All E.R.

<sup>152</sup> Davies and Freedland *Kahn-Freund's Labour and the Law* 3<sup>rd</sup> ed (1983) at 18.

<sup>153</sup> (2013) VSC 469.

<sup>154</sup> *Ibid* at par 32.

<sup>155</sup> *Ibid* at par 33.

However, in South Africa, such termination does not put an end to the restraint of trade agreement, as the unlawfully terminated employee is restrained from working for the competitor of the employer.<sup>156</sup> The reason for this is that the contract of employment exists independently from the restraint of trade agreement. Therefore the need to protect the employer's trade secrets survives the unlawful termination of the employment contract by the employer. This is more evident in the circumstances where the termination of the employee's contract of employment is not marred by *mala fide* on the conduct of the employer but only by unlawful termination. *Mala fide* is only present when the employer terminates the employee's contract of employment for purposes of fraudulently limiting competition.<sup>157</sup> Under these circumstances, the court will not enforce the restraint of trade despite the wording that the restraint of trade is to operate irrespective of how the termination is occasioned and for whatever reason.<sup>158</sup>

In Australia, when the employee's contract of employment is unlawfully terminated, the employee is absolved from the restraint of trade agreement. The restrictive covenant is viewed as the integral part of the contract which is affected by the unlawful conduct of the employer. This is so because the restraint of trade clause does not survive the unlawful or wrongful termination of the contract of employment by the employer.

Therefore the restraint of trade against the employee is unenforceable, because the enforcement of the restraint of trade will be contrary to public policy. The *ex turpi causa* principle dictates in this jurisdiction that no party to an employment contract should legally benefit from its unlawful or wrongful conduct. This requires that for the employer to legally benefit from the restraint of trade agreement must approach the court with "clean hands".

In South Africa, a contract of employment containing a restraint of trade agreement is enforceable irrespective of how the termination of employment is caused. Such a restraint of trade clause is binding to the parties and is enforceable unless its enforcement will be

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<sup>156</sup> *Reeves & Another v Marfield Insurance Brokers CC & Another* (1996) (3) 766 at 776 F-H.

<sup>157</sup> Christie and Bradfield *The law of Contract in South Africa* (2007) at 384.

<sup>158</sup> *Basson v Chilwan* 1993 (3) SA 742 (A) at 771D.

contrary to public policy. This proposition is well captured in *Sunshine Records (Pty) Ltd v Frohling & Others*<sup>159</sup> where the court held that:

“In determining whether a restriction on the freedom to trade or to practice a profession is enforceable, a court should have regard to two main considerations. The first is that the public policy requires, in general, that parties should comply with their contractual obligations even if these are *unreasonable or unfair*. The second consideration is that all persons should, in the interest of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if unreasonable fetter is placed on a person’s freedom of trade or to pursue a profession”<sup>160</sup> (My emphasis)

The court, in *Reeves v Marfield Insurance Brokers CC*,<sup>161</sup> concretised this proposition and held that the words providing that “for any reason whatsoever” are clearly stating that the circumstances under which the employment relationship is terminated are irrelevant on the enforceability of the restraint of trade. Furthermore the suggestion that the words “for any reason whatsoever” should be given a limited meaning has no justification.<sup>162</sup>

This suggests that when the employer had unlawfully terminated the employee’s employment the restraint of trade is enforceable. The reason is that the parties wished that the restraint of trade should be binding to them.<sup>163</sup> This is held to be giving effect to the contracting parties’ wishes. This is so in terms of the *pacta sunt servanda* principle; this principle as alluded to above provides that the contract is binding to the parties.<sup>164</sup> The contract is binding to the parties as long as its enforcement will not be contrary to public policy.

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<sup>159</sup>(1990) 4 SA 782 A.

<sup>160</sup>*Idem* at par 794 C.

<sup>161</sup>1996 (3) SA 771.

<sup>162</sup>*Idem* at 772 A-B.

<sup>163</sup>*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (1984) 4 SA 874.

<sup>164</sup>*Ibid.*

### 3.9. Conclusion

The UK and Australia both support the individual's freedom and *ex turpi causa* principle. In both these jurisdictions it appears that the individual freedom of trade is given preference by holding that the restraint of trade clause is *prima facie* invalid and unenforceable. This legal system requires the party that seeks to enforce a restraint of trade clause to prove that the restraint of trade clause is reasonable and not contrary to public policy. The restraint of trade is viewed as the integral part of the contract of employment. The restraint of trade clause is not an island in the main contract of employment. Therefore if the contract of employment is unlawfully or wrongfully terminated by the employer the employee is absolved from being bound by the restrictive covenant. This is so in the application of the *ex turpi causa* principle which prevents the guilty party from legally benefitting from its wrongful or unlawful conduct.

In South Africa the Constitution provides that that everyone has the right to freedom of trade<sup>165</sup>and the right to fair labour practices.<sup>166</sup> These rights are fundamental rights which are afforded to everyone and cannot be dispensed with. The Constitution is the supreme law of South Africa and any law or conduct which is contrary to it is invalid and unenforceable.<sup>167</sup> The unlawful termination of the employee's employment is an example of an unfair labour practise which the Constitution prohibits.

The Constitution further provides that the rights enshrined in it can only be limited in terms of section 36. The Constitution promotes social justice in that it seeks to balance the competing interests of the employer and the employee. The employer's interest to protect its trade secrets balanced against the employee's right to freedom of trade and fair labour practice. Social justice and public policy dictate that an unreasonable fetter to a person's freedom of trade would be unenforceable. The South African legal position provides that enforcement of each contractual agreement would be determined in its own merits whether it would be contrary to public policy or not.

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<sup>165</sup>§ 22 of the Constitution.

<sup>166</sup> § 23 of the Constitution.

<sup>167</sup>§ 2 of the Constitution.

In South Africa, the contracts entered into by parties with the required capacity to act are binding between the parties, as long as it is not contrary to public policy. The question of unlawful termination of the employee's employment contract by an employer has been decisively decided on the effect it has on the enforceability of a restraint of trade clause.

The South African courts are not willing to enforce a restraint of trade clause if it intends to stifle competition not to protect the legitimate interests of the employer.<sup>168</sup> However, in the absence of that *mala fide* intention, but pure unlawful termination, the courts are ready to enforce the restraint of trade clause.<sup>169</sup> This appears to be the case when one examines the wording of the restraint of trade clause that it will be enforceable howsoever termination is caused. It may be further posited that the employer's trade secrets require protection despite how the contract of employment is terminated. Therefore, it appears that the UK and Australian legal position on the restraint of trade is not similar to that of South Africa especially where there is stipulation that the restraint of trade clause will be enforced irrespective of how employment is terminated, as long as it is not marred by *mala fide* on the part of the employer.

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<sup>168</sup> *Basson v Chilwan* 1993 (3) 742 (A) at 771 D.

<sup>169</sup> *Reeves v Marfield insurance Brokers CC* (1996) 3 SA at 772G.

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## Chapter 4

### Remedies

#### 4.1 Introduction

The breach of contract entitles the innocent party to a range of remedies, damages, interdict and cancellation of the contract.

A breach of contract brings the contract to an end or damages can be claimed for such breach or an interdict can be applied for to prevent further breach of contract. A contract of employment, like any other contract, is an agreement to create obligations and is binding between the parties. Breach of contract can affect the legal consequences of a contract.

#### 4.2 Damages

The party who wishes to claim damages for breach of contract is required to prove the following:

1. Breach of contract by the defendant;
2. Damage;
3. A factual causal connection between the breach and the damage;
4. That the damage is a natural consequence of the breach of contract or that an agreement was concluded to compensate the damage concerned;
5. The quantum of the damages.<sup>170</sup>

The plaintiff bears the onus of proving damages.<sup>171</sup> It is also noted that the plaintiff is not required to prove the exact amount of his or her loss, however is required to submit evidence of the loss suffered and is entitled to an award based on the evidence he or she

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<sup>170</sup>Van der Merwe *et al*(2012) at 375.

<sup>171</sup> *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another* (J1990/2014) [2014] ZALCJHB 353 at par 1.

submitted.<sup>172</sup> The damages are to be determined from the date of breach of contract by the defendant.<sup>173</sup>

Damages can be claimed by the plaintiff against the defendant if the damages are caused by the breach of contract. This suggests that the claim for damages should relate to the breach of contract by the defendant. Damages for the breach of contract are intended to put the plaintiff on the financial position he would have been had it not been the defendant's breach of contract.<sup>174</sup> This simply says that the plaintiff is not compensated for the loss he had suffered. But is put at the financial position he or she would have been into had it not been for the breach of contract by the defendant. This means that the plaintiff is put in a financial position he or she would have been had the contract been properly performed by the defendant. Moreover, the claim for damages does not include sentimental loss but only patrimonial loss.<sup>175</sup>

### 4.3 Interdict

An interdict is a remedy applied to prevent the continuity of breach or the contemplated breach of contract. It comes as an order of the court to prohibit the defendant from continuing or contemplating whatever is specified in the court order.<sup>176</sup> The employee is in breach of the restraint of trade agreement if the employee after termination of the employment contract gets employed by the competitor of the erstwhile employer. The erstwhile employer's remedy under these circumstances is to interdict the employee and his current employer from breaching the restraint of trade agreement. The applicant for an interdict should not have an adequate alternative remedy, such as a claim for damages. This means that a claim for damages should not be an adequate alternative remedy. This therefore places the interdict correctly as a last remedy that can be claimed to prevent a breach of contract.<sup>177</sup>

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<sup>172</sup> *Ibid.*

<sup>173</sup> Christie and Bradfield *The Law of Contract in South Africa 6<sup>th</sup> ed* (2007) at 580.

<sup>174</sup> *Idem* 566.

<sup>175</sup> *Idem* 569.

<sup>176</sup> *Idem* 554.

<sup>177</sup> *Idem* 315.

#### 4.4 Cancellation

The breach of contract affects the legal consequences of the contract; the enforceability of a restraint of trade clause incorporated in a breached contract of employment becomes affected. However this depends on who breached the contract.<sup>178</sup> If the employee is the party that breached the contract of employment, he or she cannot cancel the contract and affect the enforceability of a restraint of trade clause. The employer as the innocent party can cancel the contract and rely on the provisions of the contract.<sup>179</sup> This is based on the principle that a party cannot take advantage of its wrongful conduct to avoid the contractual obligations.

Whereas the breach of contract is caused by the employer the employee as the innocent party can cancel the contract and consequently put an end on the enforceability of a restraint of trade.<sup>180</sup> The employee may also claim damages from the breach of contract, provided he has fulfilled all the requirements of a claim for damages.

#### 4.5 Conclusion

The breach of contract of employment gives the innocent party a variety of remedies, damages, interdict and cancellation of the contract as a whole. These remedies vary from one case to another. Damages are available as a remedy to put the innocent party at the position he would have been had it not been for the breach of contract by the guilty party. It remedies the actual damage not sentimental damages. The interdict remedies a continued breach of contract or contemplated breach by demanding that the guilty party refrain from an activity that continues the breach of contract or the activity that contemplates breach of contract. However, it is a remedy available where there is no remedy that can sufficiently prohibit breach of contract.

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<sup>178</sup> *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another* (J1990/2014) [2014] ZALCJHB 353 at par 54.

<sup>179</sup> *Comwezi Security Services v Cape Empowerment Trust* (182/ 13) [2014 ZASCA 22 at par 13.

<sup>180</sup> *Idem* at par 11.

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## Chapter 5

### 5.1 Conclusion and Recommendations

The restraint of trade clause is specifically inserted into the contract of employment for the purpose of protecting the employer's trade secrets or the legitimate protectable interests. The effects of unlawful termination of the employment contract by the employer on the enforceability of the restraint of trade differ in South Africa and in English common law jurisdictions. In South Africa, the courts have expressly stated that the need for the protection of the employers' trade secrets, exists independently from the manner in which the contract of employment is terminated.<sup>181</sup>

This means that where the employer had unlawfully terminated the employee's contract of employment, the employee is still bound by the restraint of trade clause. Therefore, the restraint of trade clause exists independently from the main contract of employment, because is specifically entered into to operate once the employment relationship has been terminated.

The English law jurisdiction shows that the effect of unlawful termination of the employment contract puts an end on the restraint of trade clause. This jurisdiction views the restraint of trade clause as an ancillary contract which is inextricably linked to the main contract of employment. Consequently, the unlawful termination of the employment contract releases an employee from abiding with the obligations of the restraint of trade clause.

The two legal jurisdictions differ again fundamentally on the enforceability of the restraint of trade where the parties have specifically agreed that the restraint of trade is to be enforced "howsoever the termination of employment is caused" or "terminated for any reason whatsoever".

The South African legal position is that the restraint of trade which provides that it will be enforced irrespective of how the employment contract is terminated is enforceable. This is

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<sup>181</sup> *Reeves v Marfield Insurance Brokers CC* (1996) 3 ILJ 766(W) at 772-G.

the general legal position unless it is shown in addition to the unlawful termination that there was a fraudulent intention which will make the enforcement of the restraint of trade to be contrary to public policy.

In the English common law jurisdiction there is no requirement that the party that seeks to escape the enforcement of the restraint of trade to prove in addition to the unlawful termination that there was a fraudulent intention on the part of the employer. The unlawful termination of the employment contract by the employer on its own absolves the employee from the obligations imposed by the restraint of trade clause. Furthermore, the restraint of trade agreement is unenforceable despite the words that suggest that the restraint of trade agreement will be applicable in circumstances where the employer may have unlawfully terminated the employee's employment contract.

Despite these differences, the court, in *Reeves v Marfield Insurance Brokers CC*<sup>182</sup>, indicated that the circumstances under which the employment contract is terminated should form part of the multitude of factors to be considered when determining the enforceability of the restraint of trade. The consideration of the circumstances under which the employment contract is terminated indicates that the unlawful termination of the employment contract should put an end on the restraint of trade. Put differently it suggests that the *pacta sunt servanda* principle should yield to the public policy consideration that it is against public interest to deprive the public the opportunity receive or to do business with employee.

Moreover, the phrase "for any reason whatsoever or howsoever caused" in the restraint clause should be given a restrictive meaning so as to exclude any unlawful termination of the employment contract by the employer.<sup>183</sup> This will perfectly strike the balance between the two conflicting principles which are both based on public policy, of freedom of contract and freedom of trade accompanied with the employee's right to fair labour practice. This will be possible on the basis that the court must decide the enforcement of the restraint of trade in light of the prevailing circumstances at the time when enforcement is sought.<sup>184</sup>

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<sup>182</sup>1996 (3) SA 771.

<sup>183</sup> *Basson v Chilwan* 1993 (3) SA 742 (A) at 771D.

<sup>184</sup> *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at 16.

This is the point in which the dictates of public policy will prevail. Therefore pursuant to the fact that public policy may change from time to time. It appears that as a matter of public policy the courts should, where the employer had unlawfully terminated the employee's contract of employment refuse to enforce the restraint of trade clause.

While the question remains open in South African law, there are still indications that the unlawful termination of an employment contract by an employer might effectively put an end on the restraint of trade clause.

## **Bibliography**

### **Books**

Alexandra K and Osman C *Restrictive Covenants under Common law* (London: Sweet and Maxwell 2004)

Davies P and Freedland M *Kahn-Fruend's Labour and the Law* 3<sup>rd</sup> ed (London: Stevens 1983)

Christie R and Bradfield G *The Law of Contract in South Africa* 6<sup>th</sup>ed (LexisNexis Butterworths Durban 2007)

Hutchison D and Pretorius C (eds) *The Law of Contract in South Africa* 2<sup>nd</sup>ed (Oxford University Press Cape Town 2013)

Ransom A *Restrictive trade practices* (NSW Legal Books Sydney 1985)

Todd C *Contracts of Employment* (Siber link SA 2001)

Van der Merwe S, Van Huyssteen LF, Reinecke MFB and Lubbe GF *Contract: General Principles* 4<sup>th</sup>ed (Juta Cape Town 2012)

Van Niekerk A, Christianson MA, Smit N and Van Eck BPS *Law@Work* (LexisNexis Butterworths Durban 2012)

Van Jaarsveld SR, Fourie JD and Olivier MP *Principle and Practice of Labour Law* (LexisNexis Butterwoths Durban 2012)

### **Cases**

*Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kutin and Another* (2008) 2 SA 375

*Arrow Altech Distribution (Pty) Ltd v Byrne and Others* (2008) 29 ILJ 1391(D)

*Automotive Tooling Systems (Pty) Ltd v Wilkens and Another* (2007) 2 SA 271

*Basson v Chilwan and Others* (1993) 3 SA 742

*Briggs v Oates* (1990) I.C.R 473

*Cactus Imaging (Pty) Ltd v Peters* (2005) NSWCR 9

*Coetzee v Comitits and Others* (2001) 22 ILJ 331 (C)

*Comwezi Security services v Cape Empowerment Trust* (182/13) [2014] ZASCA 22

*David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (C)

*Den Braven SA (Pty) Ltd v Pillay and Another* (2008) SA 229

*Dickson Holdings Group (Pty) Ltd and Others v Du Plessis* (7351/06) [2006] ZAKZH 10

*DC Payments (Pty) Ltd v Lester* (2013) VSC469

*Drewtons (Pty) Ltd v Carlie* (1981) 4 SA 305

*Ecolab (PTY) Ltd v Garland* (2011) NSWSC 1095

*Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* (2001) 2 SA 853

*Globex Foreign Exchange Corp. v kelcher* (2011) ABCA 240

*General Billposting Co Ltd v Atkinson* (1909) A.C 118

*Info DB Computers v Newby and Another* (1996) 17 ILJ 32 (WLD)

*Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (C)

*Knox D'arcy Ltd and Another v Shaw and Another* (1996) 2 SA 651

*L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another* (J1990/2014) [2014] ZALCJHB 353

*Manderson M&F Consulting v Incitec Pivot* (2010) VSC 63

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

*Mozart Ice Cream Classic Franchises (Pty) Ltd V Daviddoff and Another* (2009) 30 ILJ 1750 (C)

*Nampesca (SA) Products (Pty) Ltd and Another v Zaderer and Others* (1999) 20 ILJ 549 (C)

*Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster* (2009) 30 ILJ 1762 (C)

*Reddy v Siemens Telecommunications (Pty) Ltd* (2007) 2 SA 486

*Reeves and Another v Marfield Insurance Brokers CC and Another* (1996) 3 SA 766

*Rock Refrigeration Ltd v Jones* (1997) 1 All E.R

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

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

*Wallis Nominees (Computing) (Pty) Ltd v Pickett* (2013) VSCA 24

### **Journal articles**

Arup C “What/Whose Knowledge? Restraint of Trade and Concept of Knowledge” (2012) 36 (2) *MelbULawRw* 369

Bosch C “The Implied Term of Trust and Confidence in South African Labour Law” *ILJ* (2006)

Brooks A “The Limits of Competition: Restraint of Trade in the Context of Employment Contracts” (2001) 24 (2) *UNSW Law Journal* 346

Cohen T “The Enforceability of Restraint of Trade Provisions within a Wrongfully Terminated Contract of Employment” *SAMLJ* (1998)

Du Plessis B and Davis D “Restraint of Trade and Public Policy” *SALJ* (1984)

Farwell CJ “Covenants in Restraint of Trade as Between Employer and Employee” (1928) 44 *L.Q.R* 66

Hock C “Covenants in Restraint of Trade: Do They Survive the Unlawful and Unfair Termination of Employment by the employer?” *ILJ* (2003)

Landman A “Restraints of Trade in Employment Contracts Safeguarding Intangible Property” *CLL* (2001)

Neethling J “The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants –A Need for Exercising Restraint” *SAMLJ* (2008)

Nolan R “When Principle Collide” (2009) 125 *(Jul)* 374

Pretorius P “Covenants in Restraint of Trade: A Synthesis of Traditional Common Law and Constitutional Approaches” *Obiter* (2009)

Pretorius P “Covenants in restraint of Trade: An Evaluation of Positive Law” *THRHR* (1997)

Riley J “The Evolution of the Contract of Employment Post WorkChoices” (2006) *UNSW LawJournal* 166

Simon P “Clever Compensation” *Comp.Law* (2009) 30(8) 238

Singh D “Magna Alloys on wards: Restraint of Trade in the 1990s” *SALJ* (1998)

Van der Merwe S and Van Huyssteen LF “The Force of Agreements: Valid, Void Voidable and Unenforceable?” (1995) 58 *THRHR* 560

Van Jaarsveld M “The Validity of a restraint of Trade Clause in an Employment Contract” *SAMLJ* (2003)

## **Legislation**

The Constitution of the Republic of South Africa Act 200 of 1993

The Constitution of the Republic of South Africa, 1996

Labour Relations Act 66 of 1995

## Online sources

SAHistoryOnline “Britain Takes Control of the Cape”  
<http://www.sahistory.org.za/topic/britain-takes-control-cape>, 2014 (Date of use  
21.May.2014).