

**RESTRAINT OF TRADE COVENANTS IN THE CONTEXT OF THE
FREEDOM TO TRADE**

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by

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CHAPTER 1: INTRODUCTION AND PROBLEM STATEMENT

1 Introduction

The employment relationship is generally regulated by an employment contract concluded between an employer and an employee, either orally or in writing. A restraint of trade covenant is often entered into as contractual term to the employment contract, in terms whereof the employee's right to freedom of trade, either for the duration of the employment agreement or thereafter (or both), could be restricted and regulated in order to protect the proprietary interest of the employer.¹

The difference between a contract and an agreement is that the former is enforceable in terms of the law, whereas the latter will normally be "legally ineffective".² The importance of this difference is that a restraint of trade covenant is regarded as a contract which "gives rise to obligations . . . enforced and recognised by law".³ Contracts that are contrary to public policy will not be enforceable by law. Public policy is thus regarded as the measure for the determination of the validity and enforceability of contracts in general and therefore finds application in the context of restraint of trade covenants. However, in light of the aforementioned qualification it is submitted that South African public policy does not condemn restraint of trade covenants and these will therefore be enforceable by law.⁴

It is further submitted that the public policy behind the validity and enforceability of restraint of trade covenants are rooted in firstly, the

1 Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" 2003 15 *South African Mercantile Law Journal* 326. Also see Kavanagh *Oxford Dictionary* 495.

2 Christie *The Law of Contract* 103.

3 Van Jaarsveld *SAMLJ* 327.

4 The content of public policy within South African law shall be evaluated and analysed in detail in chapters 2 and 3 with reference to the status of restraint of trade covenants prior to the landmark decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 863 (A), and the subsequent implication of the fundamental right of freedom of trade in terms of section 22 of the *Constitution of the Republic of South Africa*, 1996.

doctrine of *pacta servanda sunt* (sanctity of contract) and, secondly, in the employer's right to protect its business and interests against unlawful exploitation. The purpose of restraint of trade covenants are thus to protect some or other legitimate proprietary interest of the employer against unlawful exploitation by an employee or ex-employee. During the course of employment, an employee will be privy to confidential information of the employer and, if there is no restraint, he/she may use such information to compete with his/her employer by *inter alia*, either starting their own business in competition with the employer, working for the competition or soliciting employees of the employer. In doing so, the employee uses the benefit of private and confidential information of the employer to his/her own advantage. Therefore restraint of trade covenants remain a great part of our commercial and business life in order to regulate unlawful and wrongful competition by employees or ex-employees during or after termination of the employment relationship.

It must further be noted that restraint of trade covenants not only have application within the employment relationship. However, for the purposes of this dissertation restraint of trade covenants shall only be discussed with reference to its scope and ambit of application within the employment relationship, principally from the employer's viewpoint at large, and the validity and enforceability of restraint of trade covenants within South African law.

This dissertation is subsequently divided into four parts pertaining to restraint of trade covenants within South African law. In the first instance, the author shall reflect on the historical overview and theoretical foundations of restraint of trade covenants with reference to the principles as settled by the landmark decision of the Appellate Division (as it then was) in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (hereafter referred to as *Magna Alloys*).⁵ Secondly, the author shall endeavour to synthesise the application of restraint of trade covenants in

5 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 863 (A).

the context of the fundamental right to freedom of trade as entrenched in terms of section 22 of the *Constitution of the Republic of South Africa, 1996* (hereafter referred to as the Constitution). Thirdly, the author shall refer to the protectable interest as the object of restraint of trade covenants within the employment relationship and, finally, shall offer conclusions in relation to the current status of restraint of trade covenants as applied within South African law.

2 Historical overview and theoretical foundations

Pre-1984 South African courts followed different conflicting approaches in relation to the validity and enforceability of restraint of trade covenants within South African law. Some courts preferred the English law approach, based on the premise of the freedom of trade, whereas others preferred the Roman-Dutch principle, which favoured the sanctity of contracts.⁶ The approach followed was determinative of whether restraint of trade covenants were regarded as being *prima facie* void, or *prima facie* valid and enforceable, and would subsequently determine which party should bear the onus of proof in relation thereto.

In terms of the English law, restraint of trade covenants were regarded as *prima facie* invalid and unenforceable, founded on the principle that every person should be free to trade. The onus of proof thus rested on the party who was relying on the restraint to prove that it was reasonable *inter partes*. On the other hand, the Roman-Dutch principle regarded the sanctity of contracts to be determinative in evaluating the validity and enforceability of restraint of trade covenants. Therefore the onus of proof rested on the party who contended that he/she should not be bound by the restraint to prove that its enforcement would be contrary to public policy.

6 Van Jaarsveld 2003 *SAMLJ* 331.

However, the Appellate Division (as it was then) in *Magna Alloys* brought clarity and simplified the approach to be followed in relation to restraint of trade covenants within South African law. The Appellate Division held that there was nothing in our common law that suggested that restraint of trade covenants were regarded as prima facie invalid and unenforceable, and subsequently determined that its validity and enforceability must be evaluated and analysed in light of what is dictated by public policy. The Appellate Division declared that restraint of trade covenants should be regarded as prima facie valid and enforceable, unless its enforcement would be contrary to public policy.⁷ The onus of proof thus rests on the party who contended that he/she was not bound by the restraint to prove that its enforcement would be contrary to public policy.

It is therefore submitted that the Appellate Division in *Magna Alloys* brought certainty and simplified the approach to be followed in relation to the status of restraint of trade covenants within South African law. After much evaluation, and analysing both English law and Roman-Dutch law, the Appellate Division concluded that the common law did not view restraint of trade covenants to be void merely because it restricted a person's right to trade. It was held that the fact that such a covenant was regarded to be prima facie invalid and unenforceable was derived from English law and that the validity of restraint of trade covenants within South African law should be determined with reference to the same rules and principles pertaining to the law of contract. In South African common law a contract was regarded as illegal and subsequently unenforceable if it was *contra bonos mores* (against good morals) or against public policy.⁸ Therefore, a restraint of trade covenant that was contrary to public policy should not be enforced.⁹ Differently worded, restraint of

7 Par 897F-898B (n 5).

8 Public policy determines that agreements entered into freely should be honoured, unless the enforcement thereof will be damaging or contrary to public policy. See par 897G to 898B (n 5).

9 Par 897I (n 5).

trade covenants were valid and enforceable, unless the enforcement thereof was contrary to public policy.

It is further submitted that although the principles pertaining to restraint of trade covenants have been settled by the Appellate Division in *Magna Alloys*, some of the earlier cases may still provide insight as the consequences of the conclusion of the Appellate Division would take some time to work its way through South African law.

3 Fundamental right to freedom of trade

At the outset it is vital to take cognisance of the fact that *Magna Alloys* was decided prior to the enactment of the Constitution, which would render it essential to refer to the implication of the Constitution on the determination made by the Appellate Division in *Magna Alloys* in relation to the principles pertaining to restraint of trade covenants within South African law.

Moreover, it is essential to note that our law is governed by the Constitution, which is the "supreme law of the Republic" and that any "law or conduct" that is inconsistent therewith, will subsequently be invalid.¹⁰

In general the right to freedom of trade, occupation and profession can be exercised freely. This right is expressly recognised in terms of section 22 of the Constitution, which states that all citizens are "free to choose their trade, occupation or profession freely" provided that the practise thereof might be regulated by law. Notwithstanding the aforementioned, it is trite law that restraint of trade covenants are both valid and enforceable in South African law. Consequently, the question arises whether restraint of trade covenants are still valid and enforceable in

¹⁰ Section 2 of the *Constitution of the Republic of South Africa, 1996*.

light of section 22 of the Constitution and the recent development in case law.

However, in terms of section 39 of the Constitution, the court, in interpreting any of the rights contained in the Bill of Rights, must apply and, if necessary, develop the common law to give effect to such rights, and may also limit such rights, if the limitation is justifiable in terms of section 36 of the Constitution.¹¹

The courts have subsequently interpreted and developed the common law principles pertaining to restraint of trade covenants and have determined that the right contained in section 22 of the Constitution may be limited by such a restraint, if such limitation would be reasonable and justifiable in terms of section 36 of the Constitution.¹²

However, in *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,¹³ the Natal Provincial Division as per Kondile J, expressed the view that the public policy as infused by the constitutional values, would have the effect that restraint of trade covenants should be regarded as prima facie invalid and unenforceable. Kondile J therefore held that the onus should rest on the party who wants to impose the restraint of trade covenant, to prove that it is reasonable. It was declared that the onus of proof should therefore be reversed to reflect the English law position as held in certain case law prior to *Magna Alloys*.

Notwithstanding the view expressed by Kondile J, the Natal Provincial Division as per Pillay J in *Dickinson Holdings Group (Pty) Ltd v Du*

11 Van Jaarsveld 2003 SAMLJ 331.

12 *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 1997 4 All SA 65 SE; *Mathewson's Micro Finances BK v Lombard and Another* 2004 2 All SA 422 (NC) and *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* 2008 6 BCLR 620 (N).

13 *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another* 2004 1 BCLR 39 (N).

Plessis,¹⁴ declared that the party who seeks to escape the restraint, should bear the onus of proving that same is unreasonable. Pillay J further declared that the "infusion" approach will have application in determining public policy in evaluating and balancing the competing interests of the parties, and not in relation to where the onus of proof should lie. With reference to the "infusion" approach a restraint of trade covenant would therefore be unreasonable if it prevents an employee from exercising his/her trade, profession or occupation freely, in the absence of a corresponding right of the employer.¹⁵

It is therefore submitted that restraint of trade covenants should still be regarded as valid and enforceable within South African law and that it passes the constitutional muster for reasonableness as entrenched in terms of section 36 of the Constitution.¹⁶

4 Purpose, validity and enforceability of restraint of trade covenants within the ambit of the employment relationship

As already stated above, the validity and enforceability of a restraint of trade covenant is measured against the touchstone of public policy. Public policy therefore requires an equally important right to be protected by a restraint in order to justify the limitation of the right to freedom of trade and to subsequently render it to be valid and enforceable.

This means that restraint of trade covenants should protect some or other legitimate proprietary interest of the employer, which would render

14 Par 88-94 *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* 2008 6 BCLR 620 (N).

15 Par 98-101 (n 14).

16 It is submitted that the correct approach to be followed is the one expressed and summarised by Pillay J in *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* 2008 6 BCLR 620 (N), wherein it was held that the constitutional values were infused into any enquiry to determine whether a contract was contrary to public policy. It was further declared that the assessment of reasonableness of restraints required a value judgment and that the question relating to the onus of proof did not play a role in such a value judgment. Also see *Reddy v Siemens Telecommunications (Pty) Ltd* 2006 JOL 18829 (SCA).

the limitation of the right to freedom of trade to be reasonable. As already referred to above, employees are privy to confidential information of the employer during the course of their employment, which could be regarded as a protectable interest. The employer may thus protect the exploitation of this information and/or interest by the employee, during or after the termination of employment, by means of a restraint of trade.

However, the interests or confidential information of the employer would only constitute a protectable interest if it is worthy of protection in terms of the law. Therefore only lawful interests could be protected in terms of such a restraint of trade covenant.

Although a restraint of trade covenant can have application during employment and after the termination thereof, the case law to be discussed will focus on the enforceability of restraints after the termination of employment. However, it is submitted that the same principles shall apply when the enforcement of a restraint is sought, either during employment or after the termination thereof.

5 Conclusion

In light of the above it is thus clear that the status of restraint of trade covenants implies that there are two conflicting principles at work. On the one hand the employee has the right to freedom of trade, and on the other hand the principle of sanctity of contract in that a contract freely entered into (also with an employer) should be honoured. Furthermore, the employee has the right to freedom of trade and the employer has the right to protect its interests against exploitation by employees or ex-employees. The validity and enforceability of restraint of trade covenants is thus dependent on the balance between these two equally important rights.

As already referred to above, restraint of trade covenants are regarded as valid and enforceable and can therefore be included in employment contracts. However, it is submitted that despite the sanctity of contract, the purpose of a restraint should be the protection of a legitimate proprietary interest of the employer in order to justify the limitation of the employee's right to freedom of trade.

In light of the above, the research question thus arises as to what the purpose, application and implication of restraint of trade covenants are within the employment relationship in the context of the constitutional right of every citizen to freely choose his/her trade, occupation and profession.

In this dissertation the author shall therefore endeavour to synthesise the general principles pertaining to restraint of trade covenants within South African law by having regard to their historical development and theoretical foundations, and the subsequent implication of the fundamental right to freedom of trade in light of its purpose, validity and enforceability within the employment relationship in answering the research question above.

In answering the research question the author shall conclude that the principles pertaining to restraint of trade covenants form an integral part of our commercial and business life and are therefore required for the protection of the employer's interests despite limiting the employee's fundamental right to freedom of trade. Consequently it is also submitted that the constitutional entrenchment of the right to freedom of trade did not alter the approach as determined in *Magna Alloys*, and therefore restraints are regarded as prima facie valid and enforceable and the onus still rests on the party who contends that he/she should not be bound by such a restraint, to prove that it is contrary to public policy.

CHAPTER 2: HISTORICAL OVERVIEW AND THEORETICAL FOUNDATIONS

1 Introduction

In order to determine and refer to the current status of restraint of trade covenants within South African law, one has to refer to its historical context and the theoretical foundations thereof. For many years prior to the decision of the Appellate Division in *Magna Alloys*¹ our courts followed conflicting approaches in determining the validity and enforceability of restraint of trade covenant within South African law. Some courts preferred to follow the English law approach based on the premise of the freedom of trade, whereas others preferred the Roman-Dutch law approach which favoured the sanctity of contract.

The approach followed to determine the validity and enforceability of restraint of trade covenants are of great importance, particularly in determining the incidence of the onus of proof in relation thereto. In English law the onus of proof rests on the party who wants to enforce the restraint, to prove that the restraint is reasonable *inter partes*. Conversely, the onus of proof in Roman-Dutch law rests on the party who does not want to be bound by the restraint, to prove that it is contrary to public policy.

Notwithstanding the above, there was a need for certainty in relation to the principles pertaining to restraint of trade covenants. The position of restraints and the application thereof within South African law had to be clarified and simplified in order to establish a uniform approach to be followed by South African courts in relation to restraint of trade covenants. The need for clarity and simplicity were subsequently addressed by the Appellate Division in *Magna Alloys*.

¹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 874 (A).

Accordingly, this chapter shall primarily focus on the principles as derived from the more influential court decisions in relation to the development and entrenchment of the principles pertaining to restraint of trade covenants within South African law. More particularly, the focal point of this chapter will be on the historical jurisprudence in our law, which culminated in the landmark decision of the Appellate Division in *Magna Alloys*. This decision was instrumental in laying down the principles in relation to the implication and application of restraint of trade covenants within South African law. The author shall accordingly endeavour to synthesise the most influential decisions concerning the development of restraint of trade covenants within South African law, by evaluating and analysing relevant jurisprudence in line with the conclusion reached in *Magna Alloys*.

2 Historical context and an appeal for change

Of note is the statement made in the case of *Nachtsheim v Overath* (1968) where the learned judge declared, without determining the principles relating to the validity or otherwise of restraint of trade covenants, that:

The principles relating to the validity, or otherwise, of agreements in restraint of trade are well known and well established and it is not necessary for me to repeat them now. Briefly, the position is, in this case, that the onus is upon the applicant to show, firstly, that a bar clause of some description was necessary in the circumstances to protect an interest of his, and, secondly, that the bar clause in question does not go beyond what is reasonably required to do so.²

Expressing the same view, Erasmus J in *Brenda Hairstylers (Pty) Ltd v Marshall*³ held that all restraint of trade covenants are to be considered as prima facie unenforceable. Specifically, it was held that the onus rested on the covenantee (employer) to prove that the covenant "goes

2 At 271 *Nachtsheim v Overath* 1968 2 SA 270 (C) as referred to in Kahn 1968 85 "The Rules Relating to Contracts in Restraint of Trade – Whence and Whither" SALJ 392.

3 *Brenda Hairstylers (Pty) Ltd v Marshall* 1958 2 SA 277 (O) as referred to in Kahn 1968 85 SALJ 392.

no further than is reasonable in the interest of both parties".⁴ However, once it was proved that the covenant was reasonable, the onus shifts to the covenantor (employee) to prove that the covenant was contrary to public policy.

It was accepted in both of the above cases, without examining restraint of trade covenants within the context of South African law, that the law to be applied was a "replica of English law".⁵

Kahn⁶ expressed great concern for this approach followed by our courts and accepted the contention made by Suzman⁷ in that the English law doctrine was accepted by our courts without questioning or establishing the origins thereof.

Kahn,⁸ however, expressed immense appreciation for the judgment handed down by Leon J in *SA Wire Co (Pty) Ltd v Durban Wire Plastics (Pty) Ltd*,⁹ wherein the learned judge questioned the application of English law within South Africa. In this regard Leon J stated:

Although English law appears to have been followed in this field it is, of course, not binding but it may be persuasive. *If our law differs then our law must be followed and not the English law ...* I have been unable to find any Roman-Dutch authorities on this subject and counsel were unable to refer me to any. It is, however, a principle of our law that persons who are *sui juris* are free, generally speaking, to contract as they please but a proviso to this principle is that no contract will be enforced which is contrary to public policy. Voet 2.14.16 ... it seems to me why our courts refuse to enforce contracts which are an unreasonable restraint of trade is because such contracts are contrary to public policy ... I propose to consider the English law on this subject and thereafter to consider whether our law differs therefrom.¹⁰ (Own emphasis)

4 At 280 (n 3).

5 Kahn 1968 85 SALJ 392.

6 Kahn 1968 85 SALJ 391-399.

7 Suzman 1968 85 SALJ 91.

8 Kahn 1968 85 SALJ 393-394.

9 *SA Wire Co (Pty) Ltd v Durban Wire Plastics (Pty) Ltd* 1968 2 SA 777 (D) as referred to in Kahn 1968 85 SALJ 393-394.

10 At 781 (n 9).

The learned judge went on to state, although *obiter*, that it was not certain that the English view should have been adopted by our courts in relation to the onus of proof.¹¹ Leon J thus agreed with the view that the doctrine of restraint of trade covenants was applied in our law as a result of public policy, but maintained that one should then determine what the content of public policy was. It was accordingly concluded that:

If such view be correct then applying the ordinary principles of onus relating to pleadings it would seem that the onus would lie upon the party alleging it to show that the contract in question is an unreasonable restraint of trade.¹²

This view appears to be in keeping with the general principles of the law of contract. Kahn accepted the view expressed by Leon J, claiming it represents a "voice" of doubt in that the courts have failed to critically examine the origins of restraint of trade covenants within South African law, before it decided to unquestioningly accept and apply English law.

Kahn further expressed the need for the law to progress in this respect by producing something that is "equitable, expressive of moral standards" and which is applicable to South African law and gives effect to "both individual and public interests".¹³

The view held by Kahn was supported by Du Plessis and Davis¹⁴ who similarly expressed the view that the conflicting approaches followed by South African courts were attributed to the different meanings ascribed to public policy. It was subsequently submitted that the solution lay in defining the "principles reflecting the notion of public policy" within the South African law and to develop legal and evidential rules to "put flesh on the bare bones of such principles". They asserted that the solution in addressing these inadequacies lay in the development of the content of public policy pertaining to South African law.

11 At 787 (n 9).

12 At 787 (n 9).

13 Kahn 1968 85 SALJ 389-399.

14 Du Plessis and Davis 1984 SALJ 102.

As is evident from a long line of decisions after Khan's article appeared and prior to the judgment delivered in *Magna Alloys*, South African courts still followed different approaches in determining the validity and enforceability of restraint of trade covenants without developing specific principles applicable to South African law.

Furthermore, despite the views held by Kahn as well as Du Plessis and Davis, Nicholas J in *Super Safes (Pty) Ltd v Voulgarides*¹⁵ regarded the principles pertaining to restraint of trade covenants to be too clear to cite authority and resultantly determined that restraints could only be enforced if it were reasonable *inter partes* (as between parties). Thus, the onus of proof rested on the party alleging that the restraint was reasonable and should therefore be enforced. The aforementioned was still in keeping with the English law approach and reflected, once again, that South African courts accepted English law to be applicable to restraint of trade covenants within South African law.

Consequently it is quite evident that many of the South African courts still accepted and followed the English law approach without scrutiny, whereby restraint of trade covenants were regarded to be prima facie void and against public policy, unless it was proved that the restraint was reasonable *inter partes*. On the other hand some of the courts expressed the view and the need that Roman-Dutch law should be followed whereby these covenants were regarded to be prima facie valid and enforceable, unless the enforcement thereof would be contrary to public policy. South African courts still did not have a uniform approach in relation to the enforceability of restraint of trade covenants. This led to different and contradictory judgments, and according to Khan's article,

15 Par 785C-785F *Super Safes (Pty) Ltd and Others v Voulgarides and Others* 1975 2 SA 783 (W).

could still be attributed to the failure to examine the origins of the principles of restraint of trade covenants within South African law.¹⁶

3 A step in the right direction: an attempt to define the content of South African public policy

The assessment of the origin of restraint of trade covenants within South African law shall be done with reference to the more influential decisions prior to and in line with the landmark decision in *Magna Alloys*, which simplified and brought certainty to the status of restraint of trade covenants within South African law.

A fitting analysis can perhaps begin, firstly, with reference to the decision in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* (1977) (hereafter referred to as *Roffey*)¹⁷ in which the Natal Provincial Division as per judge Didcott (to which Friedman J concurred), held that restraint of trade covenants were not "generally condemned" by South African public policy.¹⁸ As such these covenants are not prima facie void and should only be regarded to be unenforceable and against public policy in instances where they were proven to be unreasonable. The aforementioned would thus put the onus of proof on the party making the allegation, that is to say the onus would rest on the employee who contends that he/she should not be bound by the restraint. The learned judge further expressed the view that unequal bargaining power did not render restraints to be unreasonable within South African public policy and should therefore not have been accepted as a "universal truism".¹⁹ The learned judge further held that the impact of unequal bargaining power or otherwise should be determined with reference to the facts of each case, but there should not be an unqualified presumption that the parties were on an unequal bargaining footing. It was also concluded

16 Kahn 1968 85 SALJ 389-399.

17 *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* 1977 4 SA 494 (N).

18 Par 484G (n 17).

19 Par 484H (n 17).

that the *stare decisis* principle "has less force"²⁰ when one is concerned with the public policy, since this is not a fixed concept and it may change over time. It was therefore affirmed that the court was not bound by the decisions of higher courts in relation to restraint of trade covenants within South African law.²¹

Didcott J in *Roffey* described the implication of the English law approach as applied by South African courts, to be as follows:

What originated as a contemporary reaction to *specific problems in a particular historical setting* hardened eventually into a fixed rule of law invalidating all covenants in restraint of trade. An exception was however allowed in the case of those proved to be reasonable inter partes. They too could be overcome, but only if they were then shown to be positively harmful to the public interest.²² (Own emphasis)

From the aforementioned, it is clear that the English law doctrine relating to restraint of trade covenants was developed within a particular "historical setting" of public policy, which did not necessarily have application in South African law. It has been noted that public policy is not a fixed or static concept and therefore the content thereof would and should be developed and changed to fit South African law.²³

Didcott J further remarked that the approach followed by South African courts in accordance with English law created a cult, which had been questioned over the years, but which was still followed. In relation to the implication and application of both English law and Roman-Dutch law, Didcott J referred with approval to the view held by Suzman in that:²⁴

As is often the case with borrowings from another system, all the implications of the borrowing are not always appreciated. A case in point ... is that of restraint of trade, where our Courts for over a century have almost slavishly followed the English law, including

20 Par 494I (n 17).

21 Par 507I (n 17).

22 Par 502E-502F (n 17).

23 Par 506H (n 17).

24 Par 503C-503E (n 17).

the rule that the onus is on the party seeking to enforce a restraint of trade to prove its reasonableness. This rule as to onus ... is, it is submitted, in conflict with the basic principle of our law that an agreement seriously and deliberately entered into is binding, unless the party seeking to escape from its provisions can set up some specific ground vitiating his undertaking. It is submitted that it is no part of Roman-Dutch law that all restraints of trade are per se or even prima facie contrary to public policy. The truer view would seem to be that a person who has voluntarily submitted to a restraint of trade is bound by his undertaking, unless he can show that in all circumstances the particular restraint is contrary to public policy.²⁵

In light of Suzman's view it was thus clear that the South African public policy required contracts freely and deliberately entered into, to be honoured by the parties thereto and therefore the onus of proof would rest on the party contending that he/she should not be bound by the restraint. Consequently it was held that restraint of trade covenants are not regarded as contrary to South African public policy and should therefore be held to be prima facie valid and enforceable.

Didcott J further held that one cannot conclude where the onus of proof lies without having reference to South African public policy in order to determine which approach should be followed in terms thereof, being either English law whereby restraints are regarded to be prima facie invalid and unenforceable, or Roman-Dutch law which regarded restraints to be valid and enforceable, unless it is contrary to public policy.²⁶

Before long, the Transvaal Provincial Division in *National Chemsearch (SA) (Pty) Ltd v Borrowman* (1979) (hereafter referred to as *National Chemsearch*),²⁷ as per judges Botha, Vermooten and Spoelstra, regarded restraint of trade covenants to be prima facie void and its enforceability to be limited to special circumstances, which were in line with English law. The court subsequently concluded that the party

25 Suzman A 1968 85 "Book Reviews" *South African Law Journal* 91. Also see Kahn 1986 85 SALJ 393.

26 Par 504A-504C (n 17).

27 *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 3 SA 1092 (T).

alleging the existence of the special circumstances shall endure the onus, that is to say the onus would rest on the employer to prove the special circumstances which would render the restraint to be enforceable.

However, the learned judges agreed with some of the views expressed by Didcott J in *Roffey* in relation to the content of South African public policy, but determined that it was bound to a long line of decisions reached in other courts in relation to the onus of proof.²⁸ Moreover, Botha J partially agreed with Didcott J in relation to the time at which the validity and enforceability of restraint of trade covenants should be determined in light of South African public policy. Botha J subsequently rejected the rule in terms of English law that the validity of a restraint should be determined at the time of the conclusion thereof.²⁹ The learned judge held that the onus of proof is merely the starting point,³⁰ but for everything else the rules and principles of English law as applied within South African law is open to scrutiny.³¹ It was subsequently concluded that the validity and enforceability of restraints should be determined at the time the "court is asked to make the order" by taking into account all the relevant circumstances.³²

28 Botha J made this contention, despite his view that the law of precedent and the *stare decisis* principle was incapable of being defined. Also see par 1101B-1101F (n 17).

29 At par 1106D-1106I (n 27) the court also rejected the view held in *Aling and Streak v Olivier* 1949 1 SA 215 (T) in that the validity of a restraint clause should be determined at the date of the conclusion of the contract. It was submitted that, even though this was in line with English law as applied within South African law, the aforementioned case was wrongly decided on this point. Botha J expressed the view that even if one would follow English law it is not to say that all the rules and principles in terms thereof will be applicable to South African law (par 1102B-1102C (n 27)). The English rule relating to the time when the reasonableness or otherwise of a restraint of trade covenant should be assessed was rejected and it was concluded that the court should determine the validity and enforceability of a restraint at the time it was asked to do so and where it would be in a position to take into account all the relevant circumstances (par 1107F-1108A (n 27)).

30 At par 1100H-1101A (n 27) Botha J expressed the view that there was room for "legitimate differences in opinion" in relation to where the onus of proof should lie.

31 Par 1102C-1102F (n 27).

32 Par 1107G-1107H (n 27).

The third significant judgment was *Drewtons (Pty) Ltd v Carlie* (1981) (hereafter referred to as *Drewtons*).³³ In this matter the Cape Provincial Division as per judges Watermeyer, Van den Heever and Tebbutt, held that South African public policy regarded restraint of trade covenants to be prima facie valid and enforceable in accordance with Roman-Dutch law, unless the restraint was unreasonable.³⁴ However, the court only declared the position in relation to reasonableness without concluding the matter in relation to the onus of proof, but stated *obiter* that the onus should rest on the party wishing to escape the consequences of the covenant seriously entered into. The court further determined that it would have the power to partially enforce a restraint which is unreasonably wide, because public policy requires the enforcement of an agreement not *per se* invalid to be determined at the time when the court is asked to do so.

Moreover, it was held that, if one accepts the enquiry of reasonableness as being a factual one, the court should not have to determine whether the restraint is invalid, but rather "whether the court should lend its muscle for enforcing it".³⁵ Van den Heever J concluded that restraint of trade covenants are valid and the only enquiry should be whether the court should "compel compliance with a particular agreement or not at a given time".³⁶

In conclusion, even though some of the views expressed above reflected the content which should be ascribed to South African public policy, clarity was required by a court of higher authority to determine the status of restraint of trade covenants within South African law.

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

34 At par 311F-311G (n 33) the court held that it should not be accepted as "axiomatic" that restraint of trade covenants are contrary to public policy and that the foregoing would depend on a factual enquiry of the matter before the court.

35 Par 312D (n 33).

36 Par 312G (n 33).

4 Determining the content which should be ascribed to South African public policy

The content of public policy in light of restraint of trade covenants are generally based on two pillars, these being the freedom of trade on the one hand and the sanctity of contract on the other hand. However, in determining the content of public policy it does not imply the acceptance of one to the total exclusion of the other.³⁷ Furthermore, it is submitted that these principles coexist and are interdependent, but that an approach based on the preference of the sanctity of contract should be followed in determining the enforceability of restraint of trade covenants within South African law.

However, the approaches followed by South African courts prior to *Magna Alloys* reflected mostly English law based on the preference of the freedom of trade. The commonly quoted case of *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company Limited*,³⁸ was held to be the leading authority of the position of restraint of trade covenants within English law. In this case Lord MacNaghten held that both the public and the individual have an interest in every person's right to carry on his/her trade and that the limitation thereof would be contrary to public policy. The learned judge further contended that the limitation of one's freedom of trade will only be justifiable if the limitation is reasonable with reference to the interest of the parties on the one hand, and the community as a whole on the other hand.³⁹ Nonetheless, it was held that public policy can only be determined by having reference to its content at the present time, and it goes without saying that it cannot be accepted that the content of public policy would necessarily be the same as "a hundred and fifty years ago".⁴⁰

37 Par 505C-505E (n 17).

38 *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company Limited* 1894 AC 535.

39 At 565 (n 38), as quoted in *Highlands Park Football Club Ltd v Viljoen* 1978 3 SA 191 (W) 195A-195B. Also see par 887A-887C (n 1).

40 At 553-554 (n 38).

In contrast to English law which favoured the freedom of trade, an approach which favoured the sanctity of contracts would entail the "embodiment of the idea that agreements ought to be respected by the law". Differently worded, contracts entered into freely should be honoured by both the parties thereto and the law.⁴¹ The sanctity of contract will thus not mean that "the law must never interfere with agreements", but rather that such interference should "only occur if based on sound reasons".⁴² The same principle would therefore apply to restraint of trade covenants. However, the sanctity of contract will not apply to contracts which are contrary and/or damaging to public policy, that is to say, contracts which are unreasonable.⁴³

Accordingly, Du Plessis and Davis⁴⁴ expressed the view that the sanctity of contract and freedom to trade cannot be regarded as mutually exclusive, as the one manifests in the other. Consequently, both should be taken into account in order to determine the content of public policy, but the one which has preference over the other will subsequently determine the approach to be followed, this being either that restraints are regarded as being *prima facie* void or *prima facie* valid. Thus, the approach to be followed would be the starting point in determining the content of public policy as the measure for validity and enforceability of restraint of trade covenants within South African law. It is further submitted that because South African courts did not follow the right approach, the courts could not give adequate content to what was required by South African public policy in determining the enforceability of restraint of trade covenants. The aforementioned therefore led to contradictory judgments in this area of jurisprudence. In the article of Kahn as well as Du Plessis and Davis, there was an appeal for certainty made to the courts in order to establish a uniform approach in

41 Du Plessis and Davis 1984 *SALJ* 89.

42 Du Plessis and Davis 1984 *SALJ* 89.

43 Du Plessis and Davis 1984 *SALJ* 88.

44 Du Plessis and Davis 1984 *SALJ* 96.

determining the status of restraint of trade agreements within South African law by having reference to the specific content of public policy.

Kahn,⁴⁵ as early as 1968, declared that South African rules relating to public policy as applied by South African courts, were derived from English law, and that it was not derived from Roman-Dutch law. The courts thus accepted that "everyone should have complete freedom to trade and earn a living" as being determinative of the status of restraint of trade covenants and not the sanctity of contracts. Du Plessis and Davis expressed the need for courts to strike a balance between these principles of public policy and subsequently regarded the courts' failure to take into account the sanctity of contracts as one of the main reasons which led to conflicting approaches by South African courts in deciding on the status of restraint of trade covenants within South African law.⁴⁶

In light of the aforementioned it is further submitted that for the sanctity of contract to get preference over the freedom of trade, the court would require the restraint to protect a legitimate proprietary interest of the employer that is worthy of protection in terms of the law. Moreover, the court must approach restraint of trade covenants to be prima facie valid and enforceable and therefore give preference to the sanctity of contract, provided that the party who does not want to be bound to the consequences thereof would bear the onus to prove that it is contrary to public policy. However, the party merely has to prove that the employer does not have a legitimate proprietary interest that it seeks to protect through the restraint, to render the restraint of trade covenant contrary to public policy.

45 Kahn 1968 85 SALJ 394.

46 Du Plessis and Davis 1984 SALJ 95.

The importance of the sanctity of contract as a general principle of public policy was emphasised by Jessel MR in *Printing and Numerical Registering Co v Sampson*,⁴⁷ wherein the learned judge stated that:

If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.⁴⁸

Furthermore, Tredgold CJ highlighted the preference of the sanctity of contract within South African public policy in *Pest Control (Central Africa) Ltd v Martin*,⁴⁹ where he held that:

The rule against covenants in restraint of trade was built up at a time when freedom of trade was almost a fetish. I feel that the trend of modern decisions is to recognise that, whilst it is against public policy that trade should be fettered, it is also against public policy that contractual obligations solemnly undertaken should be avoided without strong and cogent reason.

It is therefore submitted that even if the sanctity of contract is to be preferred over the freedom of trade it does not suggest "the unqualified acceptance of one to the total exclusion of the other".⁵⁰ Therefore, neither would be disregarded, but whichever one prevails would subsequently be determinative of the question of whether a restraint of trade is regarded to be prima facie valid or not.⁵¹

Didcott J in *Roffey* unequivocally concluded that the sanctity of contract prevails within South African law in that the freedom of trade "does not vibrate nearly as strongly through our jurisprudence".⁵² Didcott J further

47 *Printing and Numerical Registering Co v Sampson* 1875 LR 19 EQ 462.

48 At 465 (n 47) as quoted at par 505H-505I (n 17).

49 *Pest Control (Central Africa) v Martin and Another* 1955 3 SA 609 (SR).

50 Par 505C-505F (n 17).

51 Par 505C-505F (n 17).

52 Par 505F (n 17).

submitted that the sanctity of contract further reflects a moral dimension in that "people should keep their promises".⁵³

As a mere opinion Botha J shared the view of Didcott J in *Roffey*, but held that whichever principle of public policy is to take preference over the other, merely constitutes a difference of opinion,⁵⁴ which did not justify a departure from the precedent established by South African courts over the preceding years.⁵⁵ The learned judge further held that the sanctity of contract may only be regarded as the preferred principle of public policy if it was reshaped by the Appellate Division to be as such.⁵⁶

In *Drewtons* Tebbutt J further declared that restraint of trade covenants "requires the same emphatic preservation as does the maintenance of the sanctity of contract" and that parties who entered freely into such covenants should be bound by them, unless its enforceability will be contrary to public policy.⁵⁷ It was held that the determination of public policy would require a value judgment,⁵⁸ which could be described as "the vehicle by which judicial discretion is introduced into the law".⁵⁹ Van den Heever J affirmed that "morality and public policy are not static concepts"⁶⁰ and that the meaning and content thereof would thus change and develop over time. Thus, what may be the content of public policy and be applicable today, may and will change over time. In relation to the correlation between the doctrine of *stare decisis* and public policy it was concluded that "*stare decisis* is not a bar to fresh judicial decision".⁶¹ Therefore, the court was not bound to follow the

53 Par 505 G-505H (n 17).

54 Par 1099H and 1100G-1101F (n 27).

55 Par 1100D-1100F and 1101E-1101F (n 27).

56 Par 1101E-1101F (n 27).

57 Par 317A-317D (n 33).

58 Du Plessis and Davis 1984 SALJ 96.

59 Du Plessis and Davis 1984 SALJ 89.

60 Par 311B (n 33).

61 Par 312I (n 33).

principles laid down by other courts in relation to the content to be ascribed to South African public policy.

Furthermore, it should be noted that South African law has always been based on the law of precedent, which in turn make subsequent courts reluctant to differ from earlier decisions, and specifically with reference to public policy. Thus, courts making judgments relating to public policy will bind subsequent courts in their judicial decisions. The aforementioned resulted in public policy, as determined by earlier judgments, acquiring the status of rule of law.⁶² Notwithstanding the aforementioned, Didcott J expressed the view in *Roffey* that the *stare decisis* principle has less force when one is considering and determining public policy and the content thereof.⁶³

Finally, by referring to the views expressed above, the Appellate Division as per the unanimous judgment handed down by Rabie JP⁶⁴ in *Magna Alloys*, declared and determined the content of South African public policy and the status of restraint of trade covenants in terms thereof. It was held that there is nothing in our common law which declares restraint of trade covenant to be contrary to public policy. However, whether it would be contrary to public policy would have to be evaluated with reference to the particular circumstances of the case. Restraint of trade covenants should therefore be regarded as prima facie valid and enforceable, unless the court is convinced that the enforcement thereof would be contrary to public policy.⁶⁵ The Appellate Division further approved the view held by De Beer Wn RP,⁶⁶ in that the approach followed by our courts in line with the English law did not reflect the

62 Du Plessis and Davis 1984 SALJ 91.

63 Par 506 H (n 17).

64 Joubert J, Trengove J and Van Heerden J all concurred with the judgment handed down by Rabie JP (par 908F (n 1)).

65 Par 891G-892A (n 1).

66 Page 610 *Katz v Efthimiou* 1984 4 SA 603 (O) as referred to in par 891D (n 1).

correct approach which ought to have been followed within South African public policy.⁶⁷

The Appellate Division conclusively determined that the sanctity of contract should be given preference within South African public policy and that the onus of proof should rest on the party who wishes to escape the consequences thereof. It thus answered the appeal by Kahn above and the submission of Du Plessis and Davis to "put flesh on the bare bones" of the principles and content of public policy governing the status of restraint of trade covenants within South African law.

In light of the aforementioned it is clear that the enforceability of restraint of trade covenants should be determined with reference to both pillars of public policy, these being the sanctity of contract on the one hand and the freedom of trade on the other hand.⁶⁸ Nonetheless, an approach should be followed which gives preference to the sanctity of contracts in that restraint of trade covenants are prima facie valid and enforceable, unless the enforcement thereof would be contrary to public policy.

5 Reasonableness

5.1 *Unequal bargaining power*

Ancillary to the requirement of reasonableness within English law was that a restraint of trade covenant entered into by parties of equal bargaining power should be "more favourably considered" when deciding the reasonableness of such a covenant, as opposed to one entered into by parties of "unequal bargaining strength".⁶⁹ If one refers to the equality or inequality of bargaining strengths, it is held that when one wants to take into account the opinions of parties with equal bargaining strength to be determinative of reasonableness, it can merely prove that

67 Par 891D (n 1).

68 Par 892D-892E (n 1).

69 Du Plessis and Davis 1984 *SALJ* 93-94.

a restraint of trade covenant is reasonable *inter partes* and will not render it to be reasonable as a whole.⁷⁰ This was the exemption to the rule of freedom of trade within English law.

However, Didcott J⁷¹ in *Roffey* contended that restraint of trade covenants within the employment relationship are approached with more caution and declared to be more reprehensible because of the "supposed inequality of employees". Moreover, the learned judge held that "economic development, industrial legislation, trade unionism and other modern phenomena" have strengthened the employees' bargaining position in order to balance it with the bargaining strength of their employers. The implication of inequality of bargaining strength whilst concluding a restraint of trade covenant will thus be viewed in light of the particular circumstances. Therefore one cannot hold an "obsolete assumption about the bargaining inequality of employees per se", but it should merely be taken into account as one of the factors whilst evaluating reasonableness.⁷²

In light of the above, it is thus clear that there cannot be a general assumption that restraint of trade covenants should be critically approached and readily be condemned on the basis of its nature.⁷³ However, Didcott J further noted that the court must have regard to an employee who was the weaker of the parties during negotiation, but that it should not be automatically assumed that the employee was the weaker of the parties. The foregoing should thus be one of the factors to be considered, but should not be determinative of the fairness and/or reasonableness of the restraint of trade.

On the other hand, Du Plessis and Davis contended that a restraint of trade covenant could not be merely reasonable because the parties

70 Du Plessis and Davis 1984 SALJ 95.

71 Par 495A (n 17).

72 Par 499G to 500A (n 17).

73 Par 499F (n 17).

were of equal bargaining strength when such a covenant was entered into. Du Plessis and Davis subsequently concluded that:

If the courts considered the opinions of parties of equal bargaining strength as expressed by their agreement as being important, then the requirement ought no longer to refer to the restraint being reasonable, it should be that the agreement containing the restraint is reasonable *inter partes*.⁷⁴

Resultantly, it must be noted that Du Plessis and Davis regarded bargaining power only to be important in order to determine the *inter partes* reasonableness of a restraint of trade covenant. Expressing a similar view, Van den Heever J in *Drewtons* held the inequality of bargaining strengths "to be totally irrelevant" if one approaches the restraint of trade covenant to be *prima facie* valid and enforceable, unless the enforcement thereof would be contrary to public policy.⁷⁵ The inequality of the parties' bargaining strengths was further declared as being "artificial" as most contracts are concluded on a somewhat unequal footing.⁷⁶

In conclusion, it is thus submitted that the inequality of bargaining power would thus not be the determinative factor of the reasonableness of a restraint of trade covenant. However, the inequality of bargaining strengths should not be regarded as totally irrelevant, but shall merely be one of the circumstances to be objectively evaluated in order to determine whether a restraint of trade covenant is reasonable or not.⁷⁷

5.2 Proprietary interest

As already stated above, English law regarded restraint of trade covenants to be *prima facie* invalid and unenforceable, unless the restraint could be proved to be reasonable *inter partes*. The foregoing

74 Du Plessis and Davis 1984 SALJ 95.

75 Par 313I (n 33).

76 As noted by Tebbutt J who concurred with Van den Heever J in par 317C-317D (n 33).

77 Par 500E-500F (n 17).

qualification of reasonableness was thus the only exemption to the general principle and was the only way in which a restraint of trade covenant could have been enforced within English law.

Furthermore, English law generally determined reasonableness with reference to "the nature of the protection afforded to the employer"⁷⁸ and the necessity for the conclusion of a restraint of trade covenant to protect such an interest of the employer. The test was thus whether the restraint was reasonable to protect the employer's interests.⁷⁹

However, it is submitted that the same principle would be applicable within South African law.⁸⁰ In relation to the reasonableness of a restraint by referring to the proprietary interest it seeks to protect, Botha J in *National Chemsearch* declared that:

... the restraint ... goes no further than is required to provide fair protection to the appellant against the first respondent in respect of its proprietary interest in its business connections with its customers and that it has accordingly been shown to be reasonable and enforceable ...⁸¹

In light of the above conclusion it is clear that an employer must have a legitimate proprietary interest that it seeks to protect through a restraint of trade, before such a restraint would be regarded as reasonable and subsequently enforceable. A legitimate proprietary interest is thus one of the determining factors which need to be taken into account in order to determine the reasonableness of a restraint.

Thus, if a restraint is unreasonably wide and the employer could not show that the restraint is necessary to protect its proprietary interest, the restraint could be considered to be unreasonable on that basis alone. Furthermore, if the employer is unable to show that it has a legitimate

78 Du Plessis and Davis 1984 SALJ 93.

79 Du Plessis and Davis 1984 SALJ 93.

80 Par 767E-767I *Basson v Chilwan* 1993 3 SA 742 (A).

81 Par 1110C-1110D (n 27).

proprietary interest that it seeks to protect through the conclusion of a restraint, the restraint could be viewed as a mere restraint against competition *per se*, which shall render it to be subsequently unreasonable and unenforceable.

In *Basson v Chilwan* (hereafter referred to as *Basson*),⁸² Nienaber JA clearly laid out the test to be followed in determining whether the employer had a legitimate proprietary interest that it sought to protect through a restraint of trade covenant, and stated that the following questions should be answered in that regard:

Vier vrae moet in dié verband gestel word:

- (a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?*
- (b) Word so 'n belang deur die ander party in gedrang gebring?*
- (c) Indien wel, weeg sodanig belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?*
- (d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te maak het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie? ...*

*Vir sover die belang in (c) die belang in (a) oortref, is die bepaling in die reël onredelik en gevolglik onafdwingbaar. Dit is 'n kwessie van beoordeling wat van geval tot geval kan wissel.*⁸³

Although the Appellate Division in *Magna Alloys* did not conclude the matter in relation to the importance of the proprietary interest that a restraint seeks to protect, it held that an unreasonable restraint would be contrary to public policy. It is therefore submitted that a restraint which does not protect a legitimate protectable interest of the employer, would be unreasonable and therefore contrary to public policy. It is further submitted that the above approach, as set down by Nienaber JA, would be the correct approach to be followed in order to determine whether the restraint seeks to protect a legitimate proprietary interest or not.

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

83 Par 767E-767I (n 82).

5.3 *Doctrine of severability or divisibility*

As referred to by Christie, the court is not entitled to "make a contract for the parties" when it is interpreting contracts.⁸⁴ However, when restraint of trade covenants have been too widely formulated, the court can use the doctrine of severability or divisibility in order to enforce it. Christie describes the value of this principle as follows:

It is unthinkable that the courts should not only tell the parties what they ought to have done but then make them do it by enforcing the court's idea of what the contract ought to have been. When a restraint clause has been so widely drawn as to be unreasonable, however, a rigid application of this rule will often lead to injustice.⁸⁵

The doctrine of severability can be applied to interpret and enforce restraint of trade covenants in light of reasonableness. Thus, if the unreasonable part of the restraint can be detached from the reasonable part of the restraint, the doctrine of severability can be used in order for the reasonable part to be enforced. Christie subsequently describes the basis of this principle to be the following:

The court is not making a contract for the parties any more than a surgeon makes a new person by amputating a limb. If the unreasonable portion is not severable the court can do nothing to help and the whole clause fails.⁸⁶

Severability is applicable where a restraint goes too far to be valid as a whole, but it does not prevent a court to enforce parts of the restraint insofar as it would be reasonable. However, the principle of severability should only be applied to the extent that the court is not making a "new agreement" between the parties.

Botha J in *National Chemsearch*, with reference to severability within English law, stated that he could not get "readily intelligible and

84 Christie *The Law of Contract* 423.

85 Christie *The Law of Contract* 423.

86 Christie *The Law of Contract* 423.

consistent criteria" for the applicability of the doctrine of severability in restraint of trade covenants. Botha J subsequently determined that the clauses of a restraint could be severable if it will not alter the nature of the restraint or the basic intent or objective of the clauses.⁸⁷

The learned judge further, and in accordance with the view of Christie above, stated that the courts should not be entitled to make a new agreement between the parties. Botha J summarises the power of the courts to be as follows:

Always the underlying rationale of our Court's approach is stated that *the Court will not carve out of an unreasonably wide covenant the maximum that the covenantee might legally have exacted, that the act of severance must be the act of the parties themselves*, and not of the Court, and that the Court will not make a new contract for the parties, one that they did not make themselves. In my respectful but firm opinion this traditional justification for the rules on severability is clearly unsound, both in principle and in logic. In principle, when the Court enforces a restraint partially, it is not making a new contract for the parties; it is simply *tailoring its own order in accordance with the dictates of public policy*.⁸⁸ (Own emphasis)

In English law the principle of severability or divisibility was referred to as the court drawing its "blue pencil" through the unreasonable clauses of a restraint of trade covenant. Botha J could not bring himself to agree with this approach as followed by South African courts, and concluded that it was "artificial, ill-defined, and internally inconsistent" and therefore declined it.⁸⁹

Consequently Botha J concluded that where the clauses in a restraint of trade covenant are "unreasonably wide in its scope of operation" the court would have the power to partially enforce the clauses which are

87 Par 1112F (n 27).

88 Par1114H-1115A (n 27).

89 Par 1115E-1115G (n 27).

reasonable by "limiting words" that will make the scope of operation of the restraint reasonable.⁹⁰

The position that the learned judge advocates is that if the clauses in the covenant could be considered independently or separately from one another, and the words that needed to be added did not change the nature of the restraint⁹¹ and did not constitute a "radical departure" therefrom, the court may partially enforce such a restraint by making use of the doctrine of severability. The extent of the doctrine of severability is describe by Botha J as follows:

I imagine that when an unreasonable restraint is so formulated that it would require *major plastic surgery*, in the form of a drastic recasting of its provisions, to make it reasonable, the Court will decline to perform the operation. That, however, is not the position in this case. Here the words required to be added are obvious and capable of easy formulation.⁹² (Own emphasis)

Furthermore, Botha J added that the doctrine of severability may be applied when its application is not "unduly oppressive" or if the "partial enforcement will not operate harshly or unfairly" towards the party who duly entered into such a restraint.⁹³

Consequently, Rabie JP in *Magna Alloys* concluded that if one takes into account that the enforceability of a restraint of trade covenant is dependent on public policy, the court would have the power to sever clauses which are against public policy and only to enforce those which are not contrary thereto.⁹⁴ It is therefore submitted that the view held by Botha J as confirmed by the Appellate Division in *Magna Alloys* is the correct one in relation to the doctrine of severability or divisibility of restraint of trade covenants within South African law.

90 Par 1116E-1116F (n 27).
91 Par 1116H-1116I (n 27).
92 Par 1117B-117C (n 27).
93 Par 1117E (n 27).
94 Par 896C-896E (n 1).

5.4 Particular circumstances

In English law the factors to be taken into account when determining the enforceability of a restraint of trade covenant, are those circumstances which existed when the restraint was concluded, and subsequent events would therefore be irrelevant.⁹⁵

As referred to by the Appellate Division in *Magna Alloys*, the correct view of the role of the particular circumstances in relation to the enforceability of restraints within English law, was the one held by Diplock LJ in *Gledhow Autoparts Ltd v Delaney*,⁹⁶ where it was held that:

...the question of the validity of a covenant in restraint of trade has to be determined at the date at which the agreement was entered into and has to be determined in light of what may happen under the agreement, although what may happen may be and always is different in some respects from what did happen. A covenant of this kind is invalid *ab ignition* or valid *ab initio*. There cannot come a moment at which it passes from the class of invalid into that of valid covenants.

In the South African case of *Aling and Streak v Olivier*,⁹⁷ Price J stated, in line with the English law approach, that the factors and circumstances that should be taken into account in relation to the enforceability of restraints, should be those prevailing at the time when the covenant was signed by the parties. The aforementioned approach was greatly criticised by Botha J in *National Chemsearch*.⁹⁸

Furthermore, Botha J held that the determination of the prevailing circumstances within English law should not be followed in South African law and stated that the reasonableness of a restraint of trade covenant should be determined with reference to "all the circumstances".⁹⁹

95 Par 894G (n 1).

96 Par 295D *Gledhow Autoparts Ltd v Delaney* 1965 3 All ER 288 as referred to in par 894H-894I (n 1).

97 At 219 *Aling and Streak v Olivier* 1949 1 SA 215 (T).

98 Par 1106G-11071108A (n 27).

99 Par 1105D (n 27).

Moreover, the enforceability of a restraint depends on public policy and the court would thus have to assess its enforceability at the time when it is asked to do so. Therefore the particular circumstances at the time when the enforcement is sought should be taken into account.¹⁰⁰ The learned judge further declared that the doctrine of severability does not have application to penalise the party seeking the enforcement of the restraint, but merely has reference to the circumstances the parties could not forecast when they entered into the restraint of trade covenant.¹⁰¹

Botha J expressed the view that, even if one follows the English law approach, the validity of restraint of trade covenants could not be determined on the date of their conclusion, without having reference to the subsequent development of events in terms thereof, and declared that the English rule was not a general rule within South African law.¹⁰²

Furthermore, Van den Heever in *Drewtons* stated that it would only be logical for a court to refer and take into account the circumstances at the time when the court is asked to determine whether a contract is illegal or not and not the circumstances at the time of the conclusion of the contract.¹⁰³

However, it is submitted that in terms of South African public policy the factors or circumstances which should be taken into account, should be those prevailing at the time when the enforcement of a restraint of trade covenant is sought.¹⁰⁴

Moreover and in light of the above it is clear that even if the English law approach was to be followed, the court would have to decide whether to "compel compliance with a particular agreement or not at a given time"

100 Par 1107H-1107I (n 27).

101 Par 1107H-1107I (n 27).

102 Par 1107I-1108A (n 27).

103 Par 312D-312E (n 33).

104 Par 507H (n 17).

and therefore the circumstances at the time when the court is requested to enforce a restraint should be taken into account.¹⁰⁵

Accordingly, the Appellate Division approves and summarises the above approach to be as follows:

The Courts should guard the interest of the community in light of the general sense of justice of the community, when the Court is best able to judge it and when the Court is best able to guard it, and that is when the Court is asked to enforce a provision in an agreement. There is no proper guardianship if the Court, concerned only to give effect to the state of affairs as it may have applied many years ago when an agreement was concluded, ignores what may be vital considerations at the time of judgment ...

The court will thus not be in a position to evaluate the reasonableness of a restraint of trade covenant if it does not have regard to the circumstances when the enforcement is sought, as it will not have adequate facts before it and will not be able to effectively determine the position in relation thereto.

Subsequently, the Appellate Division in *Magna Alloys* determined that the question whether a restraint of trade covenant would infringe public policy, should be considered in light of the "relevant circumstances prevailing at the time that judgment on the contract is sought" as it would be the content of current public policy which shall determine whether the enforcement would be reasonable or not.¹⁰⁶ In conclusion it is thus clear that the circumstances when the enforcement of a restraint is sought should be taken into account in order to determine whether a restraint would be enforceable and not contrary to public policy.

105 Par 880A (n 1).

106 Par 879F (n 1).

6 Onus of proof

The general principle applicable to the onus of proof is that the party making the allegation should prove it.

In English law the onus of proof traditionally rested on the party who wished to enforce the restraint of trade covenant to prove that it was reasonable *inter partes*. The aforementioned was in line with the approach that restraint of trade covenants were regarded as prima facie unenforceable, which would only be valid and subsequently enforceable if the party wishing to impose the restraint could prove that the restraint was reasonable *inter partes*.¹⁰⁷

Botha J in *National Chemsearch*, held that there was no rational reason for the court to "depart from the principle so well established in case law", this being the principle that restraint of trade covenants are contrary to public policy, and that same will only be enforceable when "there are special circumstances to justify them".¹⁰⁸ The onus to prove such special circumstances will rest on the person making the allegation, being the party who wished to enforce the restraint of trade. However, the learned judge expressed the opinion that the onus of proof was a "matter that is fairly arguable both ways".¹⁰⁹

Botha J further held that the onus is the "starting point" of the enquiry and where the rules are uncertain, which he adds must be rare, it would also be determinative of the outcome. It was thus of utmost importance to establish where the onus of proof will lie, before one could make a determination in relation to the validity and enforceability of restraint of trade covenants within South African law.¹¹⁰ Notwithstanding the preceding argument, Botha J further declared that:

107 Du Plessis and Davis 1984 SALJ 98.

108 Par 1101G to 1101I (n 27).

109 Par 1102B (n 27).

110 Par 1102C-1102D (n 27).

For the rest, every refinement of the English law relating to restraints of trade is open to scrutiny with a view of deciding, first, to what extent it has already been followed in our own case law, and secondly, whether it deserves to be followed, on its merits ... I am of the view that this Court should decline to follow English precedent, although they have previously been followed in our Courts.¹¹¹

Although Botha J approached the matter on the basis that the onus of proof should rest on the employer to prove the existence of special circumstances that justifies the enforcement of the restraint, his reasoning was based on the premise that he was obliged by the doctrine of precedent to follow the decisions reached in other courts.¹¹²

However, in *Drewtons* the court determined that the onus of proof would rest where the law of contract has put it, this being "he who has seriously concluded an agreement" and who does not want to be bound by it should bear the onus to prove that it is contrary to public policy, despite being "neither illegal nor immoral".¹¹³

Didcott J in *Roffey*,¹¹⁴ in accordance with the reasoning followed by Du Plessis and Davis,¹¹⁵ declared that the status of restraint of trade covenants should be determined with reference to whether the restraint of trade covenant is regarded as being prima facie valid and enforceable or otherwise, rather than with reference to the onus of proof, as the onus of proof will be dependent on the initial approach followed, which may differ in each case. Du Plessis and Davis further submitted that the "substantive issue is whether the restraint is reasonable or not " and that the interests of the parties must be balanced in relation to what is reasonable *inter partes*. As a result, the writers declared that a restraint of trade covenant will only be reasonable if the party with greater

111 Par 1102F (n 27).

112 Par1100D-1100F and 1101E-1101F (n 27).

113 Par 313B-313C (n 33).

114 Par 504B-504C (n 17).

115 Du Plessis and Davis 1984 SALJ 100-101.

bargaining strength can prove that "he did not misuse his more powerful bargaining position" when the restraint of trade covenant was concluded.¹¹⁶

In *Drewtons Tebbutt J*, who concurred with Van den Heever J in relation to the onus of proof, approved the position as held in *Roffey* and determined that:

In regard to the question of onus, however, VAN DEN HEEVER J has suggested that, although there is a long line of decisions of single judges in this Division in which it has been held that the onus lies on the promisee, ie the person seeking enforcement of a restraint clause, to establish its reasonableness, stare decisis should not prevent this Court, should it consider it to be the true legal position under Roman-Dutch law, from deciding that the onus rests upon the promisor, ie the person resisting its enforcement.¹¹⁷

In line with the view of Didcott J, Burger J in *Stewart Wrightson (Pty) Ltd v Minnitt*¹¹⁸ also declared that the onus of proof should rest on the person resisting the enforcement of the restraint of trade covenant.

Subsequently, the Appellate Division in *Magna Alloys* determined that the onus of proof should be put where our law has put it and not where English law (as declared by Botha J) has put it. Rabie JP further declared that the onus should rest on the party who is resisting the enforcement of the restraint, to prove that the enforcement thereof would be contrary to public policy.¹¹⁹ It was further held that, because the restraint of trade was to be regarded as prima facie valid and enforceable, the unreasonableness thereof as part of a defence in relation to the infringement of public policy, should be alleged and proved by the party relying on such a defence, this being the employee party.¹²⁰ Furthermore, it was affirmed that our courts "have always

116 Du Plessis and Davis 1984 SALJ 101.

117 Par 315H-315I (n 33).

118 Par 405EG *Stewart Wrightson (Pty) Ltd and Another v Minnitt* 1979 3 SA 399 (C).

119 Par 879A-879B (n 1). Also see par 504B-504C (n 17); par 313B-313D (n 33).

120 Par 879D (n 1).

accepted that the validity . . . depends on reasonableness",¹²¹ and that an unreasonable restraint of trade covenant would in general be against public policy.¹²²

In determining the enforceability of a restraint of trade covenant, the court would thus have regard to the principles of South African public policy and will subsequently evaluate the enforceability of the restraint in light of the particular circumstances. Furthermore, it is submitted that, because the sanctity of contract has preference within South African public policy, the onus of proof will rest on the party wanting to escape the consequences of the restraint. As referred to above, a restraint of trade covenant is regarded as a valid contract, and therefore the party who does not want to be bound by the contract freely entered into, should bear the onus to prove that he/she should not be bound based on the premise that the enforcement of the restraint would be contrary to public policy.¹²³

On the other hand it is further essential to note that an employer, who acknowledges a restraint of trade covenant to be too widely formulated and seeks to only enforce a part of the covenant, does not "thereby attract the burden of proof to himself".¹²⁴ Differently worded, the doctrine of severability will not shift the onus to the employer to prove the restraint to be reasonable. The employee would have to prove that the enforcement of the restraint would be contrary to public policy, whereafter the court would have to determine, in light of the circumstances, whether the enforcement of the restraint would be reasonable or not. In conclusion, it is thus clear that the onus of proof would rest on the party who seeks not to be bound by the restraint, to prove that it is contrary to public policy and should therefore not be enforced.

121 Par 881B-881D (n 1).

122 Par 893H-894C (n 1).

123 Par 896H-897A (n 1).

124 Christie *The Law of Contract* 422.

7 Conclusion

In light of the above discussion the author shares the view of Kahn in that the conflicting approaches followed by South African courts in relation to the principles pertaining to restraint of trade covenants within South African law (prior to *Magna Alloys*) was attributed to the failure to ask, "whence have the rules come".¹²⁵ As a result, it is submitted that the courts were unable to determine the principles pertaining to restraints within South African law, because they were unable to give adequate content to South African public policy.

The courts blindly followed the judgments of other South African courts thinking that it was the position within South African law, without examining or determining the application thereof within the South African legal context. The courts have failed to examine the historical origins and theoretical foundations of restraint of trade covenants within South African law and unquestioningly applied English law, thinking that it was the correct approach to follow.

Furthermore, as is evident from the above discussion, the English law regarded restraint of trade covenants to be *prima facie* void, that is to say *prima facie* invalid and unenforceable, unless it was proven to be reasonable *inter partes*. However, as concluded by the Appellate Division in *Magna Alloys*, the position within South African law proved to be quite different from English law.

The Appellate Division brought clarity to the endless debate around the status of restraint of trade covenants within South African law and determined that it should be regarded as *prima facie* valid and enforceable, unless its enforcement would be contrary to public policy. The court further held that South African common law did not hold

¹²⁵ Kahn 1968 85 SALJ 394.

restraints to be invalid, but that such an approach was derived from English law. The law of contract was affirmed as a principle of South African law in terms of which contracts entered into freely, including restraints, should be honoured and will only be unenforceable if it is contrary to public policy. In order to determine whether a restraint is enforceable or not, the court would thus have to take into account the particular circumstances at the time when the enforcement is sought.¹²⁶

In light of the conclusion drawn by the Appellate Division above, it is clear that restraint of trade covenants are not contrary to South African public policy and should therefore be regarded as prima facie valid and enforceable, unless its enforcement would be contrary to public policy. This dissertation shall forthwith proceed to examine the implication and application of the status of restraint of trade covenants within South African law as determined above, in light of the constitutional right of every citizen to choose his/her trade, occupation and profession freely in terms of the Constitution,¹²⁷ which shall be discussed in more detail in chapter 3.

126 Par 897F-898D (n 1).

127 In terms of section 22 of the *Constitution of the Republic of South Africa*, 1996.

CHAPTER 3: FUNDAMENTAL RIGHT TO FREEDOM OF TRADE

1 Introduction

As already stated in chapter 1 of this dissertation, South African law is governed by the *Constitution of the Republic of South Africa, 1996* (hereafter referred to as the Constitution), which is the "supreme law of the Republic" and any "law or conduct" that is inconsistent therewith shall be subsequently invalid.¹

Furthermore, section 22 of the Constitution entrenches every citizen's right of freedom "to choose their trade, occupation and profession freely", provided that the practise thereof "may be regulated by law". It has been accepted that the right to choose one's trade, occupation and profession includes the right to practise it.²

This constitutional right thus necessitates an evaluation of the validity and enforceability of restraint of trade covenants within the context of the current constitutional framework of freedom of trade,³ with reference to the aims and objectives of the Constitution in order to determine the status of restraint of trade covenants today, and to determine whether it would still be valid and enforceable in the context of the employment relationship, despite the constitutional entrenchment of the right to freedom of trade.

The Constitution was preceded by the *Constitution of the Republic of South Africa Act 200 of 1993* (hereafter referred to as the Interim Constitution). The Interim Constitution is useful in evaluating the implication of restraint of trade covenants on the right to freedom of trade, as both the Constitution and the Interim Constitution had similar

1 Section 2 of the *Constitution of the Republic of South Africa, 1996*.

2 *Affordable Medicines Trust and Others v Minister of Health, RSA and Another* 2005 JOL 13932 (CC).

3 In terms of section 22 of the *Constitution of the Republic of South Africa, 1996*.

objectives, but contained somewhat differently worded provisions and content for the protection of the freedom of trade.⁴

As stated in chapter 2 of this dissertation, the principles pertaining to restraint of trade covenants within South African law have been clarified and entrenched by the decision of the Appellate Division as per Rabie JP in *Magna Alloys*⁵ in terms whereof restraint of trade covenants are regarded as being prima facie valid and enforceable, unless the enforcement thereof will be contrary to public policy, and in terms of which the onus to prove that the restraint is contrary to public policy rests on the person who alleges that he/she should not be bound by the provisions of the restraint.

The current status of restraint of trade covenants within South African law shall forthwith be evaluated in the context of the constitutional right to freedom of trade with reference to its validity and enforceability in light of what public policy dictates.

2 Provisions contained in section 26 of the Interim Constitution compared to the provisions of section 22 of the Constitution

In terms of section 26 of the Interim Constitution "every person" had the right to:

(1) ... freely... engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

4 The right of freedom of trade was regulated by section 26 of the *Constitution of the Republic of South Africa Act 200 of 1993* and is currently regulated by section 22 of the *Constitution of the Republic of South Africa, 1996*.

5 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 863 (A).

On the other hand section 22 of the Constitution was limited in the sense that it only provides for the protection of "every citizen" in that:

Every citizen has the right to choose their trade, occupation or profession freely. The practice (*sic*) of a trade, occupation or profession may be regulated by law.

In light of the aforementioned provisions it seems that the provisions sought to protect different rights. However, if one does a closer evaluation and analysis of the provisions and the background against which they were drafted, the nature and objective of the rights still stayed the same. The author shall forthwith endeavour to analyse the differences and highlight the similarities of the above provisions in the context of the status of restraint of trade covenants within South African law.

2.1 Freedom to engage in economic activity in terms of section 26 of the Interim Constitution

2.1.1 Introduction

In *S v Lawrence; S v Negal; S v Solberg*⁶ (hereafter referred to as *Lawrence, Negal and Solberg*) the Constitutional Court had to consider whether the appellants were in contravention of the *Liquor Act 27 of 1989* (hereafter referred to as the *Liquor Act*). The appellants (being *Lawrence, Negal and Solberg*) were charged individually in relation to contraventions of the provisions regarding grocer liquor licenses, and the stipulated periods in which liquor could be sold, and relied on similar defences in that the various provisions of the *Liquor Act* were inconsistent with section 26 of the Interim Constitution. The Constitutional Court subsequently had to interpret section 26 in relation to the right to "economic activity" and determine whether the provisions contained in the *Liquor Act* infringed this constitutional right.

6 *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC).

The appeals in relation to the interpretation and protection afforded in terms of section 26 were in short based on the following: Firstly, *Lawrence's* appeal was based on the premise that the provision which stipulated that liquor may only be sold within certain hours, was contrary to the right afforded in terms of section 26 of the Interim Constitution. Secondly, *Negal's* appeal was based on the premise that a grocer must be entitled to not only sell table wine, but also to sell beer and ciders as the prohibition on same constituted an infringement of the appellant's right to engage freely in "economic activity" in terms of section 26 of the Interim Constitution. Thirdly, *Solberg's* appeal held that the provision in the Liquor Act which stipulated that no liquor may be sold on Sundays was, so it was held, contrary to the appellant's right to freedom of religion as entrenched by section 14 of the Interim Constitution and therefore an infringement of and contrary to the appellant's right in terms of section 26 of the Interim Constitution. All the judges concurred with the judgment of Chaskalson P in relation to both *Lawrence's* and *Negal's* appeal and only differed in relation to *Solberg's* appeal.

In relation to the *Solberg* appeal, it is prudent to note that Chaskalson P (with whom Sachs J concurred) held that the aforementioned provision could constitute an infringement of section 14, but that same was justifiable in terms of section 33 of the Interim Constitution.⁷ However, O'Regan J held a different opinion in that such a provision is contrary to section 14 and found the provision contained in the Liquor Act, which prohibits the sale of liquor on Sundays, to be unconstitutional. For current purposes, however, the right to freedom of religion as contained in section 14 of the Interim Constitution will not be discussed, but only the implication of the provisions in relation to the fundamental right to engage in "economic activity" as stipulated in section 26, and the

7 Section 33 was the limitation clause in terms of the *Constitution of the Republic of South Africa Act 200 of 1993*, which is similar to section 36 of the *Constitution of the Republic of South Africa, 1996*.

justifiability thereof with reference to the proportionality test in terms of section 33 of the Interim Constitution.

The scope and ambit, as well as the onus of proof and the role of courts in determining and interpreting the rights as contained in the Interim Constitution, shall forthwith be discussed in more detail.

2.1.2 The scope, ambit and application of section 26 of the Interim Constitution

The appellants mentioned above contended that section 26 of the Interim Constitution afforded them the right to freely engage in economic activity and that section 26 should be interpreted to "encompass all forms of economic activity and all methods of pursuing a livelihood" and that it may only be limited in cases of criminal activity or conduct, which could lead to criminal sanctions being imposed.⁸ The appellants further held that all other activity, other than that which can be regarded as criminal, can be justified under section 26(2) of the Interim Constitution. It was further held that section 26(1) constituted the right and section 26(2) constituted "special limitations" of subsection (1) and that section 33 of the Interim Constitution (the limitation clause) was not applicable insofar as "economic activity" was concerned.⁹

Section 33 of the Interim Constitution contained provisions similar to section 36 of the Constitution regarding the limitation of constitutional rights, which shall be discussed in more detail below. For current purposes, however, it is only necessary to take cognisance of the fact that constitutional rights could only be limited in terms of section 33 of the Interim Constitution if such a limitation was reasonable and justifiable in an open and democratic society based on freedom and equality (proportionality test).

8 Par 26 (n 6).

9 Par 27 (n 6).

However, Chaskalson P was of the view that an interpretation of section 26 as contended by the appellants, will not give sufficient weight to the content of the provision, as section 26(1) and 26(2) should be read together in order to determine the content of the clause. Chaskalson P emphasised that if it is held that "economic activity" may only be limited and regulated in terms of subsection (2), any regulation might be "invalid no matter how reasonable or even necessary such regulation might be".¹⁰ The learned judge concluded that there is no justification for such a construction and interpretation of the provision.

Chaskalson P further analysed and described the purpose of both section 26(2) and section 33 of the Interim Constitution to be as follows:

The criteria prescribed by section 26(2) and section 33 are different. Section 26(2) is directed in the first instance to the "design" of the measure. If it is "designed" to promote the protection or improvement of any of the matters referred to in the subsection, and is a measure justifiable in an open and democratic society based on freedom and equality, it does not infringe section 26. Section 33 calls for a proportionality test which does not form part of a section 26(2) analysis. If sections 26(1) and (2) are read together as defining the right effect can be given to both section 26(2) and section 33. There is accordingly no reason why section 26 should be construed as excluding the operation of section 33.¹¹

According to the learned judge section 26 could be interpreted in two ways. Firstly, that section 26 stipulated who was entitled to the right to "economic activity" and where such right could be exercised, being within the "national territory" and that such a clause was necessitated by "job reservation, influx control and monopolies" which were present within our historical context,¹² provided that such a right may be subject to some limitations within the law.

10 Par 28 (n 6).

11 Par 30 (n 6).

12 Par 31-32 (n 6).

In relation to limitations of the above right, which shall be justifiable in an open and democratic society, Chaskalson P further declared that:

Certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. For instance, nobody is entitled to practise as a doctor or as a lawyer unless he or she holds the prescribed qualifications, and the right to engage "freely" in economic activity should not be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary. Arbitrariness is inconsistent with "values which underlie an open and democratic society based on freedom and equality", and arbitrary restrictions would not pass constitutional scrutiny.¹³

With reference to the aforementioned it is thus clear that the right to "economic activity" should be read with the "designed" measures and that the measures, if they are aimed at the limitation of the constitutional right, should be reasonable and justifiable in an open and democratic society based on democratic values as stipulated in section 33 of the Interim Constitution, provided that it is not arbitrary and that the right to engage therein shall be an entitlement to do so "freely" with others and in accordance with the law.¹⁴

Secondly, the judge held, as contended by the appellants, that section 26 can be interpreted to mean that subsections (1) and (2) should be read together and that all limitations of "economic activity" which fell outside the purview of section 26(2) should be contrary to section 26. Counsel for the appellants attempted to construe the word "design" to mean "designed to achieve".¹⁵ Chaskalson P adopted the definition of "design" to mean the "purpose or intend (a thing) to be or do (something); to mean (a thing) to serve some purpose" and that there should be a rational connection between the means and the end in light of the qualification of justifiability in an open and democratic society

13 Par 33 (n 6).

14 Par 34 (n 6).

15 Par 39 (n 6).

based on democratic values, in other words by taking into account both section 26(2) (the rationality test) and section 33 (the proportionality test) of the Interim Constitution.¹⁶

The learned judge subsequently concluded that section 26 of the Interim Constitution should be interpreted as follows:

Section 26 should not be construed as empowering a court to set aside legislation expressing social or economic policy as infringing "economic freedom" simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems. If section 26(1) is given the broad meaning for which the appellants contend, of encompassing all forms of economic activity and all methods of pursuing a livelihood, then, if regard is had to the role of the courts in a democratic society, section 26(2) should also be given a broad meaning. To maintain the proper balance between the roles of the legislature and the courts section 26(2) should be construed as requiring only that there be a rational connection between the legislation and the legislative purpose sanctioned by the section.¹⁷

Chaskalson P expressed the view that the rational basis test should be applied to section 26 and that the proportionality analysis in relation to "reasonableness" in terms of section 33 does not form part of a section 26 analysis, but that it could be limited in terms thereof. In other words there must be a rational connection between the legislation and the legislative purpose which is aimed at limiting the right as contained in section 26(1), provided that it should still answer to the proportionality test in terms of section 33 and be reasonable and justifiable in an open and democratic society based on democratic values which underlie the Constitution.

However, in *Jordan v S*¹⁸, the question before the Constitutional Court was whether prostitution and brothel-keeping were protected under section 26 of the Interim Constitution. Although section 22 of the Constitution was already in force the question had to be decided in terms

¹⁶ Par 40-41 (n 6).

¹⁷ Par 44 (n 6).

¹⁸ *Jordan and Others v S and Others* 2002 11 BCLR 1117 (CC).

of section 26 of the Interim Constitution, as the proceedings were pending when the Constitution came into force and therefore would be governed by the Interim Constitution.¹⁹ The Constitutional Court stated that subsections (1) and (2) must be read together and therefore be interpreted as follows:

... section 26(1) and (2) of the Interim constitution must be read together as meaning that all constraints upon economic activity and the earning of a livelihood that fall outside the purview of subsection (2) are in breach of section 26. All that subsection (2) requires is that there should be a rational connection between the legislation and the legislative purpose sanctioned by subsection (2). Once it is established that the purpose of the prohibition is sanctioned by subsection (2), the question whether the purpose is justifiable in an open and democratic society based on freedom and equality is essentially a question of law.²⁰

The Constitutional Court therefore held that section 26(1) and (2) should be read together in that there must be a rational connection between the legislation and the legislative purpose, provided that once the rational connection had been established, the question relating to reasonableness and justifiability shall be decided on as a question of law.

The Constitutional Court as per Ngcobo J held that it is the responsibility of the legislature to enact legislation to "combat social ills", and where applicable, it may do so by criminalising certain activities, which it did in relation to prostitution and brothel-keeping, and subsequently concluded that it is not for the court to decide whether such legislation is effective or whether the public policy would be better served if prostitution was legalised, but rather to enforce same in light of the aim and content thereof. The Constitutional Court therefore concluded that prostitution and brothel-keeping will not enjoy protection under section 26 of the Interim Constitution.²¹

19 Par 2 (n 18).

20 Par 23 (n 18).

21 Par 26 and 30 (n 18).

O'Regan and Sachs JJ concurred with the judgment by Ngcobo J and further accepted the interpretation of section 26 as held in *Lawrence* and declared that section 26(2) entitled the state to take measures "designed to promote the protection or the improvement of the quality of life".²² The learned judges further held that such measures should be reasonable and justifiable in an open and democratic society based on democratic values and that "leeway" must be given to the legislature in order to determine which measures "will achieve the desired purpose".²³ It was further concluded that prostitution does have an impact on the quality of life and therefore the state had the discretion to enact legislation in order to regulate such conduct, provided that it did not unjustifiably²⁴ infringe other fundamental rights contained in the Bill of Rights.

In conclusion, the above appeals were dismissed based on the premise that one does not enjoy an unlimited right to engage in "economic activity" as afforded in terms of section 26(1) and that the state is entitled to enact legislation (which shall be rationally connected to the legislative purpose) in order to regulate the conduct. The question as to whether legislation is reasonable and justifiable shall thus be determined as a question of law with reference to the proportionality test as contained in section 33.

2.1.3 *The onus of proof*

The appellants in *Lawrence*, *Negal* and *Solberg* contended that the onus should rest on the state to prove that the provisions of the Liquor Act fell within the ambit of the measures contained in section 26(2) of the Interim Constitution.²⁵ In light of the somewhat similar clause in the Indian Constitution, Chaskalson P expressed the view that this clause was construed as a limitation of the right in terms section 26(1), which

22 Par 55 (n 18).

23 Par 55 (n 18).

24 Meaning justifiable in an open and democratic society as stipulated in terms of section 33 of the *Constitution of the Republic of South Africa Act 200 of 1993*.

25 With reference to section 19 of the Indian Constitution.

required laws to be reasonable, and that this element of reasonableness in the construction should put the onus of proof on the litigant, which relies on the limitation. However, the learned judge concluded that such onus of proof shall have application in the context of section 33 of the Interim Constitution, which relates to reasonableness and justifiability (proportionality), but that it will not necessarily be applicable to the limitation contained in section 26(2) which is based on rationality. The learned judge further contended that the provision in the Indian Constitution cannot, in any event, be of any assistance to the appellants as the Indian court already determined that liquor is a "harmful substance" and that subsequent laws which are aimed at the regulation and limitation of same, did not infringe the Indian constitutional provision of the right "to practice (*sic*) any profession" or to "carry on any occupation, trade or business".²⁶

However, Chaskalson P did not determine where the onus of proof should lie. He held that the onus of proof would ultimately be a question of law. The learned judge subsequently determined that the question which needs to be decided, being that the onus of proof in relation to section 26(2), "is likely to be less important" when one is concerned with adjudicative facts and not with legislative facts.²⁷ The learned judge emphasised the importance of distinguishing between legislative and adjudicative facts in determining the onus of proof and with reference to authority, stated that legislative facts have a more general character concerning the "social or economic milieu which gave rise to litigation" and that adjudicative facts related to the "immediate parties to the litigation" being "who did what, where, when, how and with what motive or intent".²⁸ The onus of proof therefore related to adjudicative facts and was, according to Chaskalson P, less important when one deals with section 26(2).

²⁶ Par 48-50 (n 6).

²⁷ Par 52 (n 6).

²⁸ As held by Professor Hogg in "Proof in Constitutional Cases" 1976 26 *University of Toronto Law Journal* 395 as quoted in par 52 (n 6).

2.1.4 *The powers of the court*

Negal's appeal was mainly based on the contention that grocers should be permitted to sell beer and ciders and not only wine, and that it was irrational to permit grocers only to sell wine and not beer and ciders. Chaskalson P declared that the provision contained in the Liquor Act,²⁹ in actual fact extended the right of grocers to participate in the liquor trade and that the appellant was therefore bound to the conditions in terms whereof such an extension was made. However, the appellant did not challenge the constitutionality of the provisions contained in the Liquor Act, but asked the court to order that, to the extent that a grocer's wine licence prohibits the sale of beer and ciders, it should be declared to be "inconsistent with the Constitution and invalid".³⁰

Chaskalson P declared that the court's power is limited to striking down provisions and to "sever or read down provisions" which are inconsistent with the Constitution and it may "fashion orders to give effect to the rights protected by the Constitution", but it cannot enact new legislation, because that is the exclusive power of the legislature.³¹

2.1.5 *Conclusion*

In light of the above it is thus clear that the court applied a two-fold test in determining the constitutionality of the provisions contained in the Liquor Act. Firstly, the court had to consider whether the provisions of the Liquor Act fell within the measures contained in section 26(2) of the Interim Constitution and accepted that the excessive consumption of alcohol is "socially evil"³² and that "measures controlling and reducing

29 As held in section 87 of *The Liquor Act 27* of 1989 which is an exemption from the provisions of section 40 of the same act.

30 Par 78 (n 6).

31 Par 80 (n 6).

32 Par 54 (n 6).

consumption" were needed.³³ It was held that the objective of the measure was recognised by section 26(2) in that it led to the "improvement of quality of life". Secondly, the court had to consider whether there was a rational connection between the means and the end, being the legislation and the purpose or objective of the legislative measure.³⁴ The court established that there was a rational connection between the measure, being the measures as stipulated in the Liquor Act, and the objective of the measure, being a better quality of life, which was reasonable and justifiable in an open and democratic society based on democratic values in terms section 33 of the Interim Constitution.³⁵

2.2 The right to freedom of trade, occupation and profession in terms of section 22 of the Constitution

2.2.1 Introduction

In light of the above discussion of section 26 of the Interim Constitution, it is evident that the wording significantly differed from the wording used in section 22 of the Constitution, but as held by Currie and De Waal³⁶ "it is more difficult to pinpoint the differences in content" between the current provision and its predecessor. In terms of the wording used in section 22 of the Constitution it seems, on the face of it, that it is more limited in scope and application than section 26 of the Interim Constitution.

Jones J in *JR 1013 Investments CC v Minister of Safety and Security*³⁷ declared that the difference in wording of section 26 of the Interim Constitution and section 22 of the Constitution, is an indication of the different content it seeks to protect. The learned judge declared that:

33 Currie and De Waal *The Bill of Rights Handbook* 486.

34 Currie and De Waal *The Bill of Rights Handbook* 486.

35 Par 68 (n 6).

36 Currie and De Waal *The Bill of Rights Handbook* 487.

37 *JR 1013 Investments CC and Others v Minister of Safety and Security and Others* 1997 7 BCLR 925 (E).

If regard is had (a) to the history of job discrimination in this country which section 22 seeks to redress, (b) the deliberate wording of that section, and (c) the respects in which the wording of section 22 differs from the wording of its predecessor, section 26 of the Interim Constitution, there is no room for a finding that the two sections in reality seek to protect rights and freedoms with exactly the same content.³⁸

The content of the right as stipulated in terms of section 22 of the Constitution shall be discussed in more detail below.

2.2.2 Interpreting rights contained in the Bill of Rights

In terms of section 39(1) of the Constitution, the court should, when interpreting rights contained in the Bill of Rights, consider the following:

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

Furthermore, when the court is interpreting any legislation or developing common law, it must "promote the spirit, purport and objects" of the Bill of Rights and recognise that 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 not inconsistent with the rights contained in the Bill of Rights.³⁹

Therefore, in interpreting section 22 the court will thus take all of the above into account, which have specific application in relation to the common law principle of the sanctity of contracts in general and the implication of restraint of trade covenants in specific, as will be discussed in more detail below.

³⁸ At 930 (n 37).

³⁹ Section 39(2) and (3) of the *Constitution of the Republic of South Africa, 1996*.

2.2.3 Scope, ambit and application of section 22 of the Constitution

Section 22 of the Constitution was drafted in accordance with and to reflect a similar provision as contained in article 12(1) of the German Constitution, which provides as follows:

All Germans have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice (*sic*) of trades, occupations and professions may be regulated by law.⁴⁰

As held by Currie and De Waal⁴¹ the similarities between section 22 and section 12(1) of the German Constitution will have "considerable comparative value" when one needs to consider the scope, ambit and implication in relation to the interpretation of section 22 of the Constitution in light of section 39(1), as it contains similar worded provisions.

The leading case in German law on the interpretation of article 12(1) has been the *Apotheken*-decision,⁴² wherein the German Constitutional Court emphasised the importance of the right in stating that:

... the connections between the guarantee and the value of individual autonomy: work, according to the court, "shapes and completes the individual over a lifetime of devoted activity ... it is the foundation of a person's existence".⁴³

The court held that article 12(1) contained the authority to lay down rules for the "exercise and choice of vocation, but not with the same

40 As quoted in Currie and De Waal *The Bill of Rights Handbook* 487.

41 Currie and De Waal *The Bill of Rights Handbook* 487.

42 7BVerfG 337 (1958) as referred to in Currie and De Waal *The Bill of Rights Handbook* 487, which translation is to be found on Anonymous Foreign Law Translations – BverfG 7, 337 *Apotheken*-decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

43 Currie *The Constitution of the Federal Republic of Germany* (1994) 299 as quoted and refer to in Currie and De Waal *The Bill of Rights Handbook* 488.

intensity".⁴⁴ It is held that if the legislature seeks to regulate choice it would be subject to greater constraints than when it seeks to regulate practise.⁴⁵ The German Constitutional Court subsequently determined that the basic enquiry is to protect the freedom of the individual and to subsequently give sufficient protection to the public policy in terms thereof, and by taking both these requirements into account, the legislature would thus have to distinguish the above principles with reference to the following:

- a) Freedom of exercise of a vocation can be restricted in so far as this seems appropriate according to rational considerations of the common good. Basic right protection is restricted to preventing conditions which are in themselves contrary to the Constitution because they may be excessively burdensome and are not reasonable.
- b) Freedom of choice of vocation can only be restricted to the extent that protection of particularly important interests of the community positively requires it. If such an interference is unavoidable, the legislator must always choose the form of interference which restricts the basic right least.⁴⁶

It is essential to note that the above reference to vocation refers to trade, occupation or profession and it must be clear that, in light of the German Constitutional Court's interpretation of article 12(1), the choice of trade are subject to a stricter qualification than where the legislature seeks to regulate practise of such a trade.

If one attempts to interpret the provisions contained in section 22 of the Constitution, which reflects the wording of article 12(1) of the German Constitution, it seems that every citizen has the freedom of choice of trade, occupation and profession and that only the practise thereof could be regulated by law. The German Constitutional Court held that this is the wrong interpretation to follow as the practise of one's trade,

44 As translated in Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken – decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

45 Currie and De Waal *The Bill of Rights Handbook* 488.

46 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

occupation or profession would be preceded by a choice thereof, but declared that the legislator's power to regulate it shall differ in relation to choice and practise, as the power to regulate choice shall be subject to greater constraints than the power to regulate practise.⁴⁷

In relation to the interpretation and limitation of both choice and practise of one's trade, the German Constitutional Court declared that:

The only interpretation which fits this is one which assumes that the power to regulate does not cover both "phases" with the same objective intensity; and that the more the legislator interferes with the freedom of choice of vocation, the more he is subject to stricter limits. This interpretation also corresponds with the basic conceptions of the Constitution and the human picture which it assumes ... The choice of vocation is supposed to be an act of self determination, a free decision of the individual will. It must as far as possible remain unaffected by interferences from state power. By exercising his vocation the individual takes a direct part in social life. Limitations can be imposed on him here in the interests of others and of the general public.⁴⁸

In light of the above it should be clear that the second part of article 12(1) of the German Constitution which is aimed at the regulation of practise and which corresponds with the second sentence of section 22 of the Constitution, would include both the practise of one's trade and the freedom of choice thereof and may only be regulated from this angle, provided that the content of regulation of choice of trade would be far more limited than the content of regulation of practise of trade.⁴⁹

In relation to the meaning of regulation it is held as follows:

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- 47 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985. Also see Currie and De Waal *The Bill of Rights Handbook* 488.
- 48 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.
- 49 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

... that when the legislator is operating in the area protected by the basic right, he must take the significance of the basic right in the social order as the starting point for his regulation. It is not that he is free to determine the content of the basic right, but that a boundary can be set by the content of the basic right to his discretion about the content of his legislation... "regulate" does not mean that the legislator cannot restrict the basic right in any respect ... "regulate"... points to an intention to determine the boundaries in a more detailed way from the inside. The boundaries are set out in the nature of the basic right itself, rather than in restrictions which would leave to the legislator the objective content of the basic right itself ie that would limit its natural area of applicability (based on rational deduction) from the outside.⁵⁰

Therefore, with reference to one's right to freedom of choice and the regulation of practise, it is clear that the former is aimed at giving the freedom to choose one's trade which shall be subject to strict constraints if it sought to limit it, and the latter is aimed at protecting the public interest by providing for the regulation of the practise of one's trade. In order to interpret the scope and ambit of the aforementioned, the correct approach should thus be to balance these two equally legitimate rights within the constitutional framework. The approach to be followed in balancing these rights could thus be summarised as follows:

Freedom of exercise of vocation can be limited by way of "regulation" in so far as sensible considerations of the *common good* make it appear appropriate. Freedom of choice of vocation may, on the other hand, only be limited in so far as this is *essential for protection of especially important (paramount) community interests*. This will be so in so far as the interests must, on careful balancing, be given priority over the individual's claim to freedom, and in so far as this protection cannot be secured in another way, ie by means which do not restrict choice of vocation, or limit it less. If an interference with freedom of choice of vocation proves to be unavoidable, the legislator must always choose the form of interference which limits the basic right least.⁵¹

In relation to the freedom to choose one's trade, the German Constitutional Court held that there must be differentiation between

50 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

51 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

subjective and objective conditions for regulating it, the former relating to training and education and the latter relating to a restriction over which the candidate does not have any control, despite fulfilling the subjective requirements of training and education. Only limitations which are essential for the "protection of especially important (paramount) community interest" could justify such a limitation.⁵²

The approach followed by the German Constitutional Court in justifying the limitation of the constitutional right is in accordance with the approach followed by the South African Constitutional Court in the context of section 36 of the Constitution, which shall be discussed in more detail below.

For current purposes, however, the approach to be followed regarding the interpretation of section 22 of the Constitution should be twofold, by distinguishing between, firstly, the regulation of the freedom of choice of trade, occupation and profession which may only be limited if such a limitation is reasonable and justifiable in terms of section 36 of the Constitution, and secondly, regulation of one's practise of a trade, occupation and profession which would be subject to a less severe standard of justifiability, being regulation which is rational and therefore reasonable and justifiable in an open and democratic society based on democratic values in terms of section 36 of the Constitution.⁵³

Therefore, in order to determine the regulation of either the right to choose one's trade or the right to exercise one's trade, it is paramount to refer to the "significance of the basic right in the social order as the starting point" for the regulation thereof.⁵⁴ It would thus be of utmost

52 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

53 Currie and De Waal *The Bill of Rights Handbook* 489.

54 Anonymous Foreign Law Translations – BverfG 7, 337 Apotheken –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

importance to first determine which right forms the subject of regulation before the courts can determine how it should be regulated.

2.2.4 Beneficiaries of section 22 of the Constitution

The most important difference between section 22 and its predecessor, as stated above, is its scope of application in that only "citizens" of South Africa qualify for the protection in terms thereof, whereas section 26(1) applied to "every person".

For current purposes, however, it is not necessary to discuss in detail how this should be interpreted, provided that, as declared by Currie and De Waal⁵⁵ the nature of the right will extend to juristic persons that has "sufficient interest" in relying on the right.

In light of the above, the protection of section 22 does not extend to non-citizens with working permits, which has been held to be problematic, but for the current discussion in relation to restraint of trade covenants in the context of freedom of trade, this shall not be elaborated upon.

2.2.5 Choice of trade, occupation and profession compared to the right to engage freely in economic activity

Compared to its predecessor, section 22 protects the choice of trade, occupation and profession, whereas section 26(1) protected the right to engage freely in "economic activity and to pursue a livelihood anywhere in the national territory". At first glance it seems that the ambit of section 22 of the Constitution is more limited than the right afforded in terms of section 26(1) of its predecessor.

55 Currie and De Waal *The Bill of Rights Handbook* 490.

As stated by Currie and De Waal,⁵⁶ section 22 is aimed at the protection of an individual right, compared to the protection of a more general right contained in terms of section 26(1), which was aimed at the protection of engaging in "economic activity".

Currie and De Waal⁵⁷ subsequently determine the scope and application of section 22 to be as follows:

Occupational Freedom in s 22 is framed in the form of an individual right, but like most of the rights in the Bill of Rights, it is informed by several underlying values. The public has an interest in allowing individuals to work for their own living rather than being supported by public funds. It also has an interest in benefiting from the skills of a particular individual. Although s 22 does not expressly mention the freedom 'to pursue a livelihood' (a formulation which often appears in international human rights instruments) this aspect is, by implication, included within the scope of s 22. From the point of view of the individual, occupational freedom is also a crucial element of individual autonomy and constitutes a basis for the exercise of other rights and freedoms. It is therefore more than a right to provide materially for oneself, but is aimed at enabling individuals to live profitable, dignified and fulfilling lives.

In light of the above, section 22 is thus aimed at an individual right in addressing the inequalities of the past in choosing one's trade, compared to the right to engage in economic activity as protected by section 26(1). It is therefore submitted that the right afforded in terms of section 22 is more specific and therefore affords more protection in that it affords the freedom to choose one's trade and not merely to engage in economic activity.

In relation to the right to freely choose one's trade, occupation or profession, it must further be noted that this right has both a positive and negative sphere, the former in relation to choose one's trade and the latter in relation to choose to leave one's trade. Moreover, as declared by Currie and De Waal,⁵⁸ section 22 provides for the freedom of choice

56 Currie and De Waal *The Bill of Rights Handbook* 491.

57 Currie and De Waal *The Bill of Rights Handbook* 491.

58 Currie and De Waal *The Bill of Rights Handbook* 487.

and practise of a trade, occupation and profession, but it does not guarantee such a right, i.e. it does not promise trade, occupation and profession to all its South African citizens and does not put a duty on the state to provide same for its citizens.

In conclusion, the choice of trade, occupation and profession, as stated above with reference to the judgment by the German Constitutional Court in the *Apotheken*-case, may only be limited if the limitation is "essential for protection of especially important (paramount) community interests".⁵⁹ Moreover, the right to choose one's trade will not make sense if one does not have the right to practise such a trade. As stated by Currie and De Waal⁶⁰ the freedom of trade shall include more than the mere choice of trade and it is therefore submitted that the one implies the other, but that it may not be subject to the same degree of limitation. In relation to the regulation of the choice of practise of trade, Currie and De Waal⁶¹ concludes as follows:

Individuals choose an occupation because they expect to do a certain type of work. If regulation of the practice (*sic*) reaches the point where they are no longer able to do that work, their initial choice of an occupation is denied to them with retrospective effect. Choice and practice (*sic*) therefore constitute a 'continuum', and s 22 must be interpreted to afford some protection against arbitrary regulation of an occupation.

2.2.6 *Practise of trade, occupation and profession*

The second part of section 22 that refers to practise of one's trade, occupation and profession which can be regulated by law, replaced its predecessor's subsection (2), and applies to "measures that regulate occupational freedom without denying choice of or access to an

59 Anonymous Foreign Law Translations – BverfG 7, 337 *Apotheken* –decision http://www.utexas.edu/law/academics/centers/transnational/work_new/german/cases_bverg.shtml?11jun1985.

60 Currie and De Waal *The Bill of Rights Handbook* 492.

61 Currie and De Waal *The Bill of Rights Handbook* 493.

occupation".⁶² As stated above, the right to choose one's trade, occupation and profession may only be limited and regulated to the extent that it is reasonable and justifiable with reference to section 36 of the Constitution. However, the right to practise one's trade, occupation or profession is not subject to such a stringent approach (compared to choice of trade) and may be regulated by law. The term "regulation" is of great importance, as it does not include "to close down a certain profession",⁶³ but it may include the regulation of, for example, certain professions by providing legislation in terms whereof they should be practised, which should be reasonable and justifiable in an open and democratic society.

Moreover, section 22 does not include the same list of objectives as its predecessor, and Currie and De Waal⁶⁴ held that, in determining the scope of regulation of practise in terms of section 22, the "purpose of the law must be important" and have a subsequent "bearing on the state's responsibility to promote economic and social welfare". The objectives as contained in section 26(2) of the Interim Constitution will thus still be applicable as embodied in section 36 of the Constitution, in that the legislation must be rationally connected to the legislative purpose to regulate the practise of one's trade, occupation or profession as contained in the second part of section 22 of the Constitution.

2.2.7 Limitation of section 22 of the Constitution

The choice of trade, occupation and profession may only be limited in terms of section 36 of the Constitution, by laws of general application, which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and by taking into account the following factors:

62 Currie and De Waal *The Bill of Rights Handbook* 493.

63 Currie and De Waal *The Bill of Rights Handbook* 493.

64 Currie and De Waal *The Bill of Rights Handbook* 494.

- (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.

In *JR1013*, the Eastern Cape Division as per Jones J held that section 22 of the Constitution confined its application to "citizens", which was discussed above, and that it did not give them the right to engage in economic activity or to pursue livelihood as stated in terms of section 26 of the Interim Constitution, but the choice to freely choose a trade, occupation or profession. The learned judge held that the content and nature of section 22 of the Constitution is entirely different than section 26 of the Interim Constitution and that it was subsequently "wider in content" and declared the scope and ambit thereof to be as follows:

... all citizens should be able to choose whatever lawful pursuit they wish in order to earn a living, without there being any restriction based on discrimination of race, sex, creed, colour or personal idiosyncrasy. Proper freedom and equality among citizens are empty notions if some areas of income-earning activity are especially reserved for particular sections of the community simply because they belong to that section of the community, and all others are forever excluded on arbitrary grounds.⁶⁵

Jones J in *JR1013* further declared that the choice of trade is significantly different from the right to engage in one and that the choice of trade is open to all citizens, provided that the realisation of the right may still be limited in relation to the following restrictions:

The right to engage in any activity is always subject to a variety of restrictions, some of them natural, others man-made. Most of these restrictions have nothing to do with constitutional rights. There are unspoken restrictions, such as the absolute prohibition on unlawful income-producing activities like drug trafficking, blackmail or child prostitution which is always implicit in legislative provisions such as this ... Another category of restriction is personal. Whatever our ambitions, we are restricted by size, or strength, or physical or mental infirmity; indeed, by any number of disabilities which we may or may not be able to overcome.⁶⁶

65 At 928 (n 37).

66 At 929 (n 37).

Moreover, Jones J expressed the view that section 26 of the Interim Constitution did not take into account or address any of the above restrictions, and that the reference to the measures as stipulated in subsection (2) thereof, could be sensibly addressed by enacting legislation, which could not be applied to the restrictions stated above in relation to the choice of trade.⁶⁷ The learned judge stated that this shift of focus visible in section 22 of the Constitution seeks to address the inequalities of the past in relation to the choice of trade which was not open to all citizens. It was subsequently held that South Africa had a history of repression of choice of trade and therefore the deliberate changing of words of section 22 compared to its predecessor. Jones J stated that the "lawful pursuit which qualifies as trade, occupation or profession" is now available to every citizen to freely choose if he or she wants to, but that the foregoing does not entitle them to practise it, as the practise may still be regulated by law in terms of the second part of section 22.⁶⁸

In light of the above, it is thus clear that the right to choose one's trade was drafted against the background of the inequalities of the past in order to address the unequal opportunities to choose one's trade and in terms of which the practise may be regulated by law and which may only be limited if such a limitation is reasonable and justifiable in terms of section 36 of the Constitution.

2.2.8 Onus of proof in terms of the limitation of section 22 of the Constitution

It is submitted that the onus of proof in relation to the right afforded in terms of section 22 of the Constitution will be the same as in section 26 of the Interim Constitution. In other words, if the state wants to regulate

67 At 929 (n 37).

68 At 930 (n 37).

the practise of one's trade, it will bear the onus to prove that the legislation is rationally connected to the legislative purpose, which must be reasonable and justifiable in an open and democratic society based on democratic values in terms of section 36 of the Constitution. On the other hand, if the state wants to limit the right of choice of one's trade, a more stringent test shall be applicable in that the state will bear the onus to prove that same is reasonable and justifiable in terms of section 36 of the Constitution.

2.2.9 Conclusion

In light of the above discussion it is thus clear that the right afforded in terms of section 22 of the Constitution is more specific than the right afforded in terms of section 26 of the Interim Constitution and it is therefore submitted that section 22 is wider in content and affords more protection in choosing and practising one's trade, subject to the regulation of the latter, compared to the mere right to engage in economic activity in terms of section 26 of its predecessor.

3 Restraint of trade covenants and the Constitution

The principles pertaining to restraint of trade covenants within South African law have been determined in *Magna Alloys* in terms whereof it is trite law that restraint of trade covenants are prima facie valid and enforceable, which puts the onus of proof on the party who contends that he/she should not be bound by the restraint, to prove that the restraint is contrary to public policy.

The aforementioned common law principle shall forthwith be discussed with reference to the implication of the rights as afforded by section 26 of the Interim Constitution (to the extent that the principles still apply) and section 22 of the Constitution.

3.1 Restraint of trade covenants and section 26 of the Interim Constitution

In *Waltons Stationery Company (Pty) Ltd v Fourie*⁶⁹ (hereafter referred to as *Waltons*), the Orange Free State Provincial Division as per Edeling J concluded that, in terms of common law and customary law, it is emphasised that public policy requires the principle of sanctity of contract to be observed. The principles pertaining to restraint of trade covenants as determined by Rabie JP in *Magna Alloys* would thus still apply despite section 26 of the Interim Constitution, but the enforceability of the restraint will be dependent on whether it is within public policy⁷⁰ to enforce it.

The aforementioned approach was also approved and applied by the Cape Provincial Division as per Conradie R in *Kotze & Genis (Edms) Bpk v Potgieter*⁷¹ (hereafter referred to as *Kotze & Genis*). In light of the constitutional protection afforded by section 26 of the Interim Constitution, counsel for the respondent held that the court should return to the status of restraint of trade covenants as held prior to the judgment of *Magna Alloys* in that restraint of trade covenants should be regarded as prima facie invalid and unenforceable and that the onus of proof should rest on the party who wants to enforce it, to prove that the enforcement would be reasonable. The learned judge approved the reasoning adopted in the *Waltons* case in that section 26 does not have any bearing on a person's right to conclude contracts and that, even if one has to interpret section 26 to promote the spirit, purport and objects of the Bill of Rights in developing common law, the learned judge concluded that it will not have bearing on the principles pertaining to restraint of trade covenants as determined by *Magna Alloys*, and subsequently concluded that:

69 *Waltons Stationery Company (Pty) Ltd v Fourie and Another* 1994 1 BCLR 50 (O).

70 With reference to the requirements as stipulated in *Basson v Chilwan and Others* 1993 3 SA 742 (AD).

71 *Kotze & Genis (Edms) Bpk en 'n Ander v Potgieter en Andere* 1995 2 All SA 248 (C).

As die uiteraard vae en idealistiese bepalings van die Grondwet gebruik sou word om goedsmoeds noukeurig gekonstrueerde en gedetailleerde denkbeelde en werkwyses van ons privaatreë te versteur, gaan ons 'n chaos beërwe wat die verwarring by die toring van Babel sal verdwerg. Die bepalings van hoofstuk 3 van die Grondwet het myns insiens niks nuttigs te sê oor 'n aangeleentheid soos wáár die bewyslas in 'n saak oor handelsbeperking lê nie ... Ons howe beskerm dekades lank reeds the beginselreg van persone om vryelik aan die handelsverkeer deel te neem. Ek kan nie aanvaar dat hulle hele benadering moet verander net omdat die Grondwet nou ook sê dit is 'n lofwaardige doelstelling nie.⁷²

Furthermore, in *Knox D'Arcy Limited v Shaw*⁷³ (hereafter referred to as *Knox D'Arcy*), the Witwatersrand Local Division as per Van Schalkwyk J determined that section 26 would not require the common law principles pertaining to restraint of trade covenants as laid down by *Magna Alloys*, to be reassessed. Van Schalkwyk J concluded that there is no principle which would justify the reversion of the common law principle pertaining to restraint of trade covenants and that the protection afforded in terms of section 26 of the Interim Constitution further did not require it. In relation to the sanctity of contract, as applicable to restraint of trade covenants, the court accepted the approach followed by the applicant's counsel in his contention that:

... if an individual undertakes to surrender a particular right then that decision is not a violation of the rights but a consequence of the covenantor's freedom.⁷⁴

The court as per Van Schalkwyk J subsequently concluded that:

The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy which is violated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage.⁷⁵

72 (n 71).

73 *Knox D'Arcy Limited and Another v Shaw and Another* 1995 12 BCLR 1702 (W).

74 At 1710 (n 73).

75 Par 660D (n 73).

Van Schalkwyk J further concluded that there is a moral dimension to the sanctity of contracts in that contracts entered into freely should be honoured and that:

It is generally regarded as immoral and dishonourable for a promiser to breach his trust and even if he does so to escape the consequences of a poorly considered bargain ... there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand the enforcement of a bargain (even one which was ill-considered) gives recognition to the important constitutional principle of autonomy of the individual.⁷⁶

Furthermore, Van Schalkwyk J approved the approach followed in *S v Zuma*⁷⁷ in that when the common law is "compatible" with the provisions as contained in the Constitution, the common law should be maintained. It was therefore held that the principles pertaining to restraint of trade covenants as determined in *Magna Alloys* were consistent with section 26 of the Constitution and would therefore still be applicable.

3.2 Restraint of trade covenants and section 22 of the Constitution

In relation to the enforceability of restraint of trade covenants in the context of section 22 of the Constitution, the South Eastern Cape Local Division as per Liebenberg J in *Fidelity Guard Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*⁷⁸ (hereafter referred to as *Pearmain*), raised the implication of onus of proof without deciding the position thereof, but approved and applied the approaches followed in *Waltons, Kotze & Genis* and *Knox D'Arcy* in relation to the principles pertaining to restraint of trade covenants as determined by *Magna Alloys*, and subsequently concluded that:

76 Par 660I (n 73).

77 Par 659G *S v Zuma and Others* 1995 2 SA 642 (CC) as quoted at 1712 (n 73).

78 *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 1997 4 All SA 650 (SE).

In so far as a restraint is a limitation of the rights entrenched in section 22 of the common law as developed by the courts in my view comply with the requirements laid down in section 36(1). Any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the agreement and the common law in this regard is therefore of general application ... From the foregoing it seems to me that if a restraint clause is found to be enforceable after application of the principles laid down by the courts, the requirements of section 36(1) will have been met.⁷⁹

However, in *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*⁸⁰ (hereafter referred to as *Canon KZN*) the Natal Provincial Division as per Kondile J held that the guarantee contained in terms of section 22 of the Constitution suggested that the onus lies on the person who wished to enforce a restraint of trade to establish that the other party waived his/her constitutional right to freedom of trade and that such a restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as stipulated in terms of section 36. Kondile J held the application and enforcement of restraint of trade covenants in the context of section 22 of the Constitution to be as follows:

The restraint of trade clause in the contract constitutes a limitation on first respondent's fundamental right to freedom of trade, occupation and profession. It is inconsistent with the constitution to impose the onus to prove a constitutional protection on the first respondent. Accordingly applicant, which seeks to restrict first respondent's fundamental right, has the duty of establishing that first respondent has forfeited his right to constitutional protection ... *it seems to me that applicant needs to do more than to invoke the provisions of the contract and prove the breach. In addition and in terms of section 36 of the Constitution, it has to show that the restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. (Own emphasis)*

Notwithstanding the foregoing, Kondile J further stated that the restraint of trade covenant before him, to the extent that it was a limitation of the

79 At 658-659 (n 78).

80 *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another* 2004 1 BCLR 39 (N).

right in terms of section 22 of the Constitution, passed the constitutional muster in terms of section 36(1) thereof.

More or less at the same time, the Northern Cape Division as per Olivier J in *Mathewson's Micro Finances BK v Lombard*⁸¹ (hereafter referred to as *Mathewson's Micro*), held that the status of restraint of trade covenants to be the one as established in *Magna Alloys* and should therefore still be applied. Olivier J approved the reasoning followed in *Knox D'Arcy* above and declared that section 22 of the Constitution did not alter the onus of proof in restraint of trade covenants and disapproved the view of Kondile J in *Canon KZN* and declared that his view was made *obiter* in a sense.⁸² Olivier J subsequently declared that:

*Daar is geen rede waarom 'n persoon ... wat willens en wetens so 'n onderneming aangegaan het, bewysregtelik in 'n gunstiger posisie moet wees as 'n kontraksparty wat ook die aangaan van 'n onderneming erken, maar wie se verweer is dat hy of sy deur bedrog beweeg is om die onderneming aan te gaan nie ... Ek is van oordeel dat, solank daar by die beoordeling van die vraag of 'n handelsbeperking redelik is al dan nie, behoorlik gelet word op die bepalinge van artikel 22 van die Grondwet, deur 'n gebalanseerde oorweging daarvan teenoor partye se reg om vrylik te kontrakteer, dit onnodig is dat die bewyslas in hierdie verband moet verskuif na die party wat immers nie die een is wat die kontraktuale onderneming, wat willens en wetens aangegaan is, verbreek het nie.*⁸³

On the other hand, the Cape of Good Hope Provincial Division as per Traverso J in *Coetzee v Comititis*⁸⁴ (hereafter referred to as *Coetzee*), confirmed the principles pertaining to restraint of trade covenants as established in *Magna Alloys* and as accepted by *Walton's, Kotze & Genis* and *Knox D'Arcy*, but expressed the view that public policy should be determinative of whether a restraint should be enforced or not. Traverso J stated that the public policy is not a fixed or "constant" concept and should reflect and be considered against the background of

81 *Mathewson's Micro Finances BK v Lombard and Another* 2004 2 All SA 422 (NC).

82 At 428 (n 81).

83 At 429-430 (n 81).

84 *Coetzee v Comititis* 2001 1 All SA 538 (C).

the Constitution as the "supreme law" of the state.⁸⁵ Traverso J subsequently found the contract which had the effect of a restraint of trade covenant, to be infringing and inconsistent with section 22 of the Constitution and therefore unreasonable, and expressed the view that public policy required it to be unlawful and consequently unenforceable.⁸⁶

In light of the aforementioned discussion, the principles pertaining to public policy shall be discussed in more detail with reference to the law of contract in relation thereto.

3.3 The law of contract and public policy in light of the Constitution

The common law principle of sanctity of contract requires valid contracts which were entered into freely and voluntarily to be honoured and that public policy should be used as the measure of the validity and enforceability of same.

In relation to the foregoing it is thus important to determine the content of public policy in the law of contract to the extent that it relates or is applicable to restraint of trade covenants within South African law, as the same measures of public policy shall be applicable.

3.3.1 The law of contract and public policy in relation to the principles pertaining to restraint of trade agreements

It has been held (as will be discussed below) that the new constitutional dispensation has changed the content of public policy. This view was held by the Supreme Court of Appeal as per Cameron JA in *Brisley v*

85 At 555 (n 84).

86 At 558 (n 84).

*Drotsky*⁸⁷ (hereafter referred to as *Brisley*) in that covenants, which are contrary to public policy, will not be enforced. Cameron JA determined the content of public policy to be as follows:

In its modern guise, "public policy" is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in light of the Constitution and the values embodied in the Bill of Rights.⁸⁸

The reasoning above, even though it was expressed in relation to the validity and enforceability of contracts in light of what is dictated by public policy in general, closely reflects the reasoning followed by Liebenberg J in *Pearmain*.⁸⁹ Liebenberg J expressed the following view in relation to the onus of proof:

In terms of the *Magna Alloys* case the onus in matters of this nature is on the party wishing to show that the restraint should not be enforced. It seems that the position in terms of the Constitution may now be that the onus will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution. For purposes of this judgment I do not find it necessary to determine this question as I approached the matter on the basis that the onus is on the Applicant.⁹⁰

In *Reddy v Siemens Telecommunications (Pty) Ltd*⁹¹ (hereafter referred to as *Reddy*) the Supreme Court of Appeal as per Malan AJA, accepted (without determining)⁹² that the onus of proof, as established by *Magna*

87 *Brisley v Drotsky* 2002 JOL 9693 (A).

88 Par 4 of Cameron AJ's judgment (n 87).

89 (n 78).

90 At 659 (n 78).

91 *Reddy v Siemens Telecommunications (Pty) Ltd* 2006 JOL 18829 (SCA).

92 However a defence was raised by the applicant that the principles pertaining to restraint of trade covenants as established by *Magna Alloys* (n 5), was in conflict with section 22 of the Constitution in relation to the right to choose one's trade, occupation and profession freely. The applicant alleged that the onus should rest on the party

Alloys, rests on the party who seeks to escape the enforcement of a restraint of trade covenant. The learned judge further noted that, in determining the enforceability of the restraint, one would have to refer to the two principles of public policy, these being the freedom of contract (which is also protected by the Constitution) and the freedom of trade, which comply with the test of reasonableness and proportionality as entrenched in terms of section 36 of the Constitution.⁹³ In determining whether the restraint was in fact enforceable, the learned judge held that the party should comply with his contractual obligations and that same will be in accordance with public policy, which is consistent with the constitutional values of "dignity and autonomy".⁹⁴

However, in *Barkhuizen v Napier*⁹⁵ the Constitutional Court as per Ngcobo J expressed the following view regarding public policy in the context of the law of contract:

Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. *Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it.*⁹⁶ (Own emphasis)

In relation to the enforceability of contracts, Ngcobo J further stated that public policy should now be determined with reference to the values which underlie our Constitution and that contractual terms which are "inimical to the values . . . is contrary to public policy" and would therefore be unenforceable.⁹⁷

seeking to enforce such a restraint. The constitutional challenge was therefore limited to the principles as established in terms of *Magna Alloys* (n 5). See par 13-14 (n 91).

93 Par 17 (n 91).

94 Par 21 (n 91).

95 *Barkhuizen v Napier* 2008 JOL 19614 (CC).

96 Par 28 (n 95).

97 Par 29 (n 95).

Also relevant in the context of restraint of trade covenants within South African law is Ngcobo J's contention that the courts should decline to enforce contractual terms which are in conflict with the constitutional values despite the parties' consent thereto.⁹⁸ The aforementioned view is relevant within the framework wherein restraint of trade covenants operate. Ngcobo J further held that public policy requires a twofold approach based on the sanctity of contract on the one hand and the enforceability of contractual terms with reference to the particular circumstances on the other hand.⁹⁹

The more significant view and application of *Napier* is expressed by Davis J in relation to the approach which should be followed in relation to restraint of trade covenants and the implication of section 22 of the Constitution in determining the public policy as a measure of its validity and enforceability. In *Advtech Resourcing (Pty) Ltd t/a The Communicate Personnel Group v Kuhn*¹⁰⁰ (hereafter referred to as *Advtech Resourcing*), Davis J left numerous questions unanswered but cast doubt on the current scope and ambit of the application of the principles pertaining to restraint of trade covenants as entrenched by *Magna Alloys*.

Davis J refers to the traditional approach in terms of which the court should make a value judgment in relation to the enforceability of restraint of trade covenants. In making this value judgement the court should have regard to public policy by balancing the freedom of trade on the one hand, and the freedom to enter into contracts or the sanctity of contracts on the other hand,¹⁰¹ and by imposing the onus of proof on the party who seeks to avoid the enforcement of the restraint.¹⁰²

98 Par 30 (n 95).

99 Par 57-58 (n 95).

100 *Advtech Resourcing (Pty) Ltd t/a The Communicate Personnel Group v Kuhn and Another* 2007 4 All SA 1368 (C).

101 Par 12 and 18 (n 100).

102 Par 17-18 (n 100).

However, Davis J held that the duty of developing common law in terms of section 39(2) of the Constitution is necessitated by the measure of public policy, and that the view expressed by the Constitutional Court as per Ngcobo J in *Napier*¹⁰³ that contractual terms are subject to constitutional rights would have the following implication:

Courts will invalidate and refuse to enforce agreements contrary to public policy. Public policy is now informed by the Constitution.¹⁰⁴

In relation to the onus of proof regarding the enforceability of restraint of trade covenants, the learned judge further declared, without determining, as follows:

These cases support the view that an employer must justify a limitation upon the right to work, given the importance placed on the dignity of work and the concomitant limitation or eradication of that right when a restraint operates. Such a conclusion would entail no radical departure from our legal tradition. It would simply amount to a reversion to the law which operated prior to 1984 and cast the onus on the employer to justify the reasonableness of the restraint.¹⁰⁵

Moreover, in relation to balancing the freedom of trade and the freedom of contract with reference to the view expressed by Malan AJA in *Reddy*, Davis J declared that:

The careful application of these "two principal considerations" by Malan AJA is clearly illustrative of the need to infuse the analysis with constitutional values. I would add this caution: The uncritical use of the concept "contractual autonomy as part of freedom in forming the constitutional value of dignity" may be incongruent with the principles contained in the development clauses in the Constitution (section 8 and section 39(2)), the objective of which is to transform existing concepts of law where the content of such concepts is at war with the fundamental values of the Constitution.

The use of the phrase "contractual autonomy" wrenched from any examination of the concept of existing power relationships is, in my view, reflective of the libertarian view of the world, clearly evident in *Magna Alloys* (supra) and which is in conflict with the spirit of the

103 Par 28 (n 95) as referred to par 25 (n 100).

104 Par 27 (n 100).

105 Par 28 (n 100).

Constitution read as a whole which promotes an entirely different vision of our society.¹⁰⁶

Davis J held that contractual autonomy as quoted above, is a "heavily value-laden" concept and adds that it should be influenced by *ubuntu* "which seeks to assert that individual values are reflected from community".¹⁰⁷ Davis J further refers with approval to the view expressed by Barnard AJ 2005 (2) *SAJHR* 252 in relation to good faith, without concluding the value of such a view, wherein the writer stated that:

... good faith cannot be contained in a neat and tidy legal definition. It promotes the idea that we as a community of contracting persons, each responsible for the other's wellbeing, should ultimately be concerned with the constitutive values of the supreme law under which the subordinated but indispensable law of contract must continue to operate.¹⁰⁸

In light of this, it is submitted that public policy requires that contracts should be entered into in good faith, but that public policy, in addition, requires the parties to honour a contract entered into in good faith. Furthermore, it follows that a contract which is not entered into in good faith would be unenforceable based on public policy and that the public policy will not require the party who entered into such a contract (in good faith) to be bound by it.

In conclusion, it was submitted by Davis J that there is an important argument in the courts revisiting the principles pertaining to restraint of trade covenants, but he does not determine what the outcome should be and subsequently was bound to base his judgment on the position adopted by the Supreme Court of Appeal in *Reddy*, and the added test as stipulated in *Basson v Chilwan*.¹⁰⁹ The learned judge subsequently found that the nature of the restraint and the inapplicability of the

106 Par 30 (n 100).

107 Par 30-31 (n 100).

108 Par 31 (n 100).

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

severability doctrine and the absence of a proprietary interest rendered the restraint unenforceable.

Notwithstanding the above, the Natal Provincial Division in *Dickinson Holdings Group (Pty) Ltd v Du Plessis*¹¹⁰ (hereafter referred to as *Dickinson*) as per Pillay J expressed the view that the judgment handed down in *Napier* related to contracts and not to restraint of trade covenants and declared that the constitutional values are "infused" into any enquiry as to whether a contract is contrary to public policy.¹¹¹ Pillay J submitted that this "infusion approach" was in line with the reasoning of the court in *Reddy* and that, by balancing the two principles of public policy, a restraint of trade covenant shall be unenforceable if it precluded the one party from exercising his/her right to freedom of trade if the other party did not have a corresponding interest or right which was worthy of protection, because enforcing such a restraint shall be contrary to public policy.¹¹² Pillay J subsequently approved the Supreme Court of Appeal's judgment in that the constitutional challenge of the onus of proof in restraint of trade cases is an assessment of the reasonableness (which relates and is in correspondence with section 36 of the Constitution) of such a restraint and would therefore require a value judgment in which the onus of proof did not play a role.¹¹³

4 Conclusion

It seems that the courts are, once again, in a position which existed prior to the determination of the principles pertaining to restraint of trade covenants in *Magna Alloys*.

It is submitted that the view expressed by Davis J in that the onus of proof should shift to the party who wishes to enforce a restraint of trade

110 *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* 2008 6 BCLR 620 (N).

111 Par 97 (n 110).

112 Par 98-99 (n 110).

113 Par 99-102 (n 110).

covenant would unquestioningly be a radical departure from *Magna Alloys* and render restraint of trade covenants to be regarded as prima facie invalid and unenforceable in accordance with the English law approach. It is further submitted that such an approach will not give adequate content to public policy with reference to the right to freedom of trade as drafted against the background of the inequalities of the past of every citizen to have the choice of trade, occupation or profession and also the choice to leave his/her trade, occupation or profession.

It is submitted that the view, as expressed by Pillay J in *Dickinson*, is the view to be preferred until the Supreme Court of Appeal determines the position to be otherwise. The author's submission would thus be that the "infusion approach", as referred to by Davis J and which was in line with the reasoning of the court in *Reddy*, should be accepted to the extent that, by balancing the principles of public policy, it renders a restraint of trade covenant to be unenforceable if it precludes the one party from exercising his/her right to freedom of trade if the other party did not have a corresponding interest or right which was worthy of protection. The enforcement of a restraint in the absence of a corresponding right shall be contrary to public policy and the challenge of the onus of proof should be assessed in light of the proportionality test contained in section 36 of the Constitution, which, it is submitted, should be a value judgment in which the onus of proof does not play a role.

In light of the above discussion, chapter 4, which relates to the purpose, validity and enforceability of restraint of trade covenants within the South African law, shall be evaluated and discussed against the background of the view as expressed by Pillay J in *Dickinson* above.

CHAPTER 4: PURPOSE, VALIDITY AND ENFORCEABILITY OF RESTRAINT OF TRADE COVENANTS IN EMPLOYMENT CONTRACTS

1 Introduction

As discussed in chapter 2, the law of contract pertaining to restraint of trade covenants has been facilitated by the judgments handed down in *Roffey v Catterall, Edwards & Goudrê (Pty) Ltd*,¹ *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another*² and *Drewtons (Pty) Ltd v Carlie*.³ These judgements were subsequently analysed, evaluated and clarified by the landmark decision of the Appellate Division in *Magna Alloys*.⁴ Consequently, the principles laid down by the Appellate Division has become trite law and no restraint of trade dispute could now be decided without having reference to the principles laid down by the Appellate Division.⁵

Although some of the pre-*Magna Alloys* judgments will only be of historical interest, it may still be relevant as the implication of the judgment of the Appellate Division in *Magna Alloys* has not been "worked out in sufficient detail" to "cover all the ground" that has been covered in the decisions prior thereto.⁶

Furthermore, in light of the foregoing chapters it is evident that the restriction of one's freedom of trade is enforceable, provided that the court has regard to the considerations of public policy. Firstly, public policy requires in general that contractual obligations should be honoured and secondly, that all persons should be permitted, as far as possible, to freely engage in economic activity. In evaluating these two

1 *Roffey v Catterall, Edwards & Goudrê (Pty) Ltd* 1977 4 SA 494 (N).

2 *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 3 SA 1092 (T).

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

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

5 Christie *The Law of Contract* 417.

6 Christie *The Law of Contract* 418 and Saner 2008 <http://www.lexisnexis.co.za>.

equally important principles, the court has to have regard to the circumstances of the case before it. Thus, the court would not enforce a restraint which puts an unreasonable restriction on a person's right to freely engage in economic activity.⁷

The reasonableness or otherwise of a restraint would therefore be discussed with reference to the proprietary interests of the employer. A restraint of trade covenant would be unreasonable and subsequently unenforceable, if it does not seek to protect an equally important right of the employer. This equally important right features in the proprietary interest of the employer it seeks to protect through a restraint of trade covenant with an employee.

In light of the above, the purpose, validity and enforceability of restraint of trade covenants within South African law shall forthwith be discussed with reference to the proprietary interest that an employer wishes to protect through the conclusion of a restraint of trade covenant with its employees.

2 Purpose of restraint of trade covenants in employment contracts

The relationship between the employer and the employee is governed by an employment contract, which regulates the respective rights and obligations of the parties in terms thereof.⁸ In addition, the employer may elect to conclude a restraint of trade covenant with its employees as part of their employment contract in order to protect its proprietary interest against unlawful exploitation by employees or ex-employees.

7 As determined in par 897H-898B (n 4) and subsequently summarised in par 794B-794C *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A).

8 Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" 2003 15 *SAMLJ* 326.

The protection of a legitimate proprietary interest is the only right which may reasonably restrict an employee's right to freedom of trade. Differently worded, the purpose of a restraint of trade must be to protect the legitimate proprietary interest of the employer, which in light of public policy, would be worthy of protection and would justify the restriction of the employee's right to freedom of trade.

It is trite law that employees should not be permitted to unlawfully compete with their employers by making use of the employer's proprietary interest. Employers fortify this right by concluding restraint of trade covenants with their employees. However, the purpose of a restraint may not merely be to eliminate competition *per se*. Such a restraint would not be reasonable in light of public policy if it does not protect a legitimate proprietary interest of the employer.⁹

The more accurate description of a legitimate proprietary interest has been held to be a "protectable interest" in order to avoid the "potential ambiguity and confusion", which is evident from the terms "protectable interest" or "legitimate interests".¹⁰ Forthwith the author shall only refer to a "protectable interest" in order to encompass all the aforementioned definitions which have been ascribed to define the interest of the employer worthy of protection in terms of a restraint of trade covenant.

3 Validity and enforceability of restraint of trade covenants with reference to "protectable interest"

3.1 Introduction

The common law principle regarding contracts requires parties who have entered into a contract freely to honour their agreement, unless the

⁹ *Basson v Chilwan* 1993 3 SA 742 (A) in Saner 2008 <http://www.lexisnexis.co.za>.

¹⁰ Par 1051I-1051J *International Executive Communications t/a IIR v Turnley* 1996 3 SA 1043 (W); Par 571A *Rawlins v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A); Par 777F-777G (n 9) as referred to in Saner 2008 <http://www.lexisnexis.co.za>.

terms are contrary to the "law, morality, public policy, or public interest".¹¹ A restraint of trade covenant which unreasonably restricts a party's right to freedom of trade would be contrary to public policy.¹² The unreasonableness of a restraint would therefore be evaluated in the context of what is dictated by public policy and specifically with reference to the protectable interest it seeks to protect, as the court will not enforce a restraint which does not protect a protectable interest worthy of protection in terms of the law. Differently worded, it would be contrary to public policy for the court to enforce a restraint which does not protect a protectable interest.

As already discussed in chapter 2, public policy is determined with reference to the balance between the two considerations of the sanctity of contract on the one hand,¹³ and freedom of trade on the other hand.¹⁴ Furthermore, even when preference is given to the sanctity of contract in determining the validity and enforceability of restraint of trade covenants, public policy requires the court to balance two further considerations. These considerations are embodied in the right of the employer to protect its proprietary interest on the one hand, and the employee's right to freedom of trade on the other hand. In light of the aforementioned it thus becomes vital to determine the content of public policy with reference to restraint of trade covenants and the value attached to the protectable interest of the employer within the context whereby it operates.

3.2 Public policy

In chapter 2 it was stated that public policy is the "vehicle by which judicial discretion is introduced into law"¹⁵ which is held to be neither fixed nor "constant" and which should be interpreted in light of the

11 Van Jaarsveld 2003 15 SAMLJ 326.

12 Par 897I (n 4).

13 Par 893I (n 4).

14 Par 894A-894C (n 4).

15 Du Plessis and Davis 1984 SALJ 89.

Constitution.¹⁶ Saner subsequently declares that this power of the court should only be exercised when the "impropriety of the transaction and the element of public harm are manifest" and should not be arbitrarily used.¹⁷ Furthermore, the content of public policy is continuously evolving and the court should be careful not to impose its own notions of public policy when it has to determine the validity and enforceability of covenants in light thereof.¹⁸

The aforementioned qualities of public policy therefore justify the assumption that there will never be *numerus clausus* of the kind of restraints that could be contrary to public policy if enforced. The validity and enforceability of restraint of trade covenants should therefore be evaluated in light of the facts of the particular case.¹⁹ However, it has been accepted that an unreasonable restraint would be contrary to public policy and subsequently unenforceable.²⁰ Moreover, it is submitted that a restraint would be unreasonable if it does not seek to protect a protectable interest of the employer. The aforementioned thus necessitates the evaluation of the relationship of reasonableness and public policy in determining the validity and enforceability of restraint of trade covenants.

Nienaber AR in *Basson v Chilwan*²¹ (hereafter referred to as *Basson*) subsequently describes the correlation between public policy and reasonableness to be as follows:

Die redelikheid al dan nie van die belemmering word beoordeel aan die hand van die breëre gemeenskap, enersyds, en van die kontrakterende party self, andersyds. Wat die breëre gemeenskap betref is daar twee botsende oorwegings: ooreenkomste moet gehandhaaf word (al bevorder dit ook onproduktiwiteit);

16 At 555 *Coetzee v Comitis* 2001 1 All SA 538 (C).

17 Saner 2008 <http://www.lexisnexis.co.za>.

18 *Sasfin (Pty) Ltd v Beukes* 1989 1 SA (1) (A).

19 Par 891H-891I (n 4).

20 Par 894A-894C (n 4). Also see par 243B-243D in *J Louw & Co (Pty) Ltd v Richter* 1987 2 SA 237 (N) and (n 9) in Saner 2008 <http://www.lexisnexis.co.za>.

21 (n 9) in Saner 2008 <http://www.lexisnexis.co.za>.

onproduktiwiteit moet ontmoedig word (al verongeluk dit ook die ooreenkoms) ... Wat die partye self betref, is 'n verbod onredelik as dit die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word.²²

In light of the above it is therefore submitted that public policy considers the evaluation of two principles, these being the sanctity of contract on the one hand and the freedom of trade on the other hand. In relation to the latter it must be clear that it would be unreasonable to enforce a restraint of trade which curtails the freedom of trade of the employee, if the employer does not have an equally important right worthy of protection. In other words, the restraint would be unreasonable and subsequently against public policy if the employer does not have a protectable interest it seeks to protect through the restraint of trade covenant. However, it is equally important to note that even though the restraint might be reasonable between the parties, it might still be contrary to public policy.

3.3 Protection of a protectable interest as the purpose of a restraint of trade covenant

3.3.1 Nature of a protectable interest

Our law has recognised that the fiduciary relationship, which as a matter of law give rise to an obligation in respect of the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information, otherwise than as permitted by law or by contract. In relation to the fiduciary duty imposed by law or by contract, Stegmann J in *Meter Systems Holdings Ltd v Venter*²³ stated the following:

22 (n 9) in Saner 2008 <http://www.lexisnexis.co.za>.

23 *Meter Systems Holdings Ltd v Venter and Another* 1993 3 All SA 573 (W).

When the fiduciary relationship is based on contract, the obligation to respect the confidentiality of information imparted or received in confidence is generally regarded as a term of the contract implied by law ... The content of such an implied term must necessarily be determined in the light of the provisions of the contract as a whole.

In light of the above discussion it is thus submitted that there is also a fiduciary duty between an employer and an employee in relation to confidential information, which confidential information shall constitute the basis of a protectable interest.

In general it has been accepted that, *inter alia*, the employer's business information, trade secrets and trade connections would be regarded as confidential information, i.e. protectable interests which the employer may seek to protect through the conclusion of a restraint of trade covenant with an employee.

First and foremost it is essential to note that only a legitimate, i.e. a lawful interest of the employer will be regarded as worthy of protection in terms of the law. In addition, Nienaber AR in *Basson* (as referred to in chapter 2) determined a fourfold test which needs to be applied in order to determine the enforceability of restraint of trade covenants.²⁴ The aforementioned was further summarised by the Supreme Court of Appeal as per Lewis JA in *Digicore Fleet Management v Steyn* (hereafter referred to as *Digicore*),²⁵ to entail the following:

- (a) Is there an interest of the one party ... which pursuant to the agreement warrants protection?
- (b) Is that interest threatened by the other party?
- (c) If so, does that interest weigh qualitatively and quantitatively against the interest of the other so that he or she will be economically inactive and unproductive?
- (d) Is there another aspect of public interest that does not affect the parties but does require that the restraint be invoked?

24 (n 9) in Saner 2008 <http://www.lexisnexis.co.za>.

25 *Digicore Fleet Management v Steyn* 2009 1 All SA 442 (SCA).

In relation to the above test it is therefore clear that the reasonableness or otherwise of a restraint with reference to the protectable interest it seeks to protect, would entail a factual inquiry regarding the particular facts before the court.

Furthermore, in *Turner Morris (Pty) Ltd v Riddell*²⁶ (hereafter referred to as *Turner Morris*), Erasmus J stated that, in order to determine the reasonableness of the restraint with reference to the protectable interest it seeks to protect, the court would also have regard to the area and the nature of the employer's business. The court would subsequently take into account the employee's "experience and expertise" as well as the "nature and extent of the business" of the employer.²⁷ In the aforementioned case the court concluded that the nature and extent of the employer's business did not justify the need for a country-wide restraint.²⁸ Put differently, the area and the nature of the employer's business did not justify the restraint to be so widely formulated. However, the learned judge further held that if the restraint was narrowed it would render the restraint to be "reasonable and achieving justice between the parties".²⁹ Furthermore, the duration of an indefinite period does not automatically render the restraint unreasonable for that reason alone.³⁰ In addition, it is also vital to note that if the restraint states that the employee is not entitled to trade within an area where the employer does not have a protectable interest, the restraint shall be unreasonable and will not be upheld.

Protectable interest has been described as including, *inter alia*, "trade or customer connections, trade secrets or confidential information".³¹ The relevant principles pertaining to the protectable interest was clearly

26 *Turner Morris (Pty) Ltd v Riddell* 1997 JOL 300 (E).

27 Page 14 (n 26).

28 Page 15 (n 26).

29 Page 17 (n 26).

30 *CTP Ltd v Argus Holdings Ltd* 1995 4 SA 774 (A) in Saner 2008 <http://www.lexisnexis.co.za>.

31 Saner 2008 <http://www.lexisnexis.co.za>.

stated by the court in *Basson* (and as summarised in *Digicore*) and should therefore be evaluated in light of the questions stipulated therein.

Consequently, in order to prove that a restraint shall be contrary to public policy, the employee merely has to prove that the employer either has no protectable interest that it seeks to protect,³² or that the restraint the employer seeks to enforce will not protect its protectable interest. It is therefore submitted, as stated in *Basson*, that the first (and most important) question that the court needs to ask is whether the restraint imposed was reasonable to protect the employer's protectable interest.

It is held that there is no *numerus clausus* in relation to what can be regarded as confidential information, but a distinction may be drawn between senior or managerial employees and ordinary employees, in that the former are subject to a stricter duty of confidentiality.³³

However, it is further submitted that the enforceability of a restraint may depend on a facet of public policy which can be distinguished from the relationship between the parties, but which needs to be taken into account in determining reasonableness of the protection of a protectable interest. In relation to the aforementioned *Tebutt J et Brand J in Humphrys v Laser Transport Holdings Ltd*³⁴ (with reference to *Basson*) declared that the following, while not decisive, should be taken into account in order to determine reasonableness:

It was held in the *Basson* case that the parties' own view, as reflected in the agreement, as to what is reasonable, can never be decisive. That the parties, therefore, in concluding the agreement seriously considered such a restraint to be necessary, that they identified and evaluated the disputed interests and described the restraint itself as most reasonable cannot be decisive. At most it is a factor to be considered. It was also held that it has long been accepted that the mere elimination of competition as such is not the

32 *Hirt & Carter (Pty) Ltd v Mansfield* 2008 3 SA 512 (D) in *Saner* 2008 <http://www.lexisnexis.co.za>.

33 *Saner* 2008 <http://www.lexisnexis.co.za>.

34 *Humphrys v Laser Transport Holdings Ltd and Another* 1994 4 SA 388.

kind of interest which can be protected by a restriction of freedom of trade after the termination of a contract; that is, that it does not weigh up against the prejudice which the other party will suffer if he cannot exercise his calling. The position does not change because the restraint was not arbitrarily stipulated, but was contracted for in order to protect an investment, irrespective of whether it was an investment of capital or whether it was an investment in time and attention devoted to the training of an employee. That does not mean that an investment of this kind is not deserving of protection; it only means that it cannot normally be protected by means of a provision which attempts to restrict freedom of trade after termination of the agreement; stated differently, the interest which the restraint attempts to protect in this manner does not as a rule weigh up against the interest of the other party not to be unemployed in his chosen field.³⁵

In *Kleyenstrüber v Barr*³⁶ the court as per Selvan AJ declared that information relating to patients and the treatment they received, was confidential, but that the follow-up calls did not constitute trade secrets and were therefore not regarded as a protectable interest.³⁷

Therefore, in order for a restraint to be considered as being reasonable, one must first determine whether the party seeking the enforcement of the restraint has a protectable interest. Such an interest may thus be contained in trade secrets, confidential information and/or trade and/or customer connections.³⁸ The aforementioned was also confirmed in *Aranda Textile Mills (Pty) Ltd v Hurn*³⁹ (hereafter referred to as *Aranda Textile Mills*) where it was held that a restraint of trade must have a proprietary interest which it seeks to protect, before such a restraint will be enforceable and that such a protectable interest may take form in "trade secrets or confidential information".⁴⁰ In *Alum-Phos (Pty) Ltd v Spatz*⁴¹ (hereafter referred to as *Alum-Phos*), Southwood J further held

35 Par 352A-352E (n 34)

36 *Kleyenstrüber v Barr and Another* 2001 3 SA 672 (W).

37 Par 679J-680B (n 36).

38 Par 486I-488D *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 2 SA 482 (T); Par 541B-541C *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A); Par 769I-769I and 770C-770E *Basson v Chilwan and Others* 1993 3 SA 742 (A); Par 626A *Alum-Phos (Pty) Ltd v Spatz and Another* 1997 1 All SA 616 (W).

39 *Aranda Textile Mills (Pty) Ltd v Hurn* 2000 3 All SA 183 (EC).

40 Par 190F-190H (n 39).

41 *Alum-Phos (Pty) Ltd v Spatz and Another* 1997 1 All SA 616 (W).

that the question relating to the existence of a protectable interest would be dependent on the particular facts of the case.

Moreover, the importance of protecting one's trade connections was emphasised by Nestadt JA in *Rawlings v Caravantruck*⁴² (hereafter referred to as *Rawlings*), wherein he declared that:

The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business.

Similarly, in *Morris (Herbert) Ltd v Saxelby*⁴³ it was held that the customer connections must be such that the employee acquires:

... such personal knowledge of and influence over the customers of his employer as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connections.

As already stated above, the question as to whether customer connection would constitute a protectable interest must be evaluated in light of the facts of the case, with reference to the following:

Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee, and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left.⁴⁴

In relation to the above and with reference to *Basson* there is thus no *numerus clausus* that would constitute a protectable interest, but that

42 *Rawlings and Another v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A).

43 *Morris (Herbert) Ltd v Saxelby* 1916 1 AC 688 (HL) at 709 as quoted in par 541E-541F (n 42).

44 Par 541G-541I (n 42).

trade secrets, confidential information and trade and customer connections are accepted to fall within this ambit of protection.

It must be noted that trade secrets are regarded as a form of confidential information⁴⁵ and the type of information that could qualify as confidential is unlimited, but may include "technical, business or marketing information".⁴⁶

In relation to the confidential nature of information, Marais J in *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg*⁴⁷ (hereafter referred to as *Coolair Ventilator*), declared that:

It is a matter of common knowledge that, under the free private enterprise and therefore of competition, it is to the advantage of a trader to obtain as much information as possible concerning the business of his rivals and to let them know as little as possible of his own. He would be happiest if only what he himself chooses to disclose comes to the knowledge of his competitors. He is of course aware of the fact that his employees collectively know a great deal if not all of his business affairs. Whilst in his employ, or even after leaving it, it is in their power to disclose to competitors information capable of use adverse to him. The information may be a trade secret, e.g. a method of production not protected by a patent, or a business secret, such as the financial arrangements of the undertaking, or a piece of domestic information like salary scale of clerks, or the efficiency of the firm's filing system. Some of this information would be of a highly confidential nature, as being potentially damaging if a competitor should obtain it, some would be less so, and much would be worthless to a rival organisation. All this being well known to employers and employees alike, it must be presumed that every employer who has trade competitors would if asked the question say: 'But of course my employees are under a duty to me not to disclose information which can harm my business,' and the employees would confirm that such a term is implied in their contract of service. If an employee or ex-employee breaches this term he is liable to be interdicted from continuing to do so and to be made to compensate for damages caused.⁴⁸

45 Par 322H-324H *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another* 1997 1 SA 316 (T).

46 Par 175F *Motion Transfer & Precision Roll Grinding CC v Carsten and Another* 1998 4 All SA 168 (N). Also see par 1049C-1049D *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another* 1996 3 SA 1043 (W).

47 *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* 1967 1 SA 686 (W).

48 Par 689A-689G (n 47) and as also applied in par 321H-322C (n 45).

Marais J further concluded that knowledge would be regarded as prima facie confidential if it would give a competitor an unfair advantage if obtained from an ex-employee (or employee). Marais J declares that the confidentiality of information is fortified if such information could be used to the harm the ex-employer (or employer) if divulged to third parties.⁴⁹

In line with the above, Diemont J in *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd*⁵⁰ (hereafter referred to as *Stellenbosch Wine Trust*) also expressed the opinion that even if there is no contract between the parties, and it is proven that the one party has used confidential information of the other party, obtained directly or indirectly and without the party's consent, "he should be guilty of an infringement of the plaintiff's rights".⁵¹ Confidential information must therefore have the "necessary quality of confidence about it" in that it must not be information which is commonly known or which is "public policy or public knowledge".⁵²

It is therefore evident that the employer can establish its protectable interest with reference to confidential information, *inter alia*, in that it has specific and unique products, services and methods of operating and that the employee was privy to such information and obtained knowledge of the employer's business operations and trading conditions as well as its trade connections, including, *inter alia*, customer lists, business and trade information and connections.

The nature and extent of the confidentiality of information should thus be determined with reference to the following:

49 Par 689F-689H (n 47) and also referred to in par 732C-732E *Van Castricum v Theunissen and Another* 1993 2 SA 726 (T).

50 *Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd and Another* 1972 3 All SA 335 (C).

51 At 343 (n 50) as applied in par 322C-322D (n 45).

52 As declared by Lord Green MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* 1948 (65) RPC 203 (CA) at 215.

In order to qualify as confidential information, the information concerned must comply with three requirements. First, it must involve and be capable of application in trade or industry: i.e. it must be useful (Van Heerden & Neethling, *Unlawful Competition* at 225). Second, it must not be public knowledge and public property: i.e. objectively determined it must be known only to a restricted number of people or to a closed circle (*Saltman Engineering Co Ltd v Cambell Engineering Co Ltd* [1984] 65 RPC 203 (CA) at 211 and 215; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 321G-H; *Van Castricum v Theunissen and another* 1993 (2) SA 726 (T) at 731 C-E and the cases there cited). Third, the information objectively determined must be of economic value to the person seeking to protect it (*Coolair Ventilator Co (SA) (Pty) Limited v Liebenberg* 1967 (1) SA 686 (W) at 691B-C; *Van Castricum v Theunissen supra* at 732A-F). The nature of the information is irrelevant. If it complies with the requirements stated it will be confidential (*SA Historical Mint (Pty) Ltd v Sutcliffe and another* 1983 (2) SA 84 (C) at 89H-90D; *Meter Systems Holdings Limited v Venter* 1993 (1) SA 409 (W) at 428A-430H). Ordinary general information about a business does not become confidential because the proprietor chooses to call it confidential (*SA Historical Mint (Pty) Ltd v Sutcliffe and another supra* at 89H). Whether or not what appears to be a commonplace piece of business information is confidential will depend on all the relevant circumstances ...⁵³

It is further submitted that where information is compiled as a result of work done by the compiler upon materials which may be available for use by anybody, that information will be confidential based on the premise that the compiler has used his/her brain and thus produced a result which can only be produced by somebody who goes through the process. Someone else making use of that information and thereby saving himself/herself the trouble, involving both labour and thought, and probably the expense of going through the process, will be guilty of a breach of confidence, which is the position notwithstanding the fact that the information could be discovered subject to finished materials, produced by the compiler to an examination or analysis by some or other expert or even an inspection by a member of the public. The fact that all the individual units of equipment that are employed in a particular operation may be materials that can be obtained in the general market, and the fact that the systems employed in the operation are well known to those concerned with whatever sort of activity is involved, does not

53 As summarised by Page J in par 175D-175E *Motion Transfer & Precision Roll Grinding CC v Carsten and Another* 1998 4 All SA 168 (N).

exclude that there may be some degree of confidentiality about the way in which they are used to achieve a particular result.⁵⁴

Furthermore, it is important to note that the fact that a trade secret is known to a group of people who may compete with each other does not necessarily lead to the inference that it has ceased to be a trade secret and shall therefore still qualify as a protectable interest.⁵⁵

3.3.2 *Skill and knowledge of the employee*

In *Automotive Tooling Systems (Pty) Ltd v Wilkens*,⁵⁶ the Supreme Court of Appeal as per Cachalia AJA, determined that an employee cannot be restrained from his/her "own skill, knowledge and experience"⁵⁷ and this may blur the lines between what may and may not be protected in terms of restraint of trade covenant. Cachalia AJA further also declared that the "quantum, or accumulation"⁵⁸ does not render the ex-employee's (or employee's) own skill, knowledge and experience, which do not vest in the employer, to be the subject of a protectable interest and therefore it cannot be protected by a restraint.

In light of the above it is thus prudent to determine the nature of the protectable interest which the restraint seeks to protect, because if it could not be described as a protectable interest of the employer, it cannot be protected in terms of a restraint of trade covenant.

54 Par 322H-324H (n 45) and par 731C-731H *Van Castricum v Theunissen and Another* 1993 2 SA 726 (T).

55 Par 509B-509J *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 2 SA 482 and par 175I *Motion Transfer & Precision Roll Grinding CC v Carsten and Another* 1998 4 All SA 168 (N).

56 *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 4 All SA 1073 (SCA).

57 Par 10 (n 56).

58 Par 17 (n 56).

3.4 Time of determination of reasonableness and enforceability of the restraint

The court should determine the reasonableness of a restraint of trade covenant at the time when the enforcement thereof is sought, by having reference to all the relevant circumstances of the particular case.⁵⁹ The court would thus be in the best position to evaluate the reasonableness of the restraint if the case and the circumstances thereof, are before the court.

Furthermore, the parties' own view in relation to reasonableness will never be decisive of the question whether the restraint is contrary to public policy. Saner states the following to be the reasons thereof:

First, the reasonableness of the restraint is judged only after consideration by a court on the basis of factors which might not necessarily have been present to the minds of the parties when they entered into the agreement. Second, the content of the agreement cannot itself be the exclusive measure of what is reasonable because that would result in the propriety of the agreement being tested against itself. That the parties in concluding the agreement seriously considered such a restraint to be necessary, that they identified and evaluated the disputed interest and described the restraint itself as most reasonable cannot therefore be decisive. It can at most be said that it is a factor to be considered in determining what is deserving of protection and of what is therefore reasonable.⁶⁰

In light of the above it is therefore submitted that the court can only adequately determine the content of public policy as the measure of enforceability of restraints, if the case is before it. Therefore, not only the prevailing circumstances at the time, but also the relevant circumstances prior to when the enforcement is sought, will thus have to be taken into account in order to determine whether the restraint shall be enforceable in the particular circumstances.

⁵⁹ Par 898D (n 4).

⁶⁰ Saner 2008 <http://www.lexisnexis.co.za>. The view expressed by Saner is in accordance with the approach followed by the court in *Basson v Chilwan and Others* 1993 2 All SA 373 (A)

4 Onus of proof

4.1 Introduction

The onus of proof rests on the employee to prove that a restraint of trade covenant is contrary to public policy. However, as stated above, even though some doubt has been expressed in relation to the onus of proof in light of section 26 of the Interim Constitution and section 22 of the Constitution, neither the Supreme Court of Appeal nor the Constitutional Court has "pronounced authoritatively"⁶¹ on the matter, and therefore it is submitted that the incidence of the onus of proof in restraint of trade covenant has not changed after *Magna Alloys*.

It is therefore submitted that the debate about the onus of proof in restraint of trade covenants has been settled by the determination of the Appellate Division as per Rabie JP in *Magna Alloys*. Restraint of trade covenants are regarded as prima facie valid and enforceable and therefore the onus of proof rests on the party who contends that the enforcement of a restraint of trade covenant is contrary to public policy. The question relating to onus of proof is thus a question of fact, which shall be determined with reference to the particular circumstances of the matter.⁶² The party who contends that the restraint is contrary to public policy must thus prove on a balance of probability, that the enforcement of the restraint shall be contrary to public policy.⁶³

The Appellate Division in *Magna Alloys* further declared that, because public policy is the measure against which reasonableness is compared, there is no onus on the party who wants to enforce the restraint to prove that it is reasonable, but that the only test is whether the restraint, if enforced, would be contrary to or infringing on public policy. Therefore

61 As discussed in chapter 3 hereof. Also see Saner 2008 <http://www.lexisnexis.co.za>.

62 Par 892A (n 4).

63 Par 893A-893B (n 4) and Saner 2008 <http://www.lexisnexis.co.za>.

the onus to prove the latter shall rest on the party who contends that he/she should not be bound to the restraint of trade covenant to which he/she has consented.⁶⁴

The leading case after *Magna Alloys* has been *Sunshine Records (Pty) Ltd v Fröhling*⁶⁵ (hereafter referred to as *Sunshine Records*) wherein Grosskopf JA summarised the principle as follows:

In determination whether a restriction on the freedom to trade or to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it would be contrary to the public interest to enforce an unreasonable restriction on a person's freedom of trade.

In relation to the implication and application of the onus of proof Botha JA in *Basson v Chilwan*,⁶⁶ (hereafter referred to as *Basson*) declared the following:

The incidence of the *onus* in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in other civil cases in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the court is unable to make up its mind on the point the restraint will be enforced. The covenantor is burdened with the *onus* because public policy requires that people should be bound by their contractual undertakings. The covenantor is not bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's

64 Par 893C (n 4). Also see the conclusion of Rabie JP in par 898C-898D (n 4).

65 *Sunshine Records (Pty) Ltd v Fröhling and Others* 1990 (4) SA 782 (A).

66 (n 9) in Saner 2008 <http://www.lexisnexis.co.za>.

freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the *onus* on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into.⁶⁷

Therefore, the employee has the onus to prove that the restraint is contrary to the public policy and that he/she cannot be expected to be bound to and honour the restraint. Furthermore, as declared by Botha JA above, the employee only needs to prove that the restraint is contrary to public policy and his/her onus does not have any further role to play when the court is considering the reasonableness of the restraint. Consequently, if the employee contends and proves that the employer does not have a protectable interest which it seeks to protect through the restraint, the restraint would be against public policy.

4.2 *The incidence of the onus of proof and the Constitution*

In relation to the onus of proof and the implication of the freedom of trade⁶⁸ thereon, it is merely important to note that the incidence of the onus entails no greater or more significant consequence than what generally applies in civil cases.⁶⁹ The practical implication thereof is thus that the party who seeks to enforce the restraint needs to do no more than to invoke the provisions of the contract of employment to prove the breach and the party who wishes to avert such enforcement is required to prove on a balance of probability that it would be unreasonable to enforce the restraint in the particular circumstances. Therefore the operation of the principle of sanctity of contract is exhausted by placing the onus on the employee, and would further play no role when the reasonableness or otherwise of the restraint is enquired into. Consequently, it is submitted that section 22 should not change the

67 (n 9) in Saner 2008 <http://www.lexisnexis.co.za>. Also see par 190B-190E *Aranda Textile Mills (Pty) Ltd v Hurn and Another* 2000 3 All SA 183 (EC).

68 Section 22 of the *Constitution of the Republic of South Africa*, 1996.

69 (n 9) in Saner 2008 <http://www.lexisnexis.co.za>.

approach to be followed in relation to the onus of proof in restraint of trade covenants.

It is further submitted in accordance with Saner,⁷⁰ that the view expressed by Liebenberg J in *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*⁷¹ and as accepted by Kondile J in *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*⁷², was incorrect in speculating that the provisions in relation to freedom of trade as entrenched in the Constitution, would subsequently put the onus of proof on the party who wants to enforce the restraint. In relation to the position of the onus of proof, Saner declares that:

Having reached the conclusion that agreements in restraint of trade are not *per se* repugnant to the Constitution (as he did), it should follow that a party seeking to enforce the restraint bears no constitutionally imposed onus whatsoever. On the contrary, any party alleging, in a special case, that the Constitution does affect such a restraint, should have to prove that fact. The incidence of the onus, as set out in *Magna Alloys*, must consequently remain on the party seeking to escape the effect of a restraint, whether such party alleges it is unreasonable or contrary to the Constitution.⁷³

In *Reddy v Siemens Telecommunications (Pty) Ltd*⁷⁴ the Supreme Court of Appeal as per Malan AJA, declared without determining the onus of proof, that the substantive law was laid down in *Magna Alloys* and that the facts in the case before it called for a value judgment in which the onus of proof played no role. Malan AJA further held that both principles of public policy, being freedom of trade on the one hand and sanctity of contract on the other hand, does not only reflect common law but also the "constitutional values" and restraint of trade covenants should therefore be evaluated in light of the particular protectable interests it seeks to protect.⁷⁵

70 Saner 2008 <http://www.lexisnexis.co.za>.

71 *Fidelity Guard Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 1997 4 All SA 650 SE.

72 *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another* 2004 1 BCLR 39 (N).

73 Saner 2008 <http://www.lexisnexis.co.za>.

74 *Reddy v Siemens Telecommunications (Pty) Ltd* 2006 JOL 11829 (SCA).

75 Par 15-16 (n 74).

In light of the above discussion it is thus clear that the principles pertaining to the incidence of the onus of proof are those laid down in *Magna Alloys* and therefore the employee will bear the onus to prove that the restraint, if enforced, would be contrary to public policy.

5 Enforceability

As already stated above, restraint of trade covenants are prima facie valid and enforceable and therefore the employee bears the onus to prove that the restraint is against public policy and should not be enforced. However, even if the restraint is too widely formulated, the court may, in light of reasonableness, order the partial enforcement thereof. Furthermore, the employer does not attract the onus of proof if it contends that the restraint is too wide and should be partially enforced.⁷⁶

The aforementioned view was also endorsed by the court in *Nampesca (SA) Ltd v Zaderer*,⁷⁷ but it was held that a proper basis of the narrower enforcement of the restraint should be put before the court by the employer. However, Saner declares that:

Consequently, once the covenantor has discharged the onus of proving that the covenant in restraint of trade is in conflict with the public interest and thus unenforceable as a whole, it would not seem unreasonable to require that the covenantee provide a suitable answer to indicate why partial enforcement should nevertheless be allowed.⁷⁸

Saner subsequently submits that the onus of partial enforcement should rest on the employer to prove that the partial enforcement of the restraint should be allowed. In the author's view the approach followed by Saner is the correct one and does not impose an unreasonable burden on the

76 *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 3 All SA 126 (W).

77 Par 895H-895I *Nampesca (SA) (Pty) Ltd* 1999 1 SA (C) as referred to in Saner 2008 <http://www.lexisnexis.co.za>.

78 Saner 2008 <http://www.lexisnexis.co.za>.

employer to prove that the partial enforcement should be allowed. It is further submitted that the employer would be in a better position to put a proper basis of reasoning before the court to show why the restraint should still be partially enforced even though the employee has discharged the onus in relation to the enforceability of the restraint as a whole.

In conclusion, it is vital to note that the court will not make a new contract between the parties and the court is obliged not to enforce the court's idea of what ought to have been. It is thus submitted that the courts need to apply the doctrine of severability, specifically in relation to restraint of trade covenants, since the failure to utilise this doctrine will lead to injustice of what is sought to be protected by the restraint. Notwithstanding the foregoing, it goes without saying that the courts will still not enforce restraints which are contrary to public policy.

6 Conclusion

In light of the above discussion it is thus clear that a restraint of trade covenant forms an integral part of our commercial life and has an important purpose in protecting the protectable interests of an employer.

In relation to the enforceability of a restraint of trade covenant, there must be a real or potential risk (objectively evaluated) that, unless the restraint is enforced, the employee will encroach on the protectable interest of the employer.⁷⁹ It is further submitted that public policy requires parties to comply with and honour their contractual obligations and therefore a restraint of trade covenant shall be valid and enforceable to the extent that it is not contrary to public policy.⁸⁰

79 Par 20 (n 74).

80 Par 893H-894D (n 4).

It is therefore further submitted that a restraint of trade covenant must be construed not so much as a negative restriction of the employee's right to freedom of trade, but as a positive protection of the employer's protectable interests. In light of the foregoing it is thus clear that the restraint must not go further than is necessary to reasonably protect the protectable interest of the employer. In other words, if the employer seeks to protect its protectable interest, such protection should not go further than to restrain the employee from using, *inter alia*, the employer's customer connections, information, know-how, techniques, systems and methods which the employee became privy to during his/her employment, and to protect the employer from an employee using the aforementioned information to unlawfully and/or wrongfully compete with the employer, or to use such information to solicit existing and potential customers of the employer.

Restraint of trade covenants thus do not have the objective of excluding the employee from being economically active or productive, but to prevent the employee from using the protectable interest of his/her employer as a "springboard" to unlawfully and/or wrongfully compete with the employer.

In conclusion, public policy thus requires that both the employee's right to freedom of trade and the right of the employer to protect its interests, be protected in our society. Thus, enforcement of a restraint would therefore have to be evaluated against the backdrop of striking a balance between these rights. Accordingly, a restraint would be unenforceable if it does not protect an equally important right of the employer in relation to its protectable interests.

CHAPTER 5: CONCLUSION

1 Introduction

The purpose of this dissertation was to evaluate and synthesise literature and jurisprudence in order to determine the current principles pertaining to restraint of trade covenants in the context of the constitutionally entrenched right to freedom of trade.

As stated in the introduction, the Constitution is supreme and therefore any law or conduct inconsistent therewith would accordingly be invalid. The principles pertaining to restraint of trade covenants derive from common law and should therefore be interpreted in accordance with section 39 of the Constitution in order to determine their validity and enforceability. Despite the view held by Kondile J in *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,¹ it is submitted that restraint of trade covenants, as interpreted and developed by our courts, promote the spirit, purport and objectives of our Constitution and should therefore be regarded as prima facie valid and enforceable.

Furthermore, it is submitted that public policy would require having reference to the values underpinning our Constitution, but that the assessment of the reasonableness of a restraint of trade covenant in light hereof, requires a value judgment by the court and that the incidence of onus of proof would not play a role in such a value judgment. In other words, such a value judgment would comprehend the requirements stipulated in terms of section 36 of the Constitution and would therefore not require restraints to be regarded as prima facie void as per the English law approach.

1 *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2004 1 BCLR 39 (N).

2 Historical overview and theoretical foundations

In light of the historical overview and theoretical foundations of restraint of trade covenants within South African law, it is clear that the principles were clarified and simplified in the judgment of the Appellate Division in *Magna Alloys*² in terms whereof restraint of trade covenants are regarded as prima facie valid and enforceable, unless they are contrary to public policy.

Despite the recent development in jurisprudence, it is submitted that the sanctity of contract is deeply rooted in our public policy and forms an integral part of our commercial and business life. It is further submitted that the principles pertaining to restraint of trade covenants as determined by the Appellate Division in *Magna Alloys*³, as it was then, and as subsequently interpreted and developed by our courts, would still be applicable today.

3 Fundamental right to freedom of trade

As is evident from chapter 3, section 22 of the Constitution was enacted against the backdrop of repudiating past exclusionary practices and affirming the entitlements appropriate in our open and democratic society. Section 22 entrenches the freedom of trade against the history of job reservation, past practices and restrictions on employment, exclusion from employment and mostly arbitrary practices in relation thereto. It is thus submitted that section 22 of the Constitution was not enacted to afford an unlimited right to freedom of trade to every citizen, but that it had the objective of addressing the inequalities of the past. Therefore, it did not have the objective to deprive the employer of its right to protect its legitimate proprietary interest, nor does public policy require the employer to do so.

2 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 863 (A).

3 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 863 (A).

Consequently, restraint of trade covenants do limit the right to freedom of trade, but in light of the discussions above, the limitation would be reasonable and justifiable in an open and democratic society, because it protects an equally important right of the employer. However, it must be noted that, for the employer to have this equally important right, it must seek to protect a legitimate proprietary interest, which must form the basis of the restraint of trade covenant. If the aforementioned is absent from the restraint, the restraint would be contrary to public policy.

4 Purpose, validity and enforceability of restraint of trade covenants in employment contracts

The validity and enforceability of restraint of trade covenants are measured against the touchstone of public policy. Public policy therefore dictates that, in order for a restraint to be reasonable, it should protect a right which can be balanced with the limitation of the constitutional right to freedom of trade.

It is therefore submitted that the only way that such an equal right could be established, is that there must be a legitimate proprietary interest worthy of protection in terms of the law, which the restraint seeks to protect.

Accordingly, it is submitted that in the absence of such a legitimate proprietary interest, the restraint would be against public policy and would therefore not be enforceable.

5 Conclusion: What is the purpose, validity and implication of restraint of trade covenants within the ambit of the employment relationship in light of the constitutional protection of every citizen's right to choose his/her trade, occupation and profession freely?

In light of the above and in answering the research question posed in chapter 1 of this dissertation, the author therefore submits that restraint of trade covenants are prima facie valid and enforceable within South African law, provided that a balance is struck between the right of the employer to protect its legitimate proprietary interest and the employee's right to freedom of trade. It is further submitted that these rights are of equal importance within South African law and therefore restraint of trade covenants cannot be regarded as prima facie invalid and unenforceable.

Furthermore, it is submitted that the purpose of a restraint of trade covenant is to protect the protectable interest of the employer against an employee who became privy thereto during the course of employment, and therefore finds vital application within this ambit. The employee only needs to prove that the employer does not have a legitimate proprietary interest that it seeks to protect through the restraint, to show that such a restraint is contrary to public policy, which does not impose a heavier burden on the employee in the context of freedom of trade. Consequently, it is further submitted that it is trite law that where the restraint does not protect a legitimate proprietary interest, it would be regarded as contrary to public policy, because the employer does not have an equally important right to weigh up against the limitation of the constitutional right to freedom of trade.

It is important to point out that restraint of trade covenants remain an integral part of our commercial and business life and empower employers to protect their legitimate proprietary interests against

employees who have been privy to such interests to prevent them from unlawfully and/or wrongfully competing with their employers. The restraint therefore does not have the aim of eliminating competition *per se*, but to regulate competition by employees who, *inter alia*, start their own businesses in competition with the ex-employer, take up employment with the competition or solicit employees and/or customers of the employer, to name but a few possibilities.

Furthermore, as submitted above and as discussed in chapter 3 of this dissertation, the enactment of the Constitution did not alter the principles pertaining to restraint of trade covenants as determined in *Magna Alloys*. In conclusion it is submitted that despite neither the Supreme Court of Appeal nor the Constitutional Court determining the status of restraint of trade covenants in light of the enactment of section 22 of the Constitution, the courts would not reverse the status of restraints to reflect the position held by our courts prior to the judgment of *Magna Alloys* (in accordance with English law), due to restraint of trade covenants being reasonable and justifiable and complying with the requirements of limitation of a constitutional right in terms of section 36 of the Constitution. Restraint of trade covenants are therefore *prima facie* valid and enforceable, despite the constitutional right to freedom of trade.

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To whom it may concern,

This letter serves to confirm that the dissertation entitled, "RESTRAINT OF TRADE COVENANTS IN THE CONTEXT OF THE FREEDOM TO TRADE" by JOHANNA ANTOINETTE ESTERHUIZEN (ID number: 8305160090085), has been language edited by CTrans, the language practice office of the School of Languages and service provider at the North-West University (Vaal Triangle Campus). This means that the language has been checked for spelling, grammar and sentence construction. The above-mentioned document was edited by a SATI Accredited Professional Editor. The dissertation will be submitted for examination by Ms Esterhuizen, under the supervision of Adv. P. Myburgh, to the Faculty of Law at the North-West University (Potchefstroom Campus).

Sincerely

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Manager: CTrans