

**AN ANALYSIS OF THE FAIRNESS AND CONSTITUTIONALITY
OF RESTRAINT OF TRADE COVENANTS
IN EMPLOYMENT CONTRACTS AND
THEIR EFFECT IN THE MARKET PLACE**

Dissertation submitted in partial fulfilment of the
Requirement's for the degree
Masters Legum (LLM)

By

Gabriella Daniela Sirchia

10030566

under the supervision

of

Prof Birgit Kuschke

at the

University of Pretoria

October 2017

TABLE OF CONTENTS

CHAPTER 1	PAGE
1.1 Background.	4
1.2 Problem statement.	6
1.3 Proposed methodology.	7
1.4 Delimitations.	8
CHAPTER 2 - The common law element of the debate: position prior to 1984	
2.1 The common law approach: <i>Pacta sunt servanda</i> .	10
2.2 The market theory underpinning the sanctity of contract.	12
2.3 Corner stones of contract law: Privity of contract & the concept of good faith.	12
2.4 The onus of proof prior to the decision in the <i>Magna Alloys</i> case. The traditional approach: Influence of English law.	13
CHAPTER 3 - The effect of the Constitution on restraint of trade agreements and of particular importance, section 22.	
3.1 The interaction between the Constitution and common law with regard to restraint of trade covenants.	15
3.2 Section 22 of the Constitution.	18
3.3 The market theory underpinning section 22.	19
3.4 The reason for conflict in our law.	20
3.5 Dignity as the precursor for sanctity of contract and section 22.	21
CHAPTER 4 – Positive law – <i>ratio decidendi</i> of case law	
4.1 The case of <i>Magna Alloys</i> – a turning point in our law.	
4.1.1 The facts.	23
4.1.2 <i>Ratio decidendi</i> of the Appellate Division.	24
4.1.3 Public policy as the criterion and the shift in onus.	24
4.2 Case law subsequent to the decision in <i>Magna Alloys</i> .	
4.2.1 The void left by the decision in <i>Magna Alloys</i> .	25
4.2.2 The <i>Basson</i> case.	26

4.2.3 The <i>Coetzee</i> case.	27
4.2.4 The <i>Reddy</i> case.	28
4.3 Conclusion drawn on case law.	29

CHAPTER 5 – The determination of ‘reasonableness’.

5.1 What constitutes a protectable interest? A review of case law.	30
5.2 The locational and time aspects of a restraint of trade clause.	34
5.3 Courts’ aversion to enforce overreaching restraint.	36

CHAPTER 6 – Realistic application of restraint of trade agreements

6.1 The standard practice being utilised in employment contracts.	38
6.2 The result of the ‘standard practice’ coupled with the effect of the <i>Magna Alloys</i> case.	41
6.3 Remedies utilised by the courts.	
6.3.1 The birth of the ‘blue pencil’ test.	42
6.3.1 The current position on severance and partial enforcement.	43

CHAPTER 7 – Conclusion

BIBLIOGRAPHY

CHAPTER 1

Overview

1.1 Background

It is important to first understand what a restraint is and why restraint of trade agreements are often utilised in employment contracts. McGregor describes a restraint of trade agreement as “a clause in an employment contract that protects the interests of the employer during and after the employment of the employee”.¹ This then limits the employee’s right to trade as protected under section 22 of the Constitution.² This type of covenant is used by companies to protect an interest or interests that have an economic value to them such as trade secrets, customer lists and inappropriately engaging in competition with the employer. These few aforementioned examples shed light on the basis on which an employer functions and is able to succeed. When an employee is employed he/she can become privy to confidential information which, when the employment is terminated, can be used against the employer. An example of the interests employers seek to protect can be found in the case of *Reddy v Siemens Telecommunication*³, where the court dealt with the issue of what constitutes a trade secret. It highlighted the fact that it must hold some sort of economic value for the party wishing to enforce the restraint of trade and that the use of this confidential information could be to their detriment.⁴

It is clear that restraint of trade agreements affect the employee personally in the contractual relationship, but the needs of the employer must also be considered, specifically on how these covenants are used to protect the interests of the employer and subsequently affect a free following market that supports and protects healthy competition.

¹ McGregor M et al *Labour Law Rules!* p 35.

² Section 22 of the Constitution states that, “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”.

³ *Reddy v Siemens Telecommunication (Pty) Ltd* 2007 (2) SA 486 (SCA) (hereinafter referred to as the *Reddy* case).

⁴ *Reddy* para 20.

Pretorius denotes that sanctity of contract and freedom of trade are both connected to the comprehensive ideology of “market- individualism”.⁵ They essentially aim to support one another. This ideology is made up of two theories, namely the market theory and the individualistic theory. Contract law in terms of the market theory is used to assist healthy competition by instituting a set of rules within which exchange and commerce can be conducted, highlighting protection of transactions. Therefore employment contracts that are freely entered into should be upheld thereby inadvertently according with the doctrine of *pacta sunt servanda*, otherwise known as sanctity of contract.

On the other hand, the individualistic theory deals with the fact that parties can voluntarily enter the market and thus contract with their respective employers on their own terms. This is a broad ideology primarily based on sanctity of contract but which incorporates the freedom to trade as well. Although the decision to enter into these contracts is voluntary, it is also implied that a party choosing to contract has to take responsibility for the consequences that flow from this contract and its binding terms. This circles back to the market theory as the parties have to abide by the terms of the contract that they willingly and voluntarily entered into, therefore endorsing the principle of sanctity of contract.

This entails that an employee who is competent and who voluntarily entered into an employment contract with his/her employer has to accept the responsibility of a restraint of trade agreement when terminating the contract.

Before the case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,⁶ the employer bore the burden of proving that the restraint of trade agreement was reasonable. This was known as the traditional approach and stemmed from English law. Thereafter the *Magna Alloys* judgment was noted as a ‘land-mark’ decision and completely opposed the traditional approach to bring it in line with Roman-Dutch law. The onus of proof now rests on the employee to prove that the restraint of trade agreement is against public policy. Whether it is reasonable or not is but one of the factors that informs the criteria of public policy. The court came to this conclusion by

⁵ Pretorius CJ “Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches” (2009 Vol 30) *Obiter* p 154-155.

⁶ *Magna Alloys and Research (SA)(Pty)Ltd v Ellis* 1984 (4) SA 874 (A) (hereinafter referred to as the *Magna Alloys* case).

asserting that Roman-Dutch law contained no principle stating that restraint of trade covenants were *prima facie* void and that *pacta sunt servanda* should be given due regard as one of the corner stones of South African contract law. Calitz⁷ describes this radical shift by the *Magna Alloys* case as an attempt by the courts to “purify” South African law of its English influence and to re-establish our roots stemming from Roman-Dutch law. Furthermore, it could be said that employees are in an inferior bargaining position to their employers, as the discussion in chapter 6 will evidence, thus providing one example out of many, that leads to the question on the constitutionality of restraint of trade agreements.

One must note that although the *Magna Alloys* case drastically changed the burden of proof with regard to restraint of trade agreements and the fact that they are no longer *prima facie* void, the court did not hand down any guidelines in determining whether a restraint of trade covenant is reasonable and in line with public policy. Relief of the aforementioned void came in the case of *Basson v Chilwan*⁸ where the court formulated a test to assist with this dilemma. The test is now seen as authoritative and the court had posed four distinct questions with which reasonableness of a restraint could be determined, this will be discussed further in Chapter 4.

The aim of this research paper is to establish if the test stated above as well as the line of judgment handed down in the *Magna Alloys* case, can assist in determining whether current restraint of trade agreements are in the view of subsequent legal developments in the field of constitutionalism in fact constitutional, and if so, then to evaluate the role the judiciary plays in the cohesion of the principles underlying our current law of contract with the values enshrined in our Constitution.

1.2 Problem statement

It is clear that the enforcement of a restraint of trade agreement in an employment contract effectively limits the employee’s right to freedom of trade as protected by

⁷ Calitz K “Restraint of Trade Agreements in Employment Contracts: Time For Pacta Sunt Servanda To Bow Out?” (2011 Vol 22) *Stell LR* p 4.

⁸ *Basson v Chilwan* 1993 (3) SA 742 (A) (hereinafter referred to as the *Basson* case).

section 22 of the Constitution.⁹ The legal question which arises is whether restraint of trade covenants should still be enforced in South African contract law through the weighing up of an individual's fundamental rights as contained in the Constitution, against that of the sanctity of contract, thereby attempting to strike a balance between the two.

1.3 Methodology

In order to determine whether it is possible to find a happy medium between the sanctity of contract and the right to freedom of trade, one will first have to provide an explanation on what exactly a restraint of trade agreement entails and where these agreements are usually found. This research paper will be dealing with employment contracts only.

Thereafter, one has to examine the first leg of the debate, that being the principle of *pacta sunt servanda* and the common law approach to restraint of trade agreements and then the second leg of the debate, being section 22 of the Constitution and constitutional reform in South Africa. This will be done individually to understand where each principle stems from and how they operate and the reason why they were enacted in the first place. This will be conducted by examining our common law, the Constitution, other relevant legislation and the general principles of the Law of contract.¹⁰ This study will also incorporate the opinions of authors of books and other literature including various journal articles.

Thereafter the *Magna Alloys* case will be analysed in detail to gain an in depth insight as to why the court decided to deviate from the traditional English approach that was applied to that date by our courts. A discussion of the *Basson* case to observe the test that was formulated to determine whether a restraint of trade agreement is reasonable or not, follows. The discussion then leads to an investigation of the subsequent court decisions that have been handed down in cases dealing with restraints, such as the cases of *Coetzee v Comitis*¹¹ and *Reddy*. In the view of this, journal articles and discussions that shed light on the problems that

⁹ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as 'the Constitution').

¹⁰ Hutchinson et al *The Law of Contract in South Africa*.

¹¹ *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) (hereinafter referred to as the *Coetzee* case).

arise when these two principles compete in practice will be analysed to see if a balance is indeed possible.

Chapter 1 will deal with an overview of the topic.

Chapter 2 will provide a historical background on restraint of trade agreements by examining the *pacta sunt servanda* maxim and the Individualistic ideology that underpins the principle of sanctity of contract. Furthermore, the onus of proof prior to the decision in *Magna Alloys* will be discussed.

Chapter 3 will canvas the constitutional leg of the debate by examining section 22 of the Constitution to gain a better understanding of this section. As well as note the reason why these competing interests exist in South Africa and why they seem to contradict one another.

Chapter 4 will primarily deal with case of *Magna Alloys* as it encompassed a turning point in our common law. Subsequent cases will be discussed to evaluate the way in which the precedent of *Magna Alloys* was used and how the introduction of the Constitution was implemented, when restraint of trade agreements found themselves before the courts.

Chapter 5 will examine how 'reasonableness' is determined by the courts when looking at what constitutes a protectable interest on behalf of the employer and the examples of such interest that are evident in case law.

Chapter 6 will delve into the circumstances that surround the induction of a restraint of trade agreement, particularly the use of the 'standard form' as well as the unequal bargaining position of the employee, which coincides with the notion that restraint of trade covenants are not always entered into voluntarily. A discussion on a remedy utilised by the courts will feature, namely partial enforcement and severance.

Chapter 7 will contain a final conclusion.

1.4 Delimitations

This dissertation will only deal with restraints of trade in employment contracts. It is furthermore limited to the position in South African law only and will not contain any

comparative study. Only restraints that have been agreed upon in a valid contract are focused on. The scope does not include the requirements for a valid contract, or issues such as error or other factors that influence the validity of the agreement.

CHAPTER 2

The common law element - approach prior to 1984

2.1 The common law approach: *pacta sunt servanda*

Pacta sunt servanda embodies the principle of sanctity of contract. This entails the maintenance of a contract that was freely entered into, even if it contains limitations on future economic activity.¹² This principle remains one of the corner stones of South African contract law.¹³ Therefore the terms of the contract need to be strictly adhered to by the parties involved. The principle of sanctity of contract is closely linked to the principle of freedom of contract. The latter principle referring to the notion that individuals are free to determine with whom and on what terms to contract on, in other words known as 'party autonomy'.¹⁴

Legal academics, drawing on sources such as Voet and Grotius, have demonstrated support of the *pacta sunt servanda* approach as it emanates from the basis of South African law, that being Roman-Dutch law and it moves to 'purify' our law from the foreign influence of English law. Roman-Dutch law is noted to be adaptive and malleable and can be moulded to suit South Africa's legal interests without the need to incorporate English law to fill the gaps.¹⁵ Thus the want to adhere to one system of law is supported by our courts as was evident in the case of *Roffey v. Catterall, Edwards & Goudri (Pty) Ltd*.¹⁶ The judge stated that:

"I am satisfied that South African law prefers the sanctity of contracts. . . . Freedom of trade does not vibrate nearly as strongly through our Jurisprudence The principle has a moral dimension too, which gives it a durability and universality

¹² Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 154.

¹³ Hutchinson et al *The Law of Contract in South Africa* p 21.

¹⁴ Hutchinson et al *The Law of Contract in South Africa* p 21.

¹⁵ Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" (2003 Vol 15) *SA Merc LJ* p 9.

¹⁶ *Roffey v. Catterall, Edwards & Goudri (Pty) Ltd* 1977 (4) SA 494 (N) (S. Afr.) (hereinafter referred to as the *Roffey* case).

beyond the norms of the marketplace. This consists of its simple requirement that people should keep their promises.”¹⁷

Therefore, provided the contracting parties have the necessary competency and have freely agreed to the terms of an employment contract, then they should be held to those terms, including a restraint of trade clause, in order to serve the purpose of sanctity of contract. This is the mechanism used to conduct effective economic activity. Should the adherence to *pacta sunt servanda* fall way, the question arises of what legal principle will then protect our economy if a party could so easily deny their responsibilities to a contract?

Pacta sunt servanda, can further be broken up into two distinct principles. The first being the core denotations of individual autonomy. The second being the liberty a person has to consent to a contract. In our common law of contract, it is clear that there is an emphasis on an individual’s ability to enter contracts on their own accord, creating the impression that contracting parties are ‘sovereign’.¹⁸ This can be seen to curtail judicial interference with the contract in question as the court will only have to concern itself with the validity of the contract (being that it was freely entered into; the terms are not deemed immoral, illegal or *contra bonis mores*) and its subsequent enforcement rather than the formative terms present therein.¹⁹

The abovementioned paragraph displays that the courts make use of a mechanical approach when applying the law rather than delving into the consequences of the material terms contained in the contract thus providing a framework that is reliable, effective and clear for parties to contract within.²⁰

Therefore, it can be noted that the principle of sanctity of contract seeks to uphold, and if necessary, for the court’s to enforce restraint of trade covenants, provided the elements that make up a valid contract are adhered to. *Pacta sunt servanda* appears to serve public interest ensuring that people are held to the promises they make.

¹⁷ Roffey para 505.

¹⁸ Hutchinson et al *The Law of Contract in South Africa* p 23.

¹⁹ Bhana D and Pieterse M “Towards a reconciliation of contract law and Constitutional values: *Brisley* and *Afrox* revisited” (2005 Vol 122) *SALJ* p 867.

²⁰ Bhana D and Pieterse M “Towards a reconciliation of contract law and Constitutional values: *Brisley* and *Afrox* revisited” (2005 Vol 122) *SALJ* p 867.

2.2 The market theory underpinning the sanctity of contract

The market theory that supports the principle of the sanctity of contract, is known as the individualistic theory.²¹ This theory places emphasis on individual autonomy and the ability of a person to make their own decisions and be held responsible for them. Furthermore, it refers to the choice given to people to openly enter the market and contract with whomever they decide on. The former relays that this theory, although predominately supporting *pacta sunt servanda*, slightly incorporates the right to freedom of trade. Although an individual has freedom to contract, it is imperative that once they have concluded a contract with the respective employer they must be held accountable for the consequences that flow from that contract, even if the terms agreed upon relate to the limiting of one's right. Thereby, reinforcing the principle of sanctity of contract as the golden thread.²²

2.3 Corner stones of contract law: Privity of contract & the concept of good faith

Briefly put, privity of contract relates to the notion that only the persons who are actually party to the contract, may sue or be sued based on said contract. It seems to be an outrageous thought that a person, who is no way involved in contract may be sued in terms thereof. However ridiculous it may appear, the principle of privity of contract is used to combat such a scenario and ensure that only the contracting parties are held to the terms of their contract.²³ This clarifies the fact that a restraint of trade can only operate against an employee, who is a party to the employment contract and *vice versa* for the employer. It is important to note that a person, known as the principal, can be sue and be sued on he's agent's contract.²⁴ Thereby encompassing that an employer, such as a corporate, can be bound by a contract through one its employees, who is authorised to sign on the employer's behalf.

²¹ Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 155.

²² Smith et al *Atiyah's Introduction to the Law of Contract* p 219.

²³ Christie et al "*The Law of Contract in South Africa*" p 269.

²⁴ Christie et al "*The Law of Contract in South Africa*" p 269.

The principle of good faith or *bona fides*, played an important role in the growth of the Roman-Dutch law of contract and therefore our common law. It entails that people enter into a contract in good faith thus supporting consensus between the parties and reiterating the liberal notion that such individuals need to honour the contract entered into as it was their intention to do so.²⁵

2.4 The onus of proof prior to the decision in the *Magna Alloys* case: The traditional approach through the influence of English law

Although Roman-Dutch law is seen as the basis of South African law of contract and the case of *Roffey* re-enforced the weight given to *pacta sunt servanda*, as stated in the discussion above. We have an influence of English law on the governance of contracts and in particular, restraint of trade agreements.²⁶ According to the traditional approach and the position prior to the decision of the *Magna Alloys* case, restraint of trade covenants were *prima facie* void and unenforceable unless the employer could prove that it was not against public policy to enforce the restraint and that the restraint could be deemed as reasonable between the parties as it served to protect a particular of interest of the employer.²⁷ Therefore, the onus to prove that the restraint was indeed enforceable against the employee, was borne by the employer. The English case of *Nordenfelt v Maxim Nordenfelt guns and Ammunition Co. Ltd*²⁸ denoted that restraints should be viewed as *prima facie* unenforceable and thus invalid as in would in the public interest for every person to choose his trade freely.²⁹

This English law approach seems to have first appeared in South African law reports through the case of *Willet v Blake*.³⁰ It must be noted that although restraint of trade covenants were held to be *prima facie* invalid and the onus lay with the employer to prove otherwise, the employee held a somewhat small portion of the onus in that

²⁵ Bhana D and Pieterse M “Towards a reconciliation of contract law and Constitutional values: *Brisley* and *Afrox* revisited” (2005 Vol 122) *SALJ* p 867.

²⁶ Saner J *Agreements in Restraint of Trade in South African Law* p 2-7.

²⁷ Pretorius CJ “Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches” (2009 Vol 30) *Obiter* p 156.

²⁸ *Nordenfelt v Maxim Nordenfelt guns and Ammunition Co. Ltd* 1891-94 All E.R. 1 (H.L 1894) (Eng).

²⁹ Van Jaarsveld M “The Validity of a Restraint of Trade Clause in an Employment Contract” (2003 Vol 15) *SA Merc LJ* p 179.

³⁰ *Willet v Blake* 1870 (3) *Menzies* 343.

he/she had to prove that the agreement was unreasonable *inter partes*.³¹ In the tentative application of both Roman-Dutch law and English Law to our South African law contract and specifically restraint of trade agreements, confusion was created by the courts as no one case gave a distinct stance on the approach that could lead to a definitive precedent that would be utilised across the board when interpreting and applying these covenants.³² Cue the judgment handed down in the case of *Magna Alloys*.

³¹ Saner J *Agreements in Restraint of Trade in South African Law* p 2-8.

³² Saner J *Agreements in Restraint of Trade in South African Law* p 2-10.

CHAPTER 3

The effect of the Constitution on restraint of trade agreements and of particular importance, Section 22.

3.1 The interaction between the Constitution and common law with regard to restraint of trade covenants

One will begin by providing an unequivocal quote given by the Constitutional Court:

“There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”³³

It is imperative that one bears in mind that all law in South Africa operates within the ambit of the Constitution. Therefore, common law, which directs and dictates the governing of contracts, has to ensure that such directives are consistent with our constitutional values. However, it cannot be denied that the Constitutional Era which is now upon us is still in its infancy whereas common law has its roots in Roman-Dutch Law and has been operating for hundreds of years.

When a court hands down a judgment on a contractual matter, including one concerning restraint of trade covenants, this is known as administrative action. In terms of section 33 of the Constitution³⁴ every person has the right to just administrative action. Section 33 is a fundamental right that is awarded to every person in South Africa.

³³ *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44 (per Chaskalson P).

³⁴ Section 33 of the Constitution states that:-

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must-
 - (a) Provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal;
 - (b) Impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) Promote an efficient administration.

One can see how the mechanical application of the common law by the courts to employment contracts containing restraint of trade agreements, may infringe on a person's right to just administrative action. Attention must be drawn to the word 'reasonable' in section 33(1). It may not be 'reasonable' for a court to simply wash its hands of the substantive aspects of an employment contract and deal only with the procedural elements, especially where such aspects seek to limit a person's fundamental right to freedom of trade as contained in section 22 of the Constitution through a restraint of trade clause.³⁵ Such a limitation may not be constitutional in terms of section 36 yet due to the mechanical application of the common law, a court will not endeavor to examine the extent and/or the consequences of the restraint, therefore potentially resulting in unjust administrative action and a clear infringement of section 33(1) and section 22.

It is important to take cognizance of the fact that an employment contract does not operate in isolation but rather operates in the sphere of an evolving society.³⁶ Thus it would not be equitable for the courts to separate the private sector from the public sector and apply different rules to each. It is necessary to bridge the gap between these two sectors in order to achieve greater economic equality as it is common cause that the state exists to serve the people and *vice versa*. This two-sided coin can be noted in the horizontal and vertical application of the Bill of rights to our law of contract.³⁷ The Constitution was therefore enacted to aid the transformation process from the oppressive apartheid regime to the new democratic era and thereby ensuring protection of the fundamental rights of all persons equally such as those found in section 33 and in relation to the current discussion, section 22.

It is the duty of the courts to recognize that they play a pivotal role in the development of the laws pertaining to employment contracts in order to assist with the constitutionalisation of our common law of contract which has and will continue to impact the interpretation and enforcement of restraint of trade covenants. This is

³⁵ Lewis J "Fairness in South African Contract Law" (2003) 120 *SALJ* 332.

³⁶ Bhana D and Pieterse M "Towards a reconciliation of contract law and Constitutional values: *Brisley* and *Afrox* revisited" (2005 Vol 122) *SALJ* p 868.

³⁷ Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" (2003 Vol 15) *SA Merc LJ* p 187.

glaringly evident in the wording of section 8(3) of the Constitution³⁸ which provides that where the common law seems insufficient, the courts must develop such common law to bring it in line with the constitutional values.

A positive stride in the amalgamation of common law into the constitutional dispensation can be seen in section 39 of the Constitution.³⁹ Of particular importance is subsection 2 which states that, “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” This subsection provides a clear direction to courts and the alike to purposefully concern themselves with those parts of the common law that purport to be inconsistent with the Constitution.

The above sections present in the Constitution entail that when a court is interpreting a restraint of trade agreement, they cannot ignore the fact that such a covenant limits a person’s fundamental right in terms of section 22 and thus they have an obligation to ensure that such a limitation is in line with the Constitution and if it is found to be inconsistent, then it is their duty to bring the common law dealing with such an agreement to a point that is acceptable under the constitutional standards based on human dignity, freedom and equality.

Bhana describes a methodology that can be used to successfully constitutionalise contract law and more specifically restraint of trade agreements.⁴⁰ An important element to this methodology is the fact that the Bill of Rights applies horizontally, essentially removing the preverbal wall dividing the public and private sectors and

³⁸ Section 8(3) states that, “ when applying a provision of the Bill of Rights to a natural or juristic person, in terms of subsection 2, a court-

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

³⁹ Section 39 of the Constitution states that:-

“(1) When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law;
- (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights;

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

⁴⁰ Bhana D “The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract” (2015 Vol 26) *Stell LR* p 5.

replacing it with a softer 'wire-mesh fence'.⁴¹ This means that the enactment of the Bill of Rights provides for a more fluid interaction between these spheres of the law, this is instrumental as it allows judges to take note of any substantive constitutional rights that present themselves in a contract law case. Furthermore, it highlights the need for judges, when interpreting contracts, to acknowledge the benefits and downfalls to the broader private context as well as the specific circumstances surrounding the contracting parties, in order to assist in the constitutionalisation of our common law.

3.2 Section 22 of the Constitution

Section 22 of the Constitution states the following, "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law". This entails that the right that a person has to participate in economic activity without limitations is emphasised.⁴²

Yet one should note that a restraint of trade agreement operates as a limitation on the right to freedom of trade. This limitation is allowed according to section 36 (1) of the Constitution.⁴³ In the case of *Canon v Booth*⁴⁴ the court stated the following, "Insofar as a restraint is a limitation of the right to freedom of trade, occupation and profession, entrenched in section 22 of the Constitution, the common law as developed by the courts complies with the requirements laid down in s 36(1) of the Constitution as to the limitation of such a right".⁴⁵

⁴¹ Bhana D "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015 Vol 26) *Stell LR* p 5.

⁴² Hutchinson et al *The Law of Contract in South Africa* p 196.

⁴³ Section 36 (1) of the Constitution states that, "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose".

⁴⁴ *Canon Kwa-Zulu Natal (Pty) Ltd t/a Canon Office Automation v Booth and another* 2005 (3) SA 205 (N) (hereinafter referred to as the *Canon* case).

⁴⁵ *Canon* para 209.

Although a restraint of trade covenant is in fact a limitation on the right to freedom of trade, it must not take any important effect away from the former part of section 22. The freedom of trade is now entrenched into our Constitution which provides it with a greater weight than what was given to it under the influence of English law.

The post-apartheid approach to contract law in South Africa, has seen academics and judges alike embrace a more substantively open-minded and transformative approach as opposed to the conventional liberal understanding. This constitutional approach encompasses the values of freedom, dignity and equality which make up the foundation of our constitutional democracy. It suggests that when the legal experts think about the constitutionalisation of the content of the common law of contract, this thought process must also be administered to the operational element thereof.⁴⁶

This is evidence that the constitutional value given to individual autonomy in contracts precludes the right to dignity and is thus applicable when referring to restraint of trade covenants. Dent⁴⁷ explains that there are three key motivators that may influence an employee when deciding whether or not to breach his/her respective restraint of trade clause, the most notable motivator being that connected to one's reputation. This shows that a person's individual autonomy plays role not only when entering into employment contracts but it surfaces when the employee may choose to terminate the employment relationship and potentially breach the restraint clause.

3.3 The market theory underpinning section 22

It falls under the all-encompassing theory of 'market-individualism' which is a culmination of the market theory and the individualistic theory.⁴⁸ Briefly, the market theory denotes that contract law operates in such a way so as to aid in competitive exchange by the implementation of a framework within which individuals can

⁴⁶Bhana D "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015 Vol 26) *Stell LR* p 3.

⁴⁷ Dent C "Unpacking post-employment restraint of trade decisions: the motivators of key players" (2014 Vol 26) *Bond Law review* p 9.

⁴⁸ Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 154.

participate in the economy. It must be illustrated that there is a thread of sanctity of contract running through this ideal as well⁴⁹ however, restraint of trade agreements place the spotlight on principle of freedom to trade sharply thereby directing that the courts deal with the curtailment of economic activity with delicate hands.⁵⁰

The aforementioned theories can be noted as mutually supportive, however, they are sometimes pitted against one another resulting in tension as a competition emerges from the principles of *pacta sunt servanda* and that of the right to freely choose ones occupation. The cohesion of the market theory with the individualistic theory can be seen in the notion that effective economic exchange cannot take place if agreements relating thereto are not upheld, therefore *pacta sunt servanda* must form part of the freedom to trade,⁵¹ thereby creating the market-individualistic theory.

3.4 The reason for the conflict in our law

Until the *Magna Alloys* case, courts were divided on which approach to use. Some adopted the English approach which emphasised freedom of trade, whereas others opted for the Roman-Dutch approach of preferring sanctity of contract.⁵²

Instead of trying to find the middle ground of these two principles, one was always preferred over the other. The attempt to 'purify' our law of its English influence entailed that the emphasis of freedom of trade could be lost and many legal experts did not take kindly to this notion. When section 22 of the Constitution was enacted our courts were burdened with the duty to develop our common law, when it is so required, to bring it in line with the Bill of Rights.⁵³

It is precisely this duty that has provided the platform for the debate on the constitutionality of restraint of trade agreements as *pacta sunt servanda*, a principle rooted in Roman-Dutch Law operating successfully for a long period of time,

⁴⁹ Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 155.

⁵⁰ Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 155.

⁵¹ Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 155.

⁵² Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" (2003 Vol 15) *SA Merc LJ* p 177.

⁵³ Chapter 2 of the Constitution.

therefore cannot be directly preferred or denounced over a person's fundamental right in terms of section 22.

3.5 Dignity as the precursor to sanctity of contract and section 22

When considering the impact of section 10 of the Constitution⁵⁴ in relation to restraint of trade agreements, it would appear that dignity forms the basis of both the *pacta sunt servanda* maxim and the right to freedom of trade. The term 'human dignity' can be defined as an individual's or group's sense of self-respect and self-worth, physical and psychological integrity and empowerment. Thus it is important to note that human dignity is the foundational right upon which all other fundamental rights are derived.

The concept of dignity supporting *pacta sunt servanda* can be seen through the perspective that when one conducts autonomous action through concluding employment contracts, one is exercising one's right to dignity in that an individual is at liberty to enter such a contract and to determine on the terms present therein displaying empowerment and psychological integrity. The individual is seen to be governing their own lives through the formation of contracts on terms they deem fit.⁵⁵

Dignity can be seen as the basis from which we draw our constitutional right to freedom of trade as contained in section 22 as well, as the former right is closely linked to a person's self-worth and respect.⁵⁶ An individual must be productive and engage in commerce in interests of a functioning society thereby satisfying the need to develop one's self-worth and respect. In order for an individual to engage in economic activity, there needs to exist an environment that looks to support this, such can be found in the enforcement of their right to freedom of trade.⁵⁷ If dignity is the precursor to both these principles then it would suggest that they should work in unison instead of against one another.

⁵⁴ Section 10 states that, "everyone has inherent dignity and the right to have their dignity respected and protected".

⁵⁵ Bhana D "The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract" (2008 Vol 24) *SAJHR* p 301.

⁵⁶ Dent C "Unpacking post-employment restraint of trade decisions: the motivators of key players" (2014 Vol 26) *Bond L. Rev* p 6.

⁵⁷ Bhana D "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015 Vol 26) *Stell LR* p 9.

Bhana describes that the constitutionalisation of the common law of contract has become evident through judgments handed down in the Supreme Court of Appeal⁵⁸ but of specific importance, is the matter of *Barkhuizen v Napier*⁵⁹ which was dealt with in the Constitutional Court. This constitutionalisation sees the values of equality, dignity and freedom as the basis of the aforementioned court judgments.⁶⁰

In the *Barkhuizen* case, the court opted for the implementation of the Bill of Rights in an indirect horizontal manner. This meant that a corner stone of contract law, being *pacta sunt servanda*, could still be find a workable space and simultaneously the court could measure contractual terms against constitutional values and choose not to enforce those terms or part thereof that were seen as contrary to public policy.⁶¹ In the *Reddy* case, Malan AJA supports this theory by stating, “Contractual autonomy is part of freedom informing the constitutional value of dignity.”⁶²

⁵⁸ *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) (hereinafter referred to as the *Afrox* case).

⁵⁹ *Barkhuizen v Napier* 2007 BCLR 691 (CC) (hereinafter referred to as the *Barkhuizen* case).

⁶⁰ Bhana D “The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract” (2008 Vol 24) *SAJHR* p 301.

⁶¹ Bhana D “The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract” (2008 Vol 24) *SAJHR* p 314.

⁶² *Reddy* para 15.

CHAPTER 4

Positive law – court judgments

4.1 The case of *Magna Alloys* – a turning point in our law

4.1.1 The facts

Briefly stated, the facts of the *Magna Alloys* case are as follows: it was the ex-employee, Ellis that instituted litigation against his former employer, being Magna Alloys and Research (SA) (Pty) for outstanding commission owed to him for work done during his employment. Magna Alloys had then instituted a counterclaim against Ellis for damages arising from the breach of clause 6⁶³ of the employment contract concluded between the parties. Furthermore, Magna Alloys had prayed for an interdict in order to restrain Ellis from continuing to act in breach of clause 6. Ellis committed a breach of the aforementioned clause by taking up employment with a company by the name of Welding Advisory Services (Pty) Ltd, a direct competitor of his former employer.

The court of first instance held that the restraint clause, which effectively restricted an Ellis' right to of freedom of trade, is unenforceable unless special circumstances exist that could justify such a restriction.⁶⁴ At this point in time, the onus lay on the former employer as the party wanting to uphold the restraint. The court, *a quo*, stated

⁶³*Magna Alloys and Research (SA)(Pty)Ltd v Ellis* 1984 (4) SA 874 (A) p 882 -883. Clause 6(b) and (c) of the employment contract stated that Ellis undertook that for a period of two years, following the termination of the employment contract for any reason, and within a radius of 10 kilometers of the perimeter of a defined area, he would not:

“(i) directly or indirectly, as a partner, employee, agent, salesman or representative enter into or engage in any business in competition with Magna Alloys;

(ii) sell any other thing, substance or material, the function, use or purpose of which was similar to or the same as the function, use or purpose of the products defined in an annexure to the restraint;

(iii) seek or solicit customers or business for the sale of such product, substance or material within the defined area; or

(iv) promote or assist financially or otherwise any person, firm, association or corporation engaged in a business which competed with the business of Magna Alloys.”

Clause 6(d) provided that:

“(a) if the respondent breached the terms of the provisions of the agreement, the appellant would suffer damages at the rate of R250 per week for the period during which the respondent violated the provisions of clauses 6(b) and (c); and

(b) this sum would constitute a genuine pre-estimate of the damages which the appellant would suffer as a result of the respondent's breach of the provisions of the restraint.”

⁶⁴ *Magna Alloys* p 886.

that the enforceability of the restraint could be tested by proving the reasonableness thereof, which *Magna Alloys* failed to do and therefore, the counterclaim was dismissed. *Magna Alloys* then lodged an appeal against this decision and the matter came before the Appellate Division.

4.1.2 *Ratio decidendi* of the Appellate Division

The Appellate Division stated that the South African judicial approach to restraint of trade agreements in that they were *prima facie* void and therefore unenforceable, was simply incorrect.⁶⁵ The court had come to this conclusion by analysing the influence of both English law and Roman-Dutch law on our law of contract and specifically restraint clauses. The prominent change in our law came when the appeal court held that there is no principle in Roman-Dutch law, and therefore in our common law, that states that restraint of trade agreements are *prima facie* void because it seeks to restrict a person's freedom of trade.⁶⁶

The court went further to state that the notion that restraints are *prima facie* void and thus unenforceable, is a derivative from English law. However, the court did confirm the position that contracts that are deemed contrary to public policy, are invalid and thus unenforceable, however, that such a determination should be made with reference to the rules governing public policy, which are seen as the relevant circumstances that exist at the time when court is called upon to analyse the covenant. This entailed that a restraint of trade covenant was not invalid from the outset but rather that it was unenforceable should it be inimical to public policy.⁶⁷

4.1.3 Public policy as a criterion and the change in onus

This aforementioned statement relating to public policy made by the court in the *Magna Alloys* judgment, meant that public policy would be the yardstick used in

⁶⁵ *Magna Alloys* p 891 B-C.

⁶⁶ *Magna Alloys* p 897.

⁶⁷ Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" (2003 Vol 15) SA *Merc LJ* p 184 - 185.

deciding on the validity and therefore, the enforcement of such a restraint.⁶⁸ The precedent had now been set and the ripple effect of this meant that there was a shift in onus. The onus would now be borne by the party seeking to escape the restraint of trade agreement and he/she would have to prove that the enforcement thereof would injure public interest.⁶⁹

4.2 Case law subsequent to *Magna Alloys*

4.2.1 The void left by *Magna Alloys*

A question will then arise regarding the effect of the Constitution on the burden of proof in cases involving restraint of trade agreements on one hand. Neethling takes the view that the onus would be on the covenantee to prove that the infringement on this fundamental right protected by section 22 is reasonable in view of the surrounding circumstances; therefore the limitation on section 22 is justifiable.⁷⁰ This would mean that the position of the onus of proof would be as it were prior to the decision in *Magna Alloys*.

And on the other hand, the common law approach to the burden of proof, as seen in the *Magna Alloys* case where the onus rests on the covenantor to prove that the limitation impounded by the restraint of trade covenant is unreasonable and thus unenforceable. Once again, it is a duel between common law and the Constitution, burdening the judicial officers with the duty to perform a carefully negotiated balancing act between the two rivals.⁷¹ Although the *Magna Alloys* case created a precedent for future determinations on restraint of trade agreements, it left a void in that the court failed to provide a fixed framework within which such determinations

⁶⁸ Saner J *Agreements in Restraint of Trade in South African Law* p 3-9.

⁶⁹ Neethling J "The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants- A Need for Exercising Restraint" (2008 Vol 20) *SA Merc LJ* p 89.

⁷⁰ Neethling J "The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants- A Need for Exercising Restraint" (2008 Vol 20) *SA Merc LJ* p 92.

⁷¹ Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" (2003 Vol 15) *SA Merc LJ* p 187.

could be made as the criterion of public policy on its own appears to be wide and open-ended.⁷²

4.2.2 The *Basson* case

The *Basson* case concurred with the precedent set down in *Magna Alloys* with regard to the criterion of public policy. However, the court went a step further when it placed importance on the notion that there must exist a protectable interest on behalf of the employer that requires the enforcement of the restraint. The court formulated four questions which should be asked when determining the reasonableness of a restraint, the four questions are as follows:

- a) Is there an interest of one party worthy of protection?
- b) If yes, is the protectable interest threatened by the conduct of the other party?
- c) If yes, then the protectable interest of the one party needs to be weighed up against the interest of the opposing party to achieve an economical activeness and productiveness.
- d) Are there any further relevant aspects of public policy other than reasonableness of the restraint between the parties?

This test is regarded as a set of guidelines which can be used by judicial officers when dealing with restraint of trade disputes and is therefore authoritative. The court held that if the restraint did not seek to protect a legally recognisable interest on behalf of the employer but was merely being utilised to eliminate competition, then the restraint would be deemed unreasonable, contrary to public policy and thus unenforceable. When interpreting the restraint of trade through the expressive views of the parties' by the actual wording used, the court found that this could never be the final word as the court may take into account factors which the parties never did.⁷³

⁷² Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 158.

⁷³ Marcus R "Contracts in Restraint of Trade: the Role of Public Policy" (1994 Vol 2) *Juta's Bus. L.* p 35.

Furthermore, the bargaining position that employees find themselves in, be it equal or unequal was deemed an informing factor pertaining to the reasonableness of the restraint.⁷⁴

4.2.3 The Coetzee case

The position in relation to the criterion of public policy as found in the *Magna Alloys* and *Basson* matter's was confirmed in the judgment handed down in *Coetzee* case. However, Traverso J made it clear that public policy as contemplated in the aforementioned cases will differ from the factors that influence public policy during the hearing of this matter.⁷⁵ It is imperative to note that this case was determined under the constitutional dispensation and therefore the court used section 36 of the Constitution as the yardstick in deciding whether the limitation on a professional footballer's right to freedom of trade is reasonable and justifiable, shall be determined in an open and democratic society based on human dignity, equality and freedom, and that the onus rested on the covenantee, being the employer to prove as such.

This saw the restraint held as contrary to public policy and thus unenforceable. It is evident that section 22 of the Constitution was preferred over sanctity of contract by Traverso J thereby placing the onus on the employer to prove that the restriction was justifiable in accordance with section 36. Notice the shifting of the onus back to the position as it were prior to the *Magna Alloys* case.

Neethling's⁷⁶ commentary on the *Coetzee* case suggests that the reason for this shift may be noted in the case of *Brisley v Drotzky*⁷⁷, which was decided on roughly one year later. Cameron JA states, "neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness". Cameron JA explains that this is so because the courts should look to strike a balance between the unnecessary

⁷⁴ Hock C "Covenants in Restraint of Trade: Do They Survive the Unlawful and Unfair Termination of Employment by the Employer" (2003) *Indus. L.J.* p 1232.

⁷⁵ *Coetzee* para 31.

⁷⁶ Neethling J "The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants- A Need for Exercising Restraint" (2008 Vol 20) *SA Mercantile Law Journal* p 93.

⁷⁷ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) (hereinafter referred to as the *Brisley* case).

excesses of contractual freedom and ensuring that the ambit within which the ability to contract supports an individual's self-respect and dignity.

4.2.4 The *Reddy* case

The Supreme Court of Appeal concurred with the line of judgment as laid down in the *Magna Alloys* matter with regard to the principles of reasonableness, public policy and sanctity of contract. Malan AJA held that it was not necessary for the court to make a determination on the incidence of onus in this matter and thus avoided it.⁷⁸

Instead the court made a value judgment against the limitation clause contained in section 36 of the Constitution. This value judgment comprised two important policy notions. The first being that it of public concern that people are held to the promises they make thus reiterating the role played by *pacta sunt servanda*. The second being that it is in the interests of society as whole for individuals to be productive and engage in commerce.⁷⁹ Malan AJA made reference to the constitutional court case of *Barkhuizen* and stated that, "all agreements, including restraint of trade agreements are subject to constitutional rights, obliging courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution." Therefore, the Constitution is also applicable to private law.⁸⁰

Malan AJA went one step further when dealing with the test for reasonableness as laid down in the *Basson* matter by adding a fifth question: does the restraint go further than what is necessary to protect the interests of the employer?⁸¹

Although, Mashabane is of the opinion that the court used a 'short cut' to arrive at the correct decision in respect of what was to comprise confidential information. He relays that the court did an unsatisfactory weighing up of interests worthy of protection on behalf of the employer (*pacta sunt servanda*) and those on behalf of the employee (section 22), however reached the appropriate decision.⁸²

⁷⁸ *Reddy* para 14.

⁷⁹ *Reddy* para 15.

⁸⁰ *Reddy* para 11.

⁸¹ *Reddy* para 17.

⁸² Mashabane B "Confidential information/trade secrets – what do they mean?" (October 2007) *De Rebus* p 43.

4.3 Conclusion drawn on case law

A review of case law suggests that the question then is, should the enforcement of a restraint of trade covenant be determined against the Constitution or against the common law principles of contract? It is clear that there exists a substantiated argument for each channel. Should one opt to utilise the constitutional approach, then a restraint of trade covenant is deemed void as it is in direct contravention of the fundamental right entrenched in section 22 of the Constitution. Thus the restraint would be unenforceable, unless it can be shown by the employer that the restraint is reasonable and thereby limiting the right to freedom of trade through section 36(1) of the Constitution. Incidence of the onus of proof which must be borne by the conventee, is to show that such a limitation of an individual's rights is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."

Should a judicial officer opt for the common law approach, the restraint of trade agreement is viewed as *prima facie* valid and therefore enforceable unless the employee can prove that the enforcement thereof will be offensive to the existing public policy. Pretorius⁸³ suggests that the investigation into which approach should be implemented by our courts is thus a balancing act of the two competing principles, namely: *pacta sunt servanda* and the fundamental right in terms of section 22.

⁸³ Pretorius CJ "Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches" (2009 Vol 30) *Obiter* p 163.

CHAPTER 5

The determination of 'reasonableness'.

5.1 What constitutes a protectable interest by the employer?

The first question that the court asked in the *Basson* case was whether “there is an interest of one party worthy of protection”? This is the most pertinent question relating to restraint of trade covenants as it is this “interest” that forms the basis for enforcing the restraint against an employee.

It is easy for employers to overreach when enforcing a restraint of trade clause in an employment contract as they may feel that certain skills or opportunities afforded to the employee whilst under their employment remain the employer’s property, be it physical or intellectual.

In this investigation, one must delve into the judgment handed down in the case of *Automotive Tooling Systems (Pty) Ltd v Wilkens*⁸⁴ where the court grappled with the question of how a protectable interest of the employer may be determined. In the aforementioned case, two employees of the company, Automotive Tooling Systems (Pty) Ltd, had acquired technological “know-how” afforded to them via the duties they performed in the scope of their employment with the company.

Pursuant to the resignation of the two employees, Automotive Tooling sought to enforce the restraint of trade clause contained in both the respective employment contracts. However, they had failed to convince the court that the restraint of trade covenants sought to protect a legal proprietary interest that vested in the employer. The restraints were declared unfavourable toward public policy and thus unenforceable.

⁸⁴ *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2006 SCA 128 (RSA) (hereinafter referred to as the *Automotive Tooling* case).

Saner⁸⁵ explains that a restraint is generally viewed as against public policy if it merely intends to exclude or eradicate competition in the market rather than attempting to protect an interest which is “legally recognisable”.

To add more detail on this general description, Kroon J in *Aranda Textile Mills (Pty) Ltd v L D Hurn*⁸⁶ states, quite unequivocally, that a person’s abilities and skills form part of his/her own person and cannot be separated from the individual. One can appreciate that an employer may have a direct interest in preserving an employee in their respective job, and whom the employer has provided with specialised training, thus affording the employee with knowledge and skills in the public domain.

Kroon J goes further to note that such skills and “know-how” that are in the public domain do not form part of the employer’s proprietary interest in that employee, and therefore not worthy of protection in the eyes of the law.

The *Reddy* case holds a prominent judgment in terms of ‘protectable interests’. What is intriguing in this matter was that the bench found in favour of the party seeking to enforce the restraint of trade covenant against its former employee. The court held further that the confidential information in Reddy’s possession need not have actually been utilised at his new employment, but the risk that such information could be used was sufficient to grant the interdict and the restraint enforced⁸⁷

A description of what actually constitutes a protectable interest on behalf of the employer was noted in the *Southgate Electrical Wholesalers CC v Rabila*⁸⁸ case where Govindasamy AJ ventilated some of the aspects of the work environment that fall into this category. Examples of these being customer lists, price lists, settlements and trade discounts. However Govindasamy AJ went further to explain that the latter simply does not equate to confidential information or trade secrets just because the parties to the contract disclose it as such. There still needs to be a firm reason as to why these aspects hold economic weight.

⁸⁵ Saner J *Agreements in Restraint of Trade in South African Law* p 2-10.

⁸⁶ *Aranda Textile Mills (Pty) Ltd v L D Hurn* 2000 4 All SA 183 (E) (hereinafter referred to as the *Aranda* case).

⁸⁷ *Reddy* para 2.

⁸⁸ *Southgate Electrical Wholesalers CC v Rabila and Another* [2011] ZAKZDHC 27 (hereinafter referred to as the *Southgate Electrical* case).

Wallis AJ in the *Den Braven Ltd v Pillay*⁸⁹ case, did not shy away from the challenge of grappling with the elements that form a protectable interest either. One of the main interests on behalf of the employer dealt with in this case, was that of trade connections and specifically, the employee's interaction with the employer's customers during such trade.⁹⁰ Wallis AJ noted previous judgments that had provided authority on the aforementioned issue.⁹¹ The just of the previous decisions being that the employee holds a certain influence over the customer and should the employee decide to leave his current employment, he may exert this influence and induce the customer to direct its business to the employee's new place of employment. Further to the above, Wallis AJ quoted factors that play role in gaining such an influence of the customer, some of these being the personality of the employee, the duration of the contact between the two, where this contact takes place, what is being sold and so on and so forth.

It is important to note that the protectable interest of customer connections do not automatically come into being when the employee has built a relationship with the customer. But rather that is it evident that the connection between the former employee and the customer is such that the employee is able to exert influence over the customer and persuade the latter to transfer its business elsewhere.⁹² The court upheld the restraint against the former employee stating that the customer connections formed by the employee could be exploited at his new place of employment. However, the court directed that the restraint be upheld on narrower terms, specifically the duration of the restraint was to operate for a period of eight months only as opposed to the two years agreed upon in the employment contract.

In the *Digicore Fleet Management v Steyn*⁹³ matter, the Supreme Court Appeal was again obliged to delve into the contested question of what constitutes a protectable interest. The court outright stated that this case differs materially from the *Reddy* case as the in the latter, the employee was provided with extensive training by his employer and became privy to confidential information during his employment.⁹⁴

⁸⁹ *Den Braven Ltd v Pillay* 2008 6 SA 229 (D) (hereinafter referred to as the *Den Braven* case).

⁹⁰ *Den Braven* para 6.

⁹¹ *Morris (Herbert) Limited v Saxelby* 1916 1 AC 688 (HL)

⁹² *Walter McNaughtan (Pty) Limited v Schwartz and another* 2004 (3) SA 381 (C) at 390 CD.

⁹³ *Digicore Fleet Management v Steyn* 2008 ZASCA 105 (hereinafter referred to as the *Digicore* case.)

⁹⁴ *Digicore Fleet Management* para 13.

Whereas in the former case the employee had not received such specialised training and furthermore, had not become aware of such confidential information or trade secrets that was not already in the public domain.

The court went further to state that Digicore, being the employer, had no proprietary interest at risk when their former employee took up employment at a competitor. The reason for this being that the skills and knowledge that the employee possessed, particularly contacts she had made in her previous position that operated parallel to Digicore's main business, she had in fact acquired prior to being employed by Digicore thus making her desirable for their business. Therefore, Digicore cannot maintain that they hold a proprietary interest in such skills and knowledge as they were not afforded to her by the company and form part of her person and cannot be separated as such.

The court did state that Digicore did have a proprietary interest worthy of protection that being its client base and the information related thereto. However, it was found that the former employee posed no threat to this proprietary interest as she did not attempt to enter the same area of expertise as her former employer.

Therefore, the restraint of trade was not enforced against the former employee as the court applied the test laid down in the *Basson* case, to which the answers were clear, it would not be reasonable to restrain the employee from being economically active as the former employer's interest cannot be qualitatively or quantitatively regarded as worthy of protection.⁹⁵

The more recent case of *Interpark (SA) Ltd v Joubert*⁹⁶ provides further clarity of what interests are worthy of protection on behalf of the employer in the process of conducting business. In this matter, the applicant contended that it held an interest worthy of protection in the form of confidential information the former employee had in his possession. It is trite that the aspects that form trade secrets and confidential information is an objective view and not a subjective view adopted by the parties to the employment contract.⁹⁷

⁹⁵ *Digicore Fleet Management* para 16.

⁹⁶ *Interpark (South Africa) Ltd v Joubert and Another* 2010 ZAGPJHC 39 (hereinafter referred to as the *Interpark* case.)

⁹⁷ *Basson* 768A-C.

In the judgment handed down by Spilg J, he denoted that the notion of simply eliminating competition is not a legally recognisable interest worthy of protection.⁹⁸ The restraint was held to be unenforceable as the confidential information purportedly in the former employee's possession referred to the methods utilised in the business's day-to-day operations and the software used when implementing the operations is not unique to the company. What was of particular interest in this case was that the matter was brought one year after the employment relationship had been terminated.

The party seeking to enforce the restraint admitted that practices, manuals and procedures used by its staff was reviewed on a regular basis and therefore constantly evolves as more secure tools become available.⁹⁹ This admission displayed that the 'confidential information' in place when the former employee worked at Interpark, would significantly differ from information being utilised at the time this matter was taken to the courts and thus the restraint failed as there was no longer a legally recognized interest on behalf of the employer. The restraint would have had to survive the preceding year, which it did not due to the constant evolution of the procedures.¹⁰⁰

5.2 The locational and time aspects of a restraint of trade clause

One should note the exact purpose of a restraint of trade clause as contained in an employment contract. As previously stated, the effect desired by utilising a restraint of trade is essentially to curb a certain type of behaviour or action from an employee previously employed. This behaviour or action could include the exposure of trade secrets of the previous employer or in a simple example, poaching the customer base that provides the foundation of a particular type of business.

If one focuses on the example of a customer base, it becomes clear that a business will often operate in a specific area thus having a customer base that exists in close proximity to it. It would be to the detriment of that going concern if it had to lose its surrounding customers to a previous employee who would have potentially served

⁹⁸ *Interpark* para 40.

⁹⁹ *Interpark* para 24.

¹⁰⁰ *Interpark* para 66.

those customers in the scope of his/her employment, particularly in the instance of a sales representative.

Therefore, many restraint of trade clauses attempt to restrain the employee by providing a reference to a demarcated area where the employee is not allowed to carry out a similar type of business. For example, the employee may not sell wool in the Midrand area if he/she was previously employed by a company that sold their product in this area. An example of a restraint seeking to protect such an interest on behalf of an employer can be seen in the matter of *Jordaan v CCMA & Others*.¹⁰¹ This case dealt with the intended restraint of an estate agent as it is a direct consequence of their profession that customer relationships are built and nurtured and require protection under the right circumstances.

This aspect of the restraint of trade seems rather fair. However, many employment contracts have utilised overreaching locational provisions in an effort at a “shotgun” approach to restrain the employee as broadly as possible. This means that the restraint of trade clause is drafted in such a way so as to aim for the widest scope of protection possible for the employer.

It has become quite evident that the courts do not take kindly to this approach, as can be seen in the case of *Southgate Electrical*¹⁰² where the employee was restrained from applying his trade in the area of South Africa. This ‘shot-gun’ approach is clearly unreasonable as it would entail the employee immigrate to a different country, in order to carry out his right as entrenched in section 22 of the Constitution, or to not enforce his right at all. By enforcing this locational aspect of such a restraint of trade clause would essentially fly in the face of our Constitution and undermine the values we have worked so tirelessly to uphold in South Africa’s new age of democracy.

Thus when making use of such a clause, one should pay very careful attention to the desired outcome of the restraint. One should rather choose to keep the restraint narrow but specific in terms of the area that the employer is looking to protect. Therefore if the intention of the employer is to protect a customer list based in the

¹⁰¹ *Jordaan v CCMA & Others* (2010) 19 LAC (hereinafter referred to as the *Jordaan* case).

¹⁰² *Southgate Electrical Wholesalers CC v Akash Rabilal & 1 other* [2011] ZAKZDHC 27.

City of Johannesburg then the clause should read to that effect as the courts will be more likely to uphold the restraint if it seen to be reasonable and thus in line with public policy. Judges who are reluctant to enforce such a restraint at all, can attempt to balance the interests of both the employee and the employer by only partially enforcing the restraint. This can be done by ordering that it only take effect in a particular area. Mbatha AJ in the *Southgate Electrical* case gave effect to an interdict in terms of which the Respondents were prohibited from applying their trade only in the Province of Kwa-Zulu Natal instead of the area of South Africa as initially stated in the restraint of trade clause.

In a contradictory decision to the *Den Braven* case, the court in the *Advtech* case took a different position and the restraint of trade failed against the previous employee. In the latter case the entire restraint was struck down. The court held that the restraint does not protect a legitimate proprietary interest of the employer, and therefore had to invalidate restraints that are contrary to public policy.

Just as the above discussion refers to the area within which an employer intends to protect his/ her interest, there is usually a part of the restraint of trade covenant dealing with a time period. This time period is used to deter the employee from performing such similar duties as he/she had done previously for a specific period of time. Referring back to the previous example, the employee may not sell wool in Midrand for a period of 5 years. As discussed above, public policy will be determined by testing whether the time period for which competition is barred, is reasonable on the facts and circumstances of each individual case.

5.3 Courts' aversion to enforce overreaching restraints

The so-called 'shot-gun' approach has been noted many times when these employment contracts find themselves in the court room, as the employer may believe that if they ensure that the restraint so far-reaching, the employee won't have a choice in the matter and just give up on any competitive behaviour, be it in line with fair business practices or not.

One must highlight the dangers that become apparent when dealing with these agreements. Firstly, the employer runs the risk of failing to adequately describe the

extent of the restraint possibly resulting in the restraint being deemed void for vagueness. Secondly, an attempt by the employer to encompass as much as possible in order to ensure an extremely wide ambit of protection might be too extensive.

When one looks at the first notion Plasket J, in the case of *Bergh NO and Another v Van der Vyver*,¹⁰³ states that even though a clause in contract may be fatally vague, it should be the last resort of the court to strike down such a clause or it should be so “benevolently and contextually interpreted so as to void the setting aside thereof”. Plasket J therefore re-enforces the idea that parties enter into a contract willingly and as such they should be bound the particular terms found within the contract. A clear envision of the *pacta sunt servanda* maxim.

In order to facilitate the interpretative process by the courts in dealing with vagueness, rules of interpretation such as the *contra proferentem* rule find a workable space, as was denoted in *Reeves v Marfield Insurance Brokers CC*.¹⁰⁴ This rule entails that words of an uncertain or ambiguous nature should be interpreted against the drafter thereof.¹⁰⁵ This is used in practice as the belief is that the employer had ample opportunity to choose words carefully in order to adequately portray a certain intention and thus it is their failure if they have not been able to do so.

Should the *contra proferentem* rule be utilised, it brings with it the possibility that the meaning given to a restraint of trade clause may not reflect the true state of affairs of the employer, and thus lead to a failure in protecting his economic interest. This could also be the case where the *inclusio unius est exclusio alterius*¹⁰⁶ rule of interpretation is used. This rule refers to the idea that where the parties expressly included one scenario in their contract, they intentionally excluded another related scenario. Whenever a rule of interpretation is utilised as a last resort, it potentially provides a platform for the provision so interpreted to realise a different state of affairs as initially envisioned.

¹⁰³ *Bergh NO and Another v Van der Vyver and Another* [2010] ZAECHGHC 73 (hereinafter referred to as the *Bergh* case).

¹⁰⁴ *Reeves v Marfield Insurance Brokers CC* 1996 (3) SA 166 (A) (hereinafter referred to as the *Reeves* case) p 16.

¹⁰⁵ Cornelius S *Principles of the Interpretation of Contracts in South Africa* p 189.

¹⁰⁶ Cornelius S *Principles of the Interpretation of Contracts in South Africa* p 186.

CHAPTER 6

Restraint of trade covenants operating in the work place

6.1 The standard practice being utilised in employment contracts

In the discussion held throughout this paper, it has been one from a theoretical perspective providing explanations on the law and what it denotes, and how restraint of trade agreements have been dealt with by our courts in order to achieve the most equitable result in the work place. However, the practical application of these covenants in employment contracts often takes a different approach, sometimes seeming to favour the employer's interests over that of the employee's right to freedom of trade entrenched in section 22 of the Constitution right from the onset. In order to arrive at a thoroughly considered conclusion, one must also examine the realistic struggles being faced by both the employer and employee when concluding such agreements.

The birth place of a restraint of trade covenant is that moment when the employee and the employer reach consensus that an employment relationship is to begin and an employment contract is to be signed to provide a clear outline of the obligations and duties arising from the employment relationship between the two. It is actually this very start that seems to disadvantage the employee from the outset. Upon the negotiations taking place on the material aspects of the contract, the employee lacks equal bargaining power to suggest clauses that may favour his/her interests should the employment contract terminate. This is evident in the *Interpark* case, where the former employee was "instructed" to sign the restraint of trade agreement and failure to sign meant no employment.¹⁰⁷ Such a direction by a company to an individual seems to be outrageous as it infringes not only on their right in terms of section 22 but also section 16¹⁰⁸, in particular subsection (1)(b), as the employee should be

¹⁰⁷ *Interpark* para 31.

¹⁰⁸ Section 16 of the Constitution states the following:

"(1) Everyone has the right to freedom of expression, which includes-

- (a) Freedom of the press and other media;
- (b) Freedom to receive or impart information or ideas;
- (c) Freedom of artistic creativity; and
- (d) Academic freedom and freedom of scientific research.

able to participate fully in negotiations of their restraint of trade clause. Furthermore, section 10 of the Constitution¹⁰⁹ would also be infringed upon as it entails that everyone has inherent dignity and a right to have their dignity respected. To simply state that a potential employee will lose their employment should they not sign a restraint of trade agreement without any opportunity to provide his/her own point of view thereon, is taking away a person's dignity to actively engage on a material issue that could severely impact their life later on.

This entails that the employee does not have the authority to dictate or negotiate the aspects of their restraint of trade clause with the employer as the employee is at risk of losing the intended position.

Furthermore, when one contracts with a larger company, a standard form employment contract is often utilised.¹¹⁰ This leaves little to no space for employees to express their own point of view on the restraint of trade clauses. This specifically relates to the time and locational provisions that will in the future restrain them. Also it can be uncertain as to what actually constitutes a "trade secret" referred to and contained therein. Added to this 'standard form' scenario is that the people entrusted with the duty of facilitating the signing of the contracts on behalf of the employer with the employee are in no position themselves to enter negotiations on restraint of trade covenants as they do not possess the necessary authority to act and bind the employer on such terms. Thus reinforcing the unequal bargaining position of the employee. It is usually a 'take it or leave it' situation¹¹¹ compounded with the fact that many South Africans entering the work force have varied literacy levels and may not fully understand the obligations they are attaching themselves to.

An example of the unequal bargaining position of an employee faces, can be clearly seen in the *Reeves* case. In the aforementioned matter, Reeves, an employee of a close corporation which was bought over by another corporation, refused to sign a

(2) the right in subsection (1) does not extend to-

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm."

¹⁰⁹ Section 10 of the Constitution states that, "Everyone has inherent dignity and the right to have their dignity respected and protected."

¹¹⁰ Frahm-Arp L "Restraints of Trade: Employment Law" (2013 Vol 13) *Without Prejudice* p 51.

¹¹¹ Hutchinson et al *The Law of Contract in South Africa* p 24.

standard form service contract which contained a restraint of trade that sought to prohibit him from carrying on trade in the insurance industry and which such restraint canvassed the Republic of South Africa.¹¹² It appears that this restraint seems unreasonable and an appropriate discontent by Reeves in that he refused to sign it. Subsequent to his refusal, the corporation called for his departure, which he agreed to. This is blatant “take it or leave it” scenario with no regard had to the overreaching restraint by the prospective employer.

It is surprising to me that the Appeal Court upheld such a restraint and stated that it was not contrary to public policy to restrain the former employee in such wide terms as he had cultivated relationships with customers and these relationships could be ‘exploited’ to his benefit.¹¹³ It is my opinion that the restraint of trade covenant found in the abovementioned matter would not survive adjudication against our carefully constructed Constitution.

One can appreciate the mammoth task that may arise should the employer choose to deal with every single employee’s restraint of trade on an individual basis and essentially personalise the restraint to specifically suit said employee but I believe that this may assist the courts in determining the reasonableness of the restraint as all surrounding factors need to be considered.¹¹⁴

Once the employment contract has been signed and the restraint of trade clause, in whichever format, has been included, the effect of the clause is only exposed when the employment relationship has been terminated and the employee is then bound to these terms. It is this finite aspect of restraint of trade agreements that provides the employee with no remedy other than to approach the courts for a decision on the fairness thereof.¹¹⁵

One can further bear witness to the unsuitable conditions that an employee can find themselves under when breaching the restraint of agreement with their employer through the *Jordaan* matter. A ‘take it or leave it’ scenario appeared once more in the

¹¹² Reeves p 6.

¹¹³ Reeves p 34.

¹¹⁴ Reddy para 20.

¹¹⁵ Frahm-Arp L “Restraints of Trade: Employment Law” (2013 Vol 13) *Without Prejudice* p 51.

“It would be wrong to promote the practice of drafting wide ranging contracts, which are only reformulated into more reasonable prohibitions when the matter comes to court, whereas up to that point the sweeping scope of the provision hangs over the employee like an exaggerated sword of Damocles”.

aforementioned case when an employer provided restraint of trade agreements to his existing employees and stipulated a time frame within which it must signed and the consequence of failure to sign would be the termination of the employment relationship.¹¹⁶ The Applicant was stuck between a rock and a hard place as it were, as if she choose to sign and in future resigned, she would be restrained and thus without employment for six months and if she opted not to sign, she would immediately be without a job for six months.¹¹⁷ This is a clear indication to me that the employer had no intention of creating voluntary agreements between himself and his employees.

One must further take cognisance of the *Enjoy Beauty (Pty) Ltd v Pretoria and Smit Beauty Salon CC and Others*¹¹⁸ when dealing with restraint of trade agreements. In this case a third party signed as surety to a franchise agreement without being aware of a restraint of trade covenant. It must be noted that there was no argument as to the reasonableness of the restraint, the issue lay in the enforcement of the restraint against the third party.¹¹⁹

This displays the very real fact that not all restraints are signed voluntarily as the suretyship was signed prior to two relevant parties, being the intended franchisee and franchisor, signing the franchise agreement. Therefore, the third party had unknowingly and involuntarily bound herself to the restraint. Neukircher AJ held that the suretyship was “void as it was not entered into simultaneously with franchise agreement”.¹²⁰ The court accordingly provided the most appropriate decision in relation to the aforementioned third party, however, relief only came once this matter reached the courts.

¹¹⁶ *Jordaan* para 9.

¹¹⁷ *Jordaan* para 9 – 1.

¹¹⁸ *Enjoy Beauty (Pty) Ltd v Pretoria and Smit Beauty Salon CC and Others* [2016] ZAGPPHC 928 (hereinafter referred to as the *Enjoy Beauty* case).

¹¹⁹ *Enjoy Beauty* para 24.

¹²⁰ *Enjoy Beauty* para 25.

6.2 The result of the ‘standard practice’ coupled with the effect of the *Magna Alloys* case.

It becomes clear that the only remedial step available to the employee, once the employment relationship has been terminated, is to approach the court to provide a more balanced solution to the restraint as they were not able to negotiate the restraint with the perspective employer. Should the employee opt for this route a further hurdle lies in their path in that the onus of proving that the restraint of trade is unreasonable, contrary to public policy and thus unenforceable, now rests of the employee’s shoulders, as dictated in *Magna Alloys*. Further to the onus of proof, this case provides for a situation where the restraint may still be partially enforced against the employee, therefore still resulting in a limitation of their constitutional right in terms of section 22.¹²¹

6.3 Remedies utilised by the courts

6.3.1 The birth blue pencil test

The case of *African Theatres Ltd v d’Oliviera*¹²², saw the early application the ‘blue pencil’ test, where the court struck down particulars area’s that the restraint of trade encompassed. This was done by physically using a blue pencil to draw a line through the unreasonable phrase.¹²³ What this test entailed is essentially the divisibility of the contract through the concept of grammatical severability.¹²⁴ The court would sever the unreasonable portion of the restraint, provided the severance thereof would not materially affect the contract. Thereafter, the reasonable portion of the restraint remained enforceable.

In the matter of *Coin Sekerheidsgroep (Edms) Bpk v Kruger*¹²⁵ the court held that it would enforce the contract as a whole, if the unreasonable part thereof could be severed without altering the intention of the parties and without creating a completely

¹²¹ Pretorius CJ “Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches” (2009 Vol 30) *Obiter* p 157.

¹²² *African Theatres Ltd v d’Oliviera* 1927 WLD 122 (hereinafter referred to as the *African Theatres* case).

¹²³ *African Theatres* p 128.

¹²⁴ Christie et al *The Law of Contract in South Africa* p 381.

¹²⁵ *Coin Sekerheidsgroep (Edms) Bpk v Kruger en ‘n ander* 1993 (3) SA 569 (T) (hereinafter referred to as the *Coin* case).

new contract. Marcus¹²⁶ critique's this approach by the court in stating that by removing a part of contract, the court appears to be creating a new contract in any event. Rather the court should accept that it is changing the existing contract on the grounds of public policy.

6.3.2 The current position on severance and partial enforcement

The *Magna Alloys* decision further provided clarification on the issue of severability and partial enforcement of restraint of trade agreements.¹²⁷ It was held that a court may declare that an entire restraint is unenforceable or that only the specific part thereof that is offensive to public policy is unenforceable. As *Magna Alloys* is seen as the leading authority regarding restraints, courts are obliged to take into consideration which parts of the restraint are reasonable and which parts are seen as unreasonable and thus contrary to public policy.

In the *Den Braven* case the court upheld the restraint sought by the employer but Wallis AJ made it clear that the original restraint was indeed overreaching the required protection and took the position that the restraint should only be imposed for a period of eight months instead of the initial two years.¹²⁸

Such partial enforcement of a restraint by the courts cannot be granted at the sole discretion of the presiding officer and is subject to the following limitations.¹²⁹

- i. The onus will be on the employer to raise the issue and provide a basis for such partial enforcement;
- ii. If partial enforcement will materially alter the employment contract, then the court will not enforce such a restraint. An unreasonable restraint cannot be so re-constructed in order to bring it in line with public policy and therefore partially enforced;
- iii. There are many factors a court may take into account when determining the partial enforcement of a restraint, however the two most pertinent being

¹²⁶ Marcus R "Contracts in Restraint of Trade: The Role of Public Policy" p 34.

¹²⁷ Saner J *Agreements in Restraint of Trade in South African Law* p 3-6.

¹²⁸ *Den Braven* para 55.

¹²⁹ Hutchinson et al *The Law of Contract in South Africa* p 200.

whether the restraint was constructed to unduly oppress the employee and whether partial enforcement thereof will function unfairly against said employee.

In the case of *Arrow Altech Distribution (Pty) Ltd v Byrne and Others*¹³⁰ the court provided an important statement, “An unreasonable restraint will not be partially enforced if it would require major plastic surgery, in the form of a drastic re-casting of its provisions, to make it reasonable. I am not prepared to embark on such a venture. The court is therefore not obliged in all cases to whittle down an unreasonable restraint of trade until it eventually becomes reasonable.” This judgment can be seen as an affirmation of *pacta sunt servanda* and its ability to marry with the Constitution. Furthermore, a restraint of trade covenant will only be enforceable provided that offending portion thereof can be severed from the enforceable portion without detracting from the real intention of the parties and without creating a completely new contract.¹³¹

¹³⁰ *Arrow Altech Distribution (Pty) Ltd v Byrne and Others* 2008 (1) All SA 356 (D) (hereinafter referred to as the *Arrow case*).

¹³¹ Van Jaarsveld M “The Validity of a Restraint of Trade Clause in an Employment Contract” (2003 Vol 15) SA *Merc LJ* p 198.

CHAPTER 7

CONCLUSION

Once one has taken all relevant circumstances into account when dealing with restraint of trade of covenants, it is easy to see that a case can be made out for both sides of the debate. On the one hand, the right of a person to freely trade as denoted in section 22 of the Constitution seems most imperative as this directly impacts on such a person's financial well-being which may have a ripple effect on others such as family members that financially depend on him/her. This right is now entrenched in the Constitution, therefore it carries a great weight as it did under English law as the Constitution reigns supreme.

On the other hand, the interests of the employer cannot be simply pushed to the side to only favour the employee as it is these interests that indirectly impact on the employer's financial well-being. If, the interests of an employer are obtained by employee during their employment, can just be freely divulged without consequences, then a complete collapse of competitive exchange and commerce in the market place could be the result. It is these protectable interests that drive individual industries to constantly better themselves and provide more dynamic products and services to the people of South Africa and facilitate the interests of society by ensuring contractual autonomy. The debate from the employer would advocate for employees to be held to the promises they keep and that *pacta sunt servanda* serves to keep an economy flowing.

It is clear that in the case law discussed above, there still exists a strong support for the precedent laid down in the *Magna Alloys* case, although, it is important to note that the determination process used herein occurred before the operation of the Constitution. Therefore, it appears as if the right entrenched in section 22 requires the courts to make a firm denunciation or reform of the principles laid down in *Magna Alloys* against the constitutional dispensation.

Bhana suggests a 'blended' approach by the courts.¹³² This would entail that the foundational principles of the Constitution integrate with the common law approach to contract law, thereby creating a framework where section 39(2) of the Constitution allows for the application of the common law of contract to examine the extent of contractual autonomy but sections 8(2) and 36(1) are utilised to mould the implementation of the common law.

After due consideration of the above the aspects relating to restraint of trade covenants, I believe that it should not constantly be left up to the courts to decide on whether a restraint is deemed reasonable or not. If *pacta sunt servanda* serves as a cornerstone of South African contract law then those entering into employment contracts should do so *bona fidei* and take responsibility for what actually appears in those contracts to enable each party to fully adhere to the duties and obligations that flow therefrom. Each party should ensure that a true meeting of the minds occurs when entering into an employment contract, and further when binding themselves to a restraint of trade.

It cannot be said that one doctrine should be favoured over the other, in that *pacta sunt servanda* should be favoured over the right to freedom of trade and *vice versa*. The theory of 'market-individualism' as discussed in chapter 3 provides guidance on how the two competing interests should actually serve one another to provide a stable framework within which commerce can thrive and develop.

Therefore, a restraint of trade covenant can be utilised and further enforced in such way that a balance can be struck between the interests of the employer such as protecting trade secrets, and those of the employee being the right to freedom of trade as Malan AJA simply stated:

"This situation may occur when the enforceability of agreements in restraint of trade and the balancing or reconciling of the concurring private and public interests are considered."¹³³

¹³² Bhana D "The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract" (2008 Vol 24) *SAJHR* p 311.

¹³³ *Reddy* para 12.

This will form an environment which protects healthy competition in the market and which allows the employee to enforce their right contained in section 22. It is the responsibility of the contracting parties to create this balance from the outset and the most effective way of achieving such a result is to open a dialogue between employer and employee and for each to listen and understand the interest that other party intends on protecting and to attempt to resolve the unequal bargaining position.

Furthermore, it is the responsibility of the courts to carefully weigh the values underpinning the Constitution with those current principles governing our law of contract. Judicial officers are equipped with the necessary tools in law to fairly determine the most equitable position between the parties through the implementation of such sections of Constitution mentioned above. In the *Reddy* case, the decision by the court led to a fair and carefully considered outcome without the need to decide on the incidence of proof. This was achievable due to the rounded approach of the court as regard was had to right one has to freely choose their occupation as well as the *pacta sunt servanda* maxim. Balance of these two 'rivals' is what appears to be required to successfully serve the interests of public.

TOTAL WORD COUNT: 16 570

BIBLIOGRAPHY

1. Books

Christie RH *et al* The Law of Contract in South Africa (2011) 6th edition, LexisNexis, Durban.

Cornelius S Principles of the Interpretation of Contracts in South Africa (2016) 3rd edition, LexisNexis, South Africa.

Hutchinson D *et al* The Law of Contract in South Africa (2013) 2nd edition, Oxford University Press, Cape Town.

McGregor M *et al* *Labour Law Rules!* (2012) Siber Ink, Cape Town.

Saner J Agreements in Restraint of Trade in South African (2015), LexisNexis, South Africa.

Smith S *et al* Atiyah's Introduction to the Law of Contract (2005) 6th edition, Clarendon Press, Oxford.

2. Legislation

Constitution of the Republic of South Africa, 1996.

3. Case law

Advtech Resourcing Ltd t/a Communicate Personnel Group v Kuhn 2008 2 SA 375 (C).

African Theatres Ltd v d'Oliviera 1927 WLD 122.

Afrox Healthcare v Strydom 2002 (6) SA 21 (SCA).

Aranda Textile Mills (Pty) Ltd v L D Hurn [2000] 4 All SA 183 (E).

Arrow Altech Distribution (Pty) Ltd v Byrne and Others 2008 (1) All SA 356 (D).
Automotive Tooling Systems (Pty) Ltd v Wilkens 2006 (?) SCA 128 (RSA).
Basson v Chilwan 1993 (3) SA 742 (A).
Bergh NO and Another v Van der Vyver and Another [2010] ZAECGHC 73.
Brisley v Drotsky 2002 (4) SA 1 (SCA).
Canon Kwa-Zulu Natal (Pty) Ltd t/a Canon Office Automation v Booth and another
2005 (3) SA 205 (N).
Coetzee v Comititis and Others 2001 (1) SA 1254 (C).
Coin Sekerheidsgroep (Edms) Bpk v Kruger en 'n ander 1993 (3) SA 569 (T).
Den Braven Ltd v Pillay 2008 (6) SA 229 (D).
Digicore Fleet Management v Steyn 2008 ZASCA 105.
Enjoy Beauty (Pty) Ltd v Pretovia and Smit Beauty Salon CC and Others [2016]
ZAGPPHC 928.
Interpark (South Africa) Ltd v Joubert and Another 2010 ZAGPJHC 39.
Jordaan v Commission For Conciliation, Mediation and Arbitration and Others (P
143/07) (2010) 19 LAC.
Magna Alloys and Research (SA)(Pty)Ltd v Ellis 1984 (4) SA 874 (A).
Morris (Herbert) Limited v Saxelby 1916 (1) AC 688 (HL).
Nordenfelt v Maxim Nordenfelt guns and Ammunition Co. Ltd 1891-94 All E.R. 1 (H.L
1894) (Eng).
Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President
of the Republic of South Africa 2000 (2) SA 674 (CC).
Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA).
Reeves and Another v Marfield Insurance Brokers (Pty) Ltd and Another 1996
ZASCA 39; 1996 (3) SA 766 (SCA).
Roffey v. Catterall, Edwards & Goudri (Pty) Ltd 1977 (4) SA 494 (N) (S. Afr.).
Southgate Electrical Wholesalers CC v Akash Rabilal & 1 other [2011] ZAKZDHC
27.
Walter McNaughtan (Pty) Limited v Schwartz and another 2004 (3) SA 381 (C).
Willet v Blake 1870 (3) Menzies 343.

4. Journal articles

Bhana D “The development of a basic approach for the constitutionalisation of our common law of contract” (2015: Vol 26) *Stellenbosch Law Review* 3.

Bhana D “The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract” (2008: Vol 24) *South African Journal on Human Rights* 300.

Bhana D and Pieterse M “Towards a reconciliation of contract law and Constitutional values: *Brisley and Afrox* revisited” (2005: Vol 122) *South African Law Journal* 865.

Calitz K “Restraint of trade agreements in employment contracts: time for *pacta sunt servanda* to bow out?” (2011: Vol 22) *Stellenbosch Law Review* 50.

Dent C “Unpacking post-employment restraint of trade decisions: the motivators of key players” (2014: Vol 26) *Bond Law Review* 1.

Frahm-Arp L “Restraints of Trade: Employment Law” (2013: Vol 13) *Without Prejudice* 51.

Hock C “Covenants in Restraint of Trade: Do They Survive the Unlawful and Unfair Termination of Employment by the Employer” (2003) *Industrial Law Journal* 1231.

Lewis J “Fairness in South African Contract Law” (2003 Vol 120) *South African Law Journal* 330.

Marcus R “Contracts in Restraint of Trade: the Role of Public Policy” (1994 Vol 2) *Juta's Business Law Journal* 33.

Mashabane B “Confidential information/trade secrets – what do they mean?” (October 2007) *De Rebus* 43

Neethling J “The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants- A Need for Exercising Restraint” (2008 Vol 20) *SA Mercantile Law Journal* 89.

Pretorius CJ “Covenants In Restraint Of Trade: A Synthesis Of Traditional; Common Law and Constitutional Approaches” (2009 Vol 30) *Obiter* 154.

Van Jaarsveld M “The Validity of a Restraint of Trade Clause in an Employment Contract” (2003 Vol 15) *SA Mercantile Law Journal* 171.