RESTRAINTS OF TRADE AGREEMENTS REVISTED: THE LAW AND RECENT DEVELOPMENTS.

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CHAPTER 1: THE LAW ON RESTRAINT OF TRADE AGREEMENTS

1.1. Introduction

In the arena of individual employment law the parties to an employment contract are the employer and employee.[1] The validity of an employment contract, like any other contract, depends on the parties agreeing to all the terms and conditions − and a restraint of trade clause is one of the clauses which may be included in the employment contract.[2] In the broadest sense, a restraint of trade agreement can be defined as an agreement which forms part of a broader contractual relationship in which parties agree to one of the parties being restrained from exercising their trade, occupation or profession for a specific period of time, should the contractual relationship between the parties terminate.[3]

The employer is the party who usually seeks to impose the restraint against the employee and may approach a court to enforce the restraint agreement in the event of breach by the employee. Where the employer seeks to enforce a restraint agreement in court, the employee may claim that the restraint agreement is unreasonable and therefore unenforceable.

The purpose of a restraint of trade clause is to ensure that 'the proprietary rights of the covenantee' (the employer) are protected.[4] Proprietary rights include trade secrets, trade connections of the employer, confidential information and goodwill in some instances.[5] The court must balance the competing interests of the parties, namely the

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[1] Tshepo Dooka 'The restraint of trade clause: a review of general principles' (1999) 7 *Juta Business Law* 135 at 135.
[2] Marlize van Jaarsveld 'The validity of a restraint of trade clause in an employment contract' (2003) 15 *South African Mercantile Law Journal* 326 at 326.
[3] Phillip Sutherland 'Breach of preceding contracts by the covenantee and restraint of trade: England, Scotland and South Africa' (2000) *Journal of South African Law* 675 at 675.
[4] Tomas Floyd 'The constitutionality of the onus of proof when enforcing restraint of trade agreements: an appropriate evaluation of the common-law rules' (2012) 75 *THRHR* 521 at 533.
[5] Tamara Cohen 'The enforceability of restraint of trade provisions within a wrongfully terminated contract of employment' (1998) 10 *South African Mercantile Law Journal* 383 at 384.

need to uphold the public policy principle of *pacta sunt servanda,* despite any unfair or unreasonable obligations which bind the parties,[6] and the second consideration is that individuals should be allowed to engage in any commercial activity that they choose; they should be allowed to continue to engage in their profession, trade or occupation.[7] In summary, the employee's right to earn a living and remain economically productive must be balanced against the employer's right to protect his or her proprietary interest.[8]

Certainty regarding the law on restraints of trade in the South African legal system was brought about by the then Appellate Division decision in *Magna Alloys and Research (SA) (Pty) v Ellis*.[9] This decision brought an end to the application of the traditional English law approach which holds that a restraint of trade agreement is void because it limits a persons economic productivity.[10] In line with the South African contractual law principles, the court held that a restraint of trade agreement is *prima facie* enforceable, and where the enforceability of the restraint agreement is in issue, the party that seeks to avoid the restraint agreement must prove that the restraint is unreasonable and therefore unenforceable as it would be contrary to public interest that the restraint be enforced.[11]

This dissertation revisits the law regarding restraint of trade agreements to explore the current approach adopted by courts in deciding on matters regarding the enforceability of restraint of trade agreements in the employment law context. This dissertation proceeds as follows, this chapter will focus on the meaning of a restraint of trade, its purpose, requirements for its enforceability and the remedies available to both the employer to enforce the restraint of trade against the employee, and employee to escape the enforcement of restraint of trade.

Chapter two will explore the impact that the Constitution has had on the law regarding restraint of trade. The chapter will further look at the extent to which constitutional values and principles governing contractual law can be reconciled.

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[6] *Sunshine Records (Pty) Ltd v Frohling* 1990 (4) SA 782 (A) at 794C.
[7] *Sunshine Records* supra note 6 at 794C-D.
[8] Claire Hock 'Covenants in Restraint of Trade: Do they Survive the Unlawful and Unfair Termination of Employment by the Employer' (2003) 24 *ILJ* 1231 at 1234.
[9] 1984 (4) SA 874 (A).
[10] *Magna Alloys* supra note 9 at 891.
[11] *Magna Alloys* supra note 9 at 891-893.

Chapter three will explore and analyse the courts' approach to restraint of trade matters and whether the courts continue to adopt a uniform approach in applying the principles relating of restraint of trade agreements. The chapter will also discuss the developments on the law regarding restraints of trade in the past five years of importance being the introduction of the garden leave concept.

Lastly, chapter four will discuss the operation of the restraint of trade doctrine under the English legal system because the law of restraints of trade under the South African legal system was adapted from the traditional English law approach to restraints of trade. Furthermore, the chapter will compare the operation of the restraint of trade doctrine under the English legal system to the operation of the doctrine under the South African legal system.

1.2. The duty of good faith

The conclusion of a contract of employment establishes an employment relationship which is based on trust.[12] Depending on the position for which the employee is employed, the employee may owe the employer a range of duties.[13] The duties that are incumbent on all employees frequently arise out of contractual agreement.[14] These duties are either express or implied.[15] An important implied common law duty on an employee is the duty to act in good faith.[16] – an implied contractual term which obliges the employee to 'serve his or [her] employer honestly and faithfully'.[17]

The duty of good faith requires an employee not to engage in any activities which are likely to have a negative impact on the employer's interests.[18] Furthermore, an employee should not engage in activities which result in a conflict of interest.[19] The absence of an express term prohibiting such conduct does not affect the duty of good faith which the employee owes to the employer.[20] Once the employment relationship

[12] Kershwyn Bassuday 'Derivative misconduct and an employee's duty of good faith: *Western Platinum Refinery Ltd v Hlebela & others* **(**2015) 36 ILJ 2280 (LAC)' (2016) 37 *ILJ* 86 at 90.
[13] Kathy Idensohn 'The nature and scope of employees' fiduciary duties' (2012) 33 *ILJ* 1539 at 1541.
[14] Idensohn op cit note 13 at 1541.
[15] Ibid.
[16] Ibid.
[17] *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at 786A.
[18] *Ganes v Telecom Namibia Ltd* (2004) 25 ILJ 995 (SCA) at 1003A.
[19] *Ganes* supra note 18 at 1003A.
[20] *Bonfiglioli SA (Pty) Ltd v Panaino* (2015) 36 ILJ 947 (LAC) at 954G-H.

terminates with a restraint of trade agreement concluded between the parties, the restraint begins to operate as a mechanism to prevent the employee from competing with the employer using the employer's confidential information.[21]

1.3. Determining the enforceability of a restraint of trade agreement

In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*, the court affirmed the finding in *National Chemsearch (SA) v Borrowman*,[22] that when a party approaches a court seeking the enforcement of a restraint of trade agreement the court should have regard to the length of time for which the restraint of trade is intended to be enforced.[23] Such facts and circumstances will indicate whether the restraint of trade agreement is contrary to public policy or not, which in turn will determine its enforceability.[24]

The employer must show a proprietary interest before a restraint of trade can be enforced by a court.[25] Failure to do so marks the end of the dispute, and the issue of the enforceability of the restraint of trade becomes moot.[26] Once a proprietary interest is proved to exist, the reasonableness of the restraint of trade be determined and its consequent enforceability.[27]

1.3.1. Onus

Before a determination can be made on the enforceability of a restraint of trade, the employer must prove the existence of the restraint of trade agreement.[28] Once it is proved to exist, only then can the employee lead evidence to show that the restraint of trade is unreasonable and as a result unenforceable.[29] The substantive law regarding where the onus lays has been laid down in the case of *Magna Alloys and Research*

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[21] Idensohn op cit note 13 at 1552.
[22] 1979 (3) SA 1092 (T) at 1107G.
[23] *Magna Alloys* supra note 9 at 892.
[24] *Magna Alloys* supra note 9 at 896.
[25] *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) at 381D.
[26] *Advtech Resourcing (Pty) Ltd* supra note 25 at 381E.
[27] Ibid at 381E-F.
[28] *SPP Pumps (SA) (Pty) Ltd v Stoop* (2015) 36 ILJ 1134 (LC) 1140G.
[29] *SPP Pumps* supra note 28 at 1140G.

(SA) (Pty) Ltd v Ellis,[30] in which the court held that the party resisting the enforcement of the restraint should bear the onus of proving that the restraint agreement is contrary to public policy and should be rendered unenforceable.[31]

The unreasonableness of the restraint of trade agreement must be proved on a balance of probabilities.[32] Where an employee admits to the fairness, necessity and reasonableness of a restraint of trade agreement, the acknowledgement will not be decisive in determining the enforceability of the restraint of trade.[33] The employee still needs to prove the restraint is unreasonable and contrary to public policy.

The employer bears the onus to show that the employee has breached the restraint of trade agreement and that the breach puts the employer's proprietary interest in a vulnerable position.[34] The employer does not need to be the owner of the confidential information for him or her to seek protection against its misuse.[35] The employer needs to show, on the balance of probabilities, that there is a possibility that the employee may use the confidential for his or her benefit or for their new employer.[36]

The employer does not need to prove intention to impart confidential information.[37] It is enough to show that by virtue of the relationship created between the employee and the ir new employer (to whom the employee owes loyalty), a possibility exists that the employee may divulge their previous employer's confidential information or trade secrets.[38] It is the 'risk of disclosure' that must be shown by the employer.[39]

The failure to show that a protectable interest exists leads to the conclusion that that the restraint imposed on the employee is to eliminate competition and as such

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[30] *Magna Alloys* supra note 9 at 893.
[31] *Magna Alloys* supra note 9 at 893. In the case of *Reddy v Siemens Telecommunications (Pty) Ltd* (2007) 28 SA ILJ 317 (SCA) at 325F-326B, the applicant submitted that the rule as laid down in *Magna Alloys* with regards to the onus of proof, and having the party who seeks to avoid the restraint clause proving its unreasonableness, was contrary to section 22 of the Constitution. Malan AJA refused to engage in that discussion as that was not the issue brought before the court. The court held that the rule as in the case of *Magna Alloys* should stand thus the court confirmed the position held by the court in the case in *Magna Alloys*.
[32] *Experian SA (Pty) Ltd v Haynes* (2013) 34 ILJ 529 (GSJ) at 534G.
[33] *Arrow Altech Distribution (Pty) Ltd v Byrne* (2008) 29 ILJ 1391 (D) at 1402A.
[34] *Document Warehouse (Pty) Limited v Truebody* [2010] ZAGPJHC 92 para 21.
[35] *Waste Products Utilisation (Pty) Ltd v Wilkes* 2003 (2) SA 515 (W) at 574A.
[36] *Waste Products* supra note 35 at 574A.
[37] Ibid.
[38] *Reddy* supra note 31 at 329J-330A.
[39] Ibid at 330A.

is unreasonable and contrary to public policy, and so unenforceable.[40] Therefore, the employer must show that there is a 'real, substantial and proprietary interest' that is worthy of protection.[41]

1.3.2. Proprietary interest

An interest, which requires and deserves protection'[42] includes trade secrets, other confidential information, and the goodwill of the business.[43] Where a restraint of trade agreement has the outright objective of excluding or removing competition, such an agreement is regarded as unenforceable as it is unreasonable and contrary to public policy.[44] The two types of proprietary interests which are afforded protection include trade connections which are made up of customer and supplier connections,[45] and trade secrets which are made up of confidential information which is essential to the thriving nature of the business and makes the business unique from its competitors. [46]

a) Customer connections

With regard to customer connections and whether they are a protectable interest, it must be shown that an intimate relationship exists between the employee and the customers, to the extent that the customers may easily be influenced by the employee to follow him or her when the contract of employment with the old employer terminates.[47] The existence of such an intimate relationship is a question of fact which depends on various factors, such as the scope of the employee's responsibilities;[48] the number of times and the duration which the employee comes into contact with the customers;[49] and whether proof has been presented to the court showing customers leaving the employer's business following the employee.[50]

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[40] *Document Warehouse* supra note 34 para 23.
[41] Ibid at para 41.
[42] *Labournet (Pty) Ltd v Jankielsohn* (2017) 38 ILJ 1302 (LAC) at 1312C-D.
[43] CJ Pretorius 'Covenants in Restraint of Trade: An evaluation of the positive law' (1997) 60 *THRHR* 6 at 20.
[44] *Automotive Tooling Systems (Pty) Ltd v Wilkens* (2007) 28 ILJ 145 (SCA) 149G-H.
[45] *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T) at 502E-F.
[46] Ibid.
[47] *Walter Mcnaughtan (Pty) Ltd v Schwartz* (2004) 25 ILJ 1039 (C) at 1048H.
[48] *Walter Mcnaughtan* supra note 47 at 1048I.
[49]Ibid.
[50] Walter Mcnaughtan supra note 47 at 1049A.

Where the facts are prove the existence of an intimate relationship between the employee and the customers which came into being primarily because of the employment by the employer of the employee then can it be said that the customer connections are a protectable interest.[51]

b) What is regarded as confidential information

In *Knox D'Arcy Ltd v Jamieson*,[52] the court noted the difference between trade secrets and other confidential information as:

> *'(a)* "trade secrets', in a broad sense, being confidential information of an employer to which an employee may have access and which is of such a nature that the employee may never use it except for the benefit of the employer, and which the employee remains bound to keep secret at all times after leaving that employer's employ; and
>
> *(b)* other confidential information of an employer which an employee must guard as confidential as long as he remains employed by the employer, by virtue of his general implied duty of good faith to his employer (a duty the extent of which varies according to the nature of the contract), but which is of such a nature that "it is inevitably carried away in the employee's head after the employment has ended".' [53]

In the case of *Arrow Altech Distribution (Pty) Ltd v Byrne*,[54]the court noted that where information was so 'trivial' in nature or because of the ease with which persons could retrieve such information through the use of 'public sources of information' that such information could not be said to be confidential information.[55] Then there is information that can only be accessed by a closed group of people and is regarded as confidential by reason of it being labelled confidential and the nature of the information could be said to be confidential.[56] Information is regarded as confidential when it is

a) capable of application in trade or industry,
b) useful; is not . . . public knowledge or property;
c) known only to a restricted number of people or a closed circle; and

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[51] Walter Mcnaughtan supra note 47 at 1050A.
[52] 1992 (3) SA 520 (W).
[53] *Knox D'Arcy* supra note 52 at 527F-H.
[54] *Arrow Altech* supra note 33.
[55] Ibid at 1400E-F.
[56] Ibid at 1400G-H.

d) of economic value to the person seeking to protect it.[57]

Regard must be had to the relevant circumstances together with the information that is said to be confidential information, to be able to determine whether a protectable interest exists.[58]

The difficulty of defining the distinction between the 'skill, expertise and know-how' of the employee and the confidential information belonging to the employer was acknowledged by the court in *Automotive Tooling Systems (Pty) Ltd v Wilkens*.[59] Whether the skill or know-how acquired by the employee is an employer's protectable interest or whether such an interest is an employee's is a question of fact. Where an employee acquires skill as a result of working towards their trade, occupation or profession, restraining the use of such knowledge or skill would be unreasonable.[60]

The efforts of the employer in teaching the employee a new skill and making use of its resources available to train and equip an employee with the necessary skill to do his or her work does not mean that the employer creates an interest to protect.[61]

Once the employer has shown that he or she has a protectable interest, the employer still needs to satisfy the reasonableness test.[62] The enforcer will need to show that the restraint is reasonable between the parties and does not infringe public policy.[63] In some instances, however, despite the fulfilment of criteria to show that information is a trade secret or confidential information and thus that it is a proprietary interest, where the employee's interest to remain commercially active outweighs the employer's right to protect the trade secret or confidential information, a court may find the restraint agreement to be unreasonable and unenforceable [64]

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[57] *Hi-Tech Recruitment (Pty) Ltd v Nel* [2016] ZALCJHB 250 para 60.
[58] *Dickinson Holdings (Group) (Pty) Ltd v Du Plessis* 2008 (4) SA 214 (N) at 226A.
[59] (2007) 28 ILJ 145 (SCA) 146H.
[60] Ibid.
[61] *Labournet* supra note 42 at 1316J- 1317.
[62] Pretorius op cit note 43 at 6.
[63] *Super Safes (Pty) Ltd v Voulgarides* 1975 (2) SA 783 (W) at 785D.
[64] *Walter Mcnaughtan* supra note 47 at 1047F-I.

1.3.3. Reasonableness of a restraint of trade

The enforceability of a restraint of trade agreement hangs on the reasonableness of the restraint agreement.[65] In *Basson v Chilwan*[66] it was held that where the restraint of trade clause is unreasonable to the extent that it is contrary to public policy, a court will regard such a restraint as unenforceable.[67] Courts determine the reasonableness of enforcing the restraint of trade in light of the facts and circumstances of the case.[68]

To determine the reasonableness of a restraint agreement a value judgment must be made by a court in which the court takes into account the two guiding policy considerations, being that parties should be allowed to enter into agreements and be bound by them, and that parties should be free to engage in any trade, occupation or profession of their choosing to remain economically productive.[69]

Nienaber JA in *Basson v Chilwan*,[70] laid down four questions intended to assist in determining the reasonableness of a restraint. The four questions were:

- Firstly, is there an interest that is possessed by either one of the parties that needs to be protected upon the termination of the contractual relationship?[71]
- Secondly, does that party's interest stand to be infringed by the other party?[72]
- Thirdly, if so, does the party's interest count for more both 'quantitatively and qualitatively' against the other party's interest of practising their trade, occupation or profession?[73]
- Fourthly, within the sphere of public policy is there an indicator beyond the relationship of both parties which seeks to lead the court to the enforcement or non-enforcement of the restraint of trade? [74]

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[65] Dooka op cit note 1 at 136.
[66] 1993 (3) SA 742 (A).
[67] *Basson* supra note 66 at 764.
[68] *Basson* supra note 66 at 767.
[69] *Reddy* supra note 31 at 326E-327A.
[70] *Basson* supra note 66 at 767.
[71] Ibid at 767G.
[72] Ibid.
[73] Ibid.
[74] Ibid at 767H.

These four questions need to be considered within the overall facts and circumstances of each case.[75] A fifth question proposed is whether the extent to which the restraint seeks to protect the interest is extreme, with regard to the facts and circumstance of the case.[76]

The relationship that exists between the parties is not the only factor that determines reasonableness; other factors within the scope of public policy may also determine reasonableness.[77] The fact that parties have an agreement that the restraint of trade agreement is reasonable does not preclude the court from making a contrary ruling on the matter.[78] The description of the restraint of trade agreement as reasonable by the parties is not decisive.[79] Where a court finds that the restraint of trade agreement is reasonable between the parties it may still find that the restraint of trade is contrary to the public interest.[80]

The reasonableness inquiry considers the interests of both parties to the agreement.[81] Where the interest of the employee weighs more than the employer's, a court will find the restraint of trade agreement unreasonable and therefore unenforceable.[82]

Determining the reasonableness of a restraint of trade agreement amounts to a weighing of the interest of the parties at the time the enforcement of the restraint is sought.[83] The balancing exercise is done together with a consideration of factors such as the 'nature, extent and duration of the restraint' as well as factors which are present and applicable to the circumstances of the matter.[84] The bargaining powers of the parties need to be taken into consideration as well.[85]

The duration of the restraint must be reasonable and rational.[86] Where the duration of the restraint is found to be irrational, it leads to the conclusion that the

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[75] Ibid at 743.
[76] *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem* 1999 (1) SA 472 (W) at 484E.
[77] Pretorius op cit note 43 at 11.
[78] *Advtech Resourcing (Pty) Ltd* supra note 26 at 382G.
[79] Ibid.
[80] *Reddy* supra note 31 at 327D.
[81] Ibid at 328A.
[82] Ibid at 328A.
[83] *Ball Bambalela v Bolts (Pty) Ltd* (2013) 34 ILJ 2821 (LAC) at 2829A.
[84] Ibid.
[85] Ibid.
[86] *Labournet* supra note 42 at 1313D.

restraint is unreasonable.[87] In the case of wrongful termination of employment, an employer is not precluded from seeking the enforcement of the restraint of trade agreement.[88] The wrongful termination is a factor which is included in balancing the scales and determining the reasonableness of the restraint of trade.[89]

Eventually a court may rule that the restraint of trade clause is enforceable or unenforceable as a whole or partially.[90] The then Appellate Division in *Sasfin (Pty) Ltd v Beukes*,[91] held that where parts of a clause are found to be contrary to public policy and they cannot be removed from the remaining provisions without the clause losing its original meaning, objective, and distorting the intention of the parties, the entire clause is regarded as invalid and unenforceable.[92]

1.3.4. Remedies available to the employer

a) Interdict

Where an employer has shown that they have a protectable interest, and where an employee has breached a restraint of trade agreement, an employer can apply for an interdict to prevent the employee from putting the protectable interest at risk.[93] The employer must place sufficient evidence which proves on a balance of probabilities that the proprietary interest is at risk and that the restraint of trade has not been complied with.[94] The purpose of applying for a 'restraint of trade interdict . . . is all about the elimination of continued risk' to the employer's confidential information and trade secrets being exposed to their competitor.[95]

Where a court grants an interdict it is a remedy that has a dire consequence on the respondent, capable of making him/her economically unproductive for a certain

[87] Ibid.
[88] *Reeves v Marfield Insurance Brokers CC* 1996 (3) SA 766 (A) at 776F.
[89] Ibid at 776G.
[90] Van Jaarsveld op cit note 2 at 336.
[91] 1989 (1) SA 1 (A).
[92] *Sasfin* supra note 91 at 16.
[93] *L'Oreal SA (Pty) Ltd v Kilpatrick* (2015) 36 ILJ 2617 (LC) at 2638A.
[94] *TWK Agri (Pty) Ltd v Wagner* (2018) 39 ILJ 797 (LAC) at 807J.
[95] *L'Oreal SA (Pty) Ltd* supra note 93 at 2638B.

period of time.[96] The requirements to be met for a final interdict have been provided in the case of *Setlogelo v Setlogelo*,[97] the applicant must prove:

- a clear right;[98]
- injury or that an injury has been reasonably apprehended;[99]
- no other satisfactory remedy available to the applicant.[100]

Once these requisites have been met by the applicant a court has limited discretion still to refuse to grant the interdict.[101]

In the event that the employer makes an urgent application to enforce the restraint of trade merely stating that the matter is urgent is not enough to have the restraint of trade agreement enforced.[102] The employer needs to place evidence before the court to enable it to appreciate the gravity of harm that might occur should the court rule in favour of the employee –[103] the harm being that the employer's interests are placed in such a vulnerable position that necessitates urgent relief sought to prevent further harm.[104]

b) Damages

To prevent the misuse or further misuse of confidential information an employer may also seek for damages,[105] for which he must prove:

1. An interest in the confidential information which does not have to be one of ownership. [106]
2. That the information is confidential in nature.[107]
3. The presence of a relationship which imposes a duty on the employee who is being accused of the misuse of confidential information, to withhold the confidential information.[108]

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[96] *Forwarding African Transport Service CC t/a Fats v Manica Africa* (2005) 26 ILJ 734 (D) at 744A.
[97] 1914 AD 221 at 221.
[98] *Setlogelo* supra note 97 at 227.
[99] Ibid.
[100] Ibid.
[101] *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA).
[102] *Ecolab (Pty) Ltd v Thoabala* (2017) 38 ILJ 2741 (LC) at 2751B.
[103] Ecolab supra note 102 at 2751D.
[104] Ibid.
[105] *Waste Products* supra note 35 at 573F.
[106] Ibid.
[107] Ibid.
[108] Ibid at 573G.

4. The accused employee needs to have purposely taken the confidential information to make use of it.[109]
5. The employee must have made use of the confidential information in bad faith.[110]
6. The employer must have suffered damage as a result.[111]

c) Interdict pending an appeal

Should an employee appeal against an order enforcing a restraint of trade, an interim enforcement of a restraint is essential to prevent the employer from suffering irreparable harm throughout the duration of the appeal process.[112] Once the employer can show that exceptional circumstances exist which justify the granting of an interdict pending the outcome of an appeal process, a court may accordingly grant an order that enforces the restraint of trade against the employee to ensure that the proprietary interest is protected against risk of disclosure.[113]

1.3.5. Remedies available to the employee

a) Breach of contract by the employer

Where a breach of contract occurs with the employer at fault, an employee may pursue contractual or statutory remedies available against the employer.[114] Where an employer engages in fraudulent conduct and wrongfully terminates the employment of an employee, the fact that the employer's behaviour has a feature of bad faith gives a court the power to refuse to order the enforcement of the restraint of trade agreement.[115]

b) Raising the *exceptio non adimpleti contractus*

In an instance where an employer has an obligation to fulfil prior to the employee observing the restraint of trade, the employee's obligation to comply with the restraint of trade is dependent on the employer's duty to fulfil the obligation(s) as laid out in

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[109] Ibid at 573G-H.
[110] Ibid.
[111] Ibid.
[112] *L'Oreal SA (Pty) Ltd* supra note 93 at 2642G-H.
[113] Ibid at 2642J-2643.
[114] *Reeves* supra note 88 at 772H.
[115] Ibid at 775C.

the agreement.[116] Reciprocity exists and as a result the employer cannot claim performance until his or her obligation(s) have been met. Where he brings an application to compel the employee to observe the restraint of trade agreement, the employee can raise the *exceptio non adimpleti contractus* as a defence to prevent the employer from enforcing the restraint of trade until employment obligations are met.[117]

Should an employer no longer be willing to meet his or her obligation(s) as stipulated in the restraint of trade agreement or the obligation(s) could not be fulfilled for reasons beyond his or her control, it leads to the employee no longer being bound to the contract which is then terminated.[118]

1.4. Conclusion

The ruling in the case of *Magna Alloys* establishes that a restraint of trade agreement is *prima facie* enforceable provided that it is not contrary to public policy.[119] When an employer approaches court to enforce a restraint of trade, only then will the legality of the agreement will be considered.[120] The employer must, where the existence of an agreement is not in issue, prove that he or she has a protectable interest which needs protection from being exploited by the employee who seeks to escape the restraint of trade.[121] The employee who seeks to escape the restraint bears the onus to show the court that the restraint of trade is unreasonable.[122] The burden of proof is on a balance of probabilities.[123]

The presence of fiduciary relationship between parties amplifies the burden on an employee to withhold confidential information that is imparted through the employment relationship.[124] For confidential information to be regarded as such it must meet the requirements laid out in the case of *Hi-tech Recruitments*.[125] Alongside

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[116] *Universal Storage Systems (Pty) Ltd v Crafford* (2001) (4) SA 249 (W) at 252F.
[117] *Universal Storage Systems* supra note 116 at 252F.
[118] *U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd* 1976 (1) SA 137 (D) at 149G-H.
[119] *Magna Alloys* supra note 9 at 893.
[120] Sutherland op cit note 3 at 690.
[121] *Document Warehouse* supra note 34 para 41.
[122] *Magna Alloys* supra note 9 at 893.
[123] *Experian SA* supra note 32 at 534G.
[124] *Meter Systems Holdings Ltd v Venter* 1993 (1) SA 409 (W) at 426E-F.
[125] *Hi-Tech Recruitment* supra note 57 para 60.

the requirements, the facts and circumstances of the case will assist a court in determining whether the information is confidential.[126]

The fact that an employer used his or her resources to teach an employee a new skill does not mean that the employer has a protectable interest.[127] More must be proved. Despite the presence of a protectable interest the employer will need to show that the restraint clause is reasonable.[128] Where an employer merely wants to eliminate competition such a restraint will not be enforced.[129]

The competing interests of the employer and the employee play a pivotal role in determining the enforceability of a restraint of trade clause.[130] The public policy considerations which encompass these competing interests lead to a court performing a balancing exercise which helps determine whether the restraint aligns with public policy or not.[131]

The principle of sanctity of contract only allows for the interference of agreements between parties for justifiable reasons,[132] and the finding that a restraint of trade agreement is unreasonable and contrary to public policy justifies the interference with an agreement between the parties.[133]

The broader contractual relationship under which the restraint of trade agreement is formed is essential to the determination of the reasonableness of the restraint of trade.[134] The relationship between the parties is one of the considerations alongside the nature, duration, and extent of the restraint.[135] These considerations are applied in conjunction with the reasonableness inquiry, which consists of four questions laid down in the case of *Basson*,[136] with the fifth question laid down in the case of *Kwik Kopy*.[137] It is only once the restraint of trade of clause is shown to be reasonable can a restraint of trade be regarded as enforceable.[138]

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[126] *Dickinson Holdings* supra note 58 at 226A.
[127] *Labournet* supra note 42 at 1316J- 1317.
[128] Pretorius op cit note 43 at p6.
[129] *Document Warehouse* supra note 34 para 23.
[130] Cohen op cit note 5 at 384-385.
[131] Ibid.
[132] Dooka op cit note 1 at 135.
[133] Ibid.
[134] Sutherland op cit note 3 at 676.
[135] Dooka op cit note 1 at 136.
[136] *Basson* supra note 66 at 767.
[137] *Kwik Kopy* supra note 76 at 484E.
[138] Ibid.

Once the presence and reasonableness of a restraint of trade is proved, the employer may apply for an interdict and or an action for damages.[139] The requirements for both remedies need to be proved before a court sanctions the breach of the restraint clause. Where an employer has failed to fulfil his or her part of the agreement an employee reserves the right to cancel it.[140]

Therefore, it is important that each of the parties discharges their burden of proof to determine the enforceability of the restraint of trade agreement. A court is guided by the law as laid down in the case of *Magna Alloys* followed by the reasonableness inquiry laid down in *Basson*, and the application of an open-ended list of factors and considerations, should then enable a ruling on the enforceability of the restraint of trade agreement.

[139] *Waste Products* supra note 35 at 573F.
[140] *U-Drive Franchise Systems (Pty) Ltd* supra note 118 at 149G-H.

CHAPTER 2: RESTRAINT OF TRADE DOCTRINE AND THE CONSTITUTION

2.1. Introduction

Consideration of public policy is required in determining the enforceability of a restraint of trade.[141] Public policy is regarded as an 'open-ended legal standard' which requires a court to make a 'value-judgment with reference to pertinent considerations and broad guidelines'.[142] The value judgment needs to be informed by constitutional values in light of the competing considerations of sanctity of contract and the right of an employee to exercise and practise his chosen trade, occupation or profession. [143]

The principle of the *pacta sunt servanda* underlies the principle of certainty in the law of contract.[144] It is a primary consideration when contractual disputes are brought to court. Since the introduction of the 1996 Constitution, and in the light of constitutional supremacy since 1996, there has been uncertainty about the principle's level of influence in a contractual dispute. This has led courts to question whether contractual principles, when viewed through the lens of the constitution, need to be developed as required by section 39(2) of the Constitution.

2.2. The interpretation of a restraint of trade provision

Contractual principles apply to restraint of trade agreements as part of an employment contract. The correct interpretation of a provision of a contract such as a restraint of depends on the context of the entire contract and the factual situation in which the contract was concluded.[145] Regard must be had to the 'ordinary rules of grammar and syntax' and the intention of the contracting parties.[146] This is an objective exercise, and where more than one meaning can be derived from the provision at issue, a

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[141] *Canon KwaZulu- Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 93) SA 205 (N) at 209H.
[142] Gerhard Lubbe 'Taking fundamental rights seriously: The Bill of Rights and Its Implications for the Development of Contract Law' (2004) 121 *SALJ* 395 at 418.
[143] *Reddy* supra note 31 at 326E-327A.
[144] *Mozart Ice-Cream (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) at 85A.
[145] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F-G.
[146] *Natal Joint* at 604A.

commercially sensible meaning must be given to the provision.[147] Most importantly, the restraint of trade provision must be consistent with the values and 'terms of the Constitution',[148] in that 'agreements in restraint of trade must be premised on the supposition that they are subject to constitutional rights'.[149] The interpretation of the court in the light of the above factors will affect the finding on the enforceability of the restraint agreement.

2.3. The Constitution's impact on restraint of trade agreements

All contractual agreements must be viewed in the context of constitutional rights in terms of which courts are compelled to note important constitutional values when they apply the law of contract. They have a duty to improve the law of contract by importing constitutional values to ensure that the law of contract is consistent with the Constitution.[150]

In determining the enforceability of a restraint of trade there are two primary considerations which are in conflict: the first being that parties need to remain bound to their obligations stipulated in the contract regardless of their unfairness;[151] and the second that individuals need to remain economically productive and practise their trade, occupation or profession freely.[152] The interplay of these two considerations is effected within the constitutional framework when the enforceability of a restraint of trade agreement is considered by a court, because the second consideration speaks to an employee's section 22 right entrenched in the Bill of Rights. The question that arises is whether the restraint of trade unreasonably limits the employee's right to choose and practise the trade, occupation, or profession of his or her choice.

In *Reddy v Siemens Telecommunication (Pty) Ltd* it was held that where an averment is made by a party that there has been an unconstitutional limitation of his or her right to exercise his or her trade, occupation or profession, a court needs to take

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[147] *Natal Joint* at 604A-B.
[148] John Saner *Agreements in restraint of trade in South African law* (2019) *Lexis Nexis* at 15-65.
[149] *Baroque Medical (Pty) Ltd v Medtronic Africa (Pty) Ltd* 2014 JDR 0758 (GSJ) para 19.
[150] *Reddy* supra note 31 at 324G-325G.
[151] *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjè* (2011) 32 ILJ 601 (LC) para 17.
[152] Ibid.

into consideration the purpose of the limitation.[153] In addition a court needs to engage with the provisions of section 36(1) of the Constitution to determine the reasonableness and the justifiability of the limitation posed on the right in 'an open and democratic society based on human dignity, equality and freedom'.[154] In general though, as held by the court in *Fidelity Guards Holdings (Pty) Ltd v Pearmain,* the common law in the context of the law of restraints of trade as developed by courts is consistent with the provisions of section 36(1).[155]

2.3.1. The horizontal application of the Bill of Rights

The introduction of the Bill of Rights has introduced a 'more permeable wire-mesh fence' between the Constitution and the private affairs of individuals.[156] This has allowed judges to infuse contractual law with constitutional values.[157] Judges are now at liberty apply the Constitution where appropriate.[158] As expressed in the case of *Mozart,* courts need to note the mandate provided under section 39(2) of the Constitution to 'promote the object, purport and spirit of the Bill of Rights' in the event that the enforceability of a restraint of trade is in question.[159]

Section 8(1) of the Bill of Rights applies to apply to all law. Bhana argues that common law falls under the umbrella of the phrase 'all law', the reason being that the common law is considered to be one of the South African sources of law, hence its inclusion under the umbrella of the 'all law' phrase.[160] What is derived from the section is the horizontal application of the Bill of Rights 'to the common law in its entirety' even when a matter is between two parties.[161]

Section 8(2) provides for the horizontal application of the Bill of Rights to private persons. The Bill of Rights is binding on private parties 'if, and to the extent

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[153] *Reddy* supra note 31 at 325D-F.
[154] *Reddy* supra note 31 at 325D-E.
[155] 2001 (2) SA 853 (SE) at 862A-B.
[156] Deeksha Bhana 'The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract' (2015) 1 *Stellenbosch Law Review* 1 at 5.
[157] Bhana op cit note 156 at 5-6.
[158] Bhana op cit note 156 at 6.
[159] *Mozart* supra note 144 at 85G.
[160] Deeksha Bhana 'The Horizontal Application of the Bill of Rights: A Reconciliation of s 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351 at 363.
[161] Bhana op cit note 160 364.

that, it is applicable' with regard to the nature of the rights and the nature of the duty, should one stem from the right. Bhana provides the approach that courts are required to apply by section 8(2) when confronted with the horizontal application of the Bill of Rights. Section 8(2) requires 'a direct assessment of the relevant substantive provisions of the Bill of Rights to determine whether and to what extent they apply directly to the conduct of such persons'.[162]

Section 8(3) speaks to the application of the Bill of Rights provision to private parties.[163] In terms of section 8(3) where legislation giving effect to a Bill of Rights provision exists, a court will consider the extent to which the right is recognised and 'justifiably limited' through the application of such legislation.[164] Where no legislation exists to give effect to the Bill of Rights provision a court must consider the common law and either apply the common law or develop the common law to the extent that it gives effect to the Bill of Rights provision.[165] Thus, 'in the absence of (adequate) legislation, the common law must continue to act as the portal through which private conduct . . . is now regulated by the Bill of Rights'.[166]

Section 8(3)(b) illustrates the acceptance that rights may be limited to advance a greater objective; hence the courts may in some instances develop the common law to limit a right, subject to the guidance of section 36(1) which provides the relevant factors which may be taken into consideration.

In the context of the restraint of trade doctrine, a restraint of trade agreement is recognised as a contractual agreement which is *prima facie* contractually valid unless proven to be unreasonable and contrary to public policy. The restraint of trade doctrine has been developed to justifiably limit an employee's right to choose a trade, profession or occupation of their choice.[167] The courts have recognised public policy principles such as sanctity of contract which require parties to be bound to agreements freely and voluntarily entered into, and which limit an employee's right to choose a trade, profession or occupation of their choice.[168]

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[162] Bhana op cit note 160 366.
[163] Ibid 367.
[164] Ibid 368.
[165] S 8(3)(a) of the Constitution; Bhana op cit note 160 368.
[166] Bhana op cit note 160 368.
[167] *Fidelity Guards supra note 156* at 862A-B.
[168] *Dickinson* supra note 58 at 343.

2.3.2. The development of the common law of contract in light of the Constitution

Where the common law is determined to be inconsistent with the Constitution, it serves as a trigger that the common law requires development.[169] To determine whether the common law needs to develop, a two-stage inquiry was laid down by the court in the case of *Carmichele*.[170] The first stage is about determining whether, in light of the provisions of section 39(2), the common law requires change to conform to the objectives of section 39(2) of the Constitution.[171] In the event of an affirmative answer, the second stage is pursued,[172] in which a court determines the extent to which the common law needs to be developed to ensure that it 'meet[s] the section 39(2) objectives'. [173] This two stage inquiry ensures that the common law develops in line with the objectives of section 39(2) of the Constitution and guarantees that the common law will rationally develop within the boundaries of the Constitution.[174]

2.3.3. The application of section 22

Wallis AJ in *Den Braven v Pillay*,[175] considered the constitutional approach to restraint of trade, holding that in the event of the enforcement of a restraint of trade agreement being treated as an automatic infringement of the employee's section 22 right, it would be pointless for the employer to seeks to enforce the restraint of trade that *ipso facto* infringed a constitutional right.[176] Wallis AJ further held that should the section 22 right directly apply to restraint of trade agreements, the result would be that such agreements in instances where it was 'appropriate and desirable' be null; however, such an effect was would 'be an unlikely construction of the Bill of Rights'.[177]

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[169] Lubbe op cit note 142 at 402.
[170] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at 956A.
[171] *Carmichele* supra note 170 at 956A.
[172] *Carmichele* supra note 170 at 956A-B; *Dendy v University of the Witwatersrand* (2007) 28 ILJ 2215 (SCA) at 2222G.
[173] *Carmichele* supra note 170 at 956B.
[174] *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at 698B-C.
[175] 2008 (6) SA 229 (D).
[176] *Den Braven* supra note 175 para 30.
[177] Ibid.

That is not to say that section 22 has no role in the determination of the enforceability of restraint agreements.[178] The enforceability of a restraint agreement is determined through consideration of constitutional values specifically those 'in the Bill of Rights'.[179] In an instance that the enforcement of a restraint agreement would be unreasonable taking into consideration the constitutional values, the enforcement of the restraint agreement would be inconsistent with public policy.[180]

Public policy represents the legal convictions of the community, representing those values held most dear by society.[181] Public policy is heavily influenced by the Constitution and its underlying values of equality, human dignity, 'the advancement of human rights and freedoms, and the rule of law'.[182] The determination whether a contractual term complies with public policy occurs through consideration of the constitutional values, which then assists a court in determining the enforceability of the contractual term.[183]

This approach ensures that the doctrine of the *pacta sunt servanda* is not discarded and that it has room to operate in the determination whether the contractual term is enforceable or not.[184] Furthermore, it makes room for courts to find the contractual term unenforceable because it is contrary to public policy, despite parties having consented to such terms.[185] Therefore, public policy allows for valid contracts to be enforced as this is in line 'with the constitutional values of dignity and autonomy'.[186] However, where a contractual term is proved to be unreasonable and contrary to public policy, a court reserves the right to refuse the enforcement of such a contractual term.[187]

The constitutional approach to the determination of the enforceability of a restraint agreement does not mean that the principle of sanctity of contracts is

[178] Ibid para 31.
[179] Ibid para 32.
[180] *Den Braven* supra note 175 para 32.
[181] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28.
[182] Section 1 of the Constitution; *Barkhuizen* para 28.
[183] *Barkhuizen* supra note 181 para 29.
[184] Ibid para 30.
[185] Ibid.
[186] *MMA Security Services CC t/a Broubart Security v Callanan* 2010 JDR 0613 (ECP) para 21.
[187] *MMA Security Services* supra note 186 para 21.

disregarded; public policy also requires that where parties freely and voluntarily enter into contractual agreements they be held bound to their agreements.[188]

2.4. The issue of, with whom does the onus lie

The development of the common law requires careful consideration, and the above two-stage inquiry allows for courts to engage in that process. It is however, important that the enthusiasm of courts to develop the common law is curbed, as the development of the common law 'must be done in a way most appropriate for the development of the common law within its own paradigm'.[189] In the context of the conflicting views surrounding the law governing restraints of trade, a contentious issue has been on whom the onus of proof lies when a restraint of trade dispute is brought to court.

In the leading case of *Magna Alloys* the court held that where a party denies that he or she is bound by a restraint of trade, the party needs to prove that enforcing the restraint of trade agreement would be against public policy.[190] The court in *Advtech Resourcing(Pty) Ltd t/a Communicate Personnel Group v Kuhn* held that an employer should bear the onus of proving that the restraint of trade agreement which poses a limitation against the employee's right to work is reasonable and thus enforceable; such an approach, the court held, was in line with the South African jurisprudence on restraint of trade.[191]

This stance was rejected by the court in the case of *Den Braven Ltd v Pillay*,[192] in which Wallis AJ held that the stance adopted by the court in *Advtech Resourcing* seemed to imply that the law governing restraints of trade needs to be isolated and treated specially and that the existing law needed to be revised where possible.[193] Wallis AJ rejected the proposition that the onus of proof should lay with the employer who sought to uphold the restraint of trade agreement, and held that the principle laid down in the leading case of *Magna Alloys* should stand.[194]

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[188] *Den Braven* supra note 175 para 32.
[189] *Carmichele* supra note 170 at 962A-B.
[190] *Magna Alloys* supra note 9 at 893.
[191] *Advtech* supra note 25 at 387A-B.
[192] *Den Braven* supra note 175.
[193] *Den Braven* supra note 175 at 252F.
[194] *Den Braven* supra note 175 at 252G.

Liebenberg J in *Fidelity Guards Holdings* proposed that under the constitutional dispensation the onus of proof should lie with the party seeking to enforce the restraint of trade agreement; furthermore, that party should show the court that the restraint of trade was not contrary to the provisions of the Constitution.[195]

The Supreme Court of Appeal in the case of *Reddy v Siemens Telecommunications (Pty) Ltd* was presented with the opportunity to clarify the issue surrounding onus of proof. The court held that the substantive law was as laid down in the leading case of *Magna Alloys* and that it should stand.[196] Therefore, the law as laid down in the case of *Magna Alloys* remains binding. With the stance adopted by the court in *Reddy* being the highest court that has dealt with the matter, the court has found it inappropriate to develop law regarding where the onus lies as it may not necessarily be suitable within the paradigm of the law regarding restraints of trade.[197]

2.5. Reconciling contractual law principles with the Constitution

Prior to the constitutional era, the sanctity of contracts was recognised by the courts as a significant in determining whether contractual agreements could be enforced.[198] The case of *Roffey v Catterall, Edwards and Goudrè* illustrates that the *pacta sunt servanda* principle was the primary principle which triumphed over allowing an employee to be free to choose and practise the trade, occupation or profession of their choice.[199]

Under the constitutional dispensation in *Knox D'Arcy v Shaw*,[200] Van Schalkwyk J held that where parties enter into contracts, the Constitution has no place in such matters for as long as the primary principles of public policy have not been infringed.[201] The fact that an employee had bound himself or herself to a restraint of trade did not mean that the employee was at a disadvantage.[202] In the case of *Reddy*

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[195] *Fidelity Guards* supra note 156 at 862F-G.
[196] *Reddy* supra note 31 at 326A-B.
[197] *Carmichele* supra note 170 at 962A-B.
[198] Karin Calitz 'Restraint of Trade Agreement in Employment Contracts: Time for *Pacta Sunt Servanda* to Bow Out?' (2011) 1 *Stellenbosch Law Review* 50 at 62.
[199] Calitz op cit note 198 at 62; *Roffey v Catterall, Edwards and Goudrè* 1977 (4) SA 494 (N) at 505E.
[200] 1996 (2) SA 651 (W).
[201] *Shaw* supra note 200 at 660C-D.
[202] Ibid at 660E-F.

the court held that the law as laid down in *Magna Alloys* regarding the onus was the substantive law and should stand. By refusing to engage with the issue and relying on the principle laid down in the case of *Magna Alloys,* the court in *Reddy* affirmed the *pacta sunt servanda* principle as being the overriding value when considering the enforceability of a restraint of trade.[203]

Despite the upholding the *pacta sunt servanda* principle as the primary value in the determination of the enforceability of restraints of trade, the court in *Dickinson Holdings Group (Pty) Ltd v Du Plessis* held that the recognition of sanctity of contracts does not exist in isolation.[204] The question was whether the contract was reasonable and in line with public policy considerations.[205] The court further suggested that more needed to be done to determine whether, the reasonableness of the restraint of trade and its compliance with public policy was what would be appreciated in 'a free, open and democratic society' contemplated by the Constitution.[206] This approach by the court was to ensure that the common law fell within the constitutional framework. As held by the court in the case of *Mozart Ice-Cream,* the aim should be to develop legal concepts within the framework of the Constitution, meaning that the *pacta sunt servanda* should be infused with constitutional values.[207]

The principle of *pacta sunt servanda* and contractual autonomy form the basis of contractual law.[208] However, "[t]he law of contract, as a branch of the common law, is equally meant to embrace normative and constitutional values so as to adapt to the changing needs of the community'.[209] The Constitutional Court in the case of *Barkhuizen v Napier,*[210] held that the principle of *pacta sunt servanda* and the contractual autonomy of an individual were inextricably linked to the constitutional values of the individual's dignity and freedom.

The constitutional values of dignity and freedom were strengthened by the principles of *pacta sunt servanda* and contractual autonomy, and it is for this reason

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[203] Calitz op cit note 198 at 57.
[204] *Dickinson* supra note 58 at 343C.
[205] Ibid.
[206] *Dickinson* supra note 58 at 343E.
[207] *Mozart* supra note 144 at 85F-G.
[208] Deeksha Bhana and Marius Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865 at 866.
[209] Bhana and Pieterse op cit note 208 at 895.
[210] *Barkhuizen* supra note 181 para 56-57.

that the principles were influential under the constitutional dispensation.[211] This has resulted in the infusion of the principle of *pacta sunt servanda* and contractual autonomy into 'a legal system governed by constitutional values'.[212] The infusion results from the court's recognition that the principle of *pacta sunt servanda,* like any other principle of common law, needs to conform to the constitutional framework.[213]

In the case of *Barkhuizen v Napier,* Ncgobo J laid down an approach for an instance where the constitutionality of a contractual term was at issue. He held that a court must consider whether the contractual term conforms to public policy which is informed by constitutional values.[214] Ncgobo J held that this approach not only made space for the principle of *pacta sunt servanda*,[215] but it simultaneously gave courts the opportunity to refuse the enforcement of contractual terms that were contrary to constitutional values, despite the parties having consented to be bound to those contractual terms.[216]

Therefore, the infusion of constitutional law values, including but not limited to the values of ubuntu, into the law of contract is a positive initiative,[217] and a concept that courts have welcomed, acknowledging the supremacy of the Constitution.

2.6. Conclusion

The court in the case of *David Crouch Marketing CC v Du Plessis* affirmed the position that courts should determine the enforceability of restraints of trade through the lens of the Constitution,[218] directing courts to make value judgments in the face of opposing considerations, supporting the respective positions of the employer and the employee.[219]

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[211] Matthew Kruger 'The Role of Public Policy in the Law of Contract, Revisited' (2011) 128 *SALJ* 712 at 727.
[212] Kruger op cit note 211 at 727.
[213] *Barkhuizen* supra note 181 para 15.
[214] *Barkhuizen* supra note 181 para 30.
[215] Ibid.
[216] *Barkhuizen* supra note 181 para 30.
[217] *Everfresh Market Virginia* (*Pty*) *Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at 276I.
[218] (2009) 30 ILJ 1828 (LC) at 1837G.
[219] *Esquire System Technology (Pty) Ltd* supra note 152 para 17.

The common law of restraint of trade agreements is a law of general application that complies with the provisions of section 36(1) of the Constitution with regard to the limitation of the employee's right under section 22.[220] However, regardless of the contractual autonomy exercised by parties in entering into the contract, should the agreement conflict with the Constitution then the dictates of the Constitution would override the principle of *pacta sunt servanda*.[221]

The application of section 39(2) of the Constitution by a court should not be limited to instances when the Bill of Rights applies to parties, whether natural or juristic in terms of section 8 of the Constitution.[222] Should a common law rule not meet the threshold of conforming to the spirit, purport or objectives of the Constitution then a court should not hesitate to invoke its powers under section 39(2) of the Constitution.[223] This duty to develop the common law must occur where a 'value-laden concept such as public policy' features in a matter before a court.[224] There are various methods which may be adopted by courts to develop the common law in line with the section 39(2) objectives; however, not all these methods would affect the common law in the same way.[225] However, '[w]here the common law is compatible with the provisions of the Constitution the common law should be maintained'.[226]

Courts have acknowledged the importance of parties to an agreement remaining bound to their agreement; however, courts have noted that contractual principles should not be considered in isolation and have resorted to the infusion of contractual principles with constitutional values.[227] This is to ensure that contractual principles conform to the constitutional framework. Therefore, the tension that exists between an employer and an employee who are at odds regarding the enforceability of a restraint of trade may only be resolved under the 'value system' stemming from the Constitution.[228]

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[220] *Canon KwaZulu- Natal (Pty) Ltd* supra note 141 at 209G-H.
[221] *Dickinson* supra note 58 at 343G-F.
[222] *Advtech* supra note 25 at 385G-H.
[223] Ibid at 385H-I.
[224] Ibid at 385I.
[225] *Carmichele* supra note 170 at 962B-C.
[226] *Shaw* supra note 200 at 661E.
[227] *Dickinson* supra note 58 at 343C; *Barkhuizen* supra note 181 at 330F-G.
[228] *David Crouch Marketing CC* supra note 218 at 1835E-F.

CHAPTER 3: A REVIEW OF THE OPERATION OF THE RESTRAINT OF TRADE DOCTRINE BETWEEN 2015 AND 2020

3.1. Introduction

The law regarding restraints of trade remains unchanged. The principle laid down in the case of *Magna Alloys and Research (SA) (Pty) v Ellis*,[229] stating that a restraint of trade is valid and enforceable unless the opposite is proved remains pivotal to restraint of trade litigation. Courts still affirm the *pacta sunt servanda* principle; and unless the restraint agreement is contrary to public policy principles and its enforceability is unreasonable, courts will continue to uphold agreements voluntarily concluded.

In addition to the principle laid down in the case of *Magna Alloys*, the reasonableness inquiry laid down in the case of *Basson v Chilwan,*[230] asking whether the scope of the restraint against the employee extends beyond what is required to protect the employer's proprietary interest,[231] has also become entrenched in the approach to the determination of the enforceability of a restraint of trade agreement.[232] It is also accepted that restraint agreements do not infringe section 22 of the Constitution, which speaks to an employee's right to remain economically active and to choose his trade, profession and occupation.[233] The position with regard to proprietary interests also remains unchanged. An employer must present evidence to the court which shows that a proprietary interest exists which requires and deserves protection.[234]

This chapter will discuss the operation of these entrenched principles in the past five years. It will also discuss recurring issues regarding restraints of trade matters, primarily the issues of urgency, proprietary interests, novation and the transferability of restraint agreements in the case of the transfer of a business as a going concern. Lastly, the developments in the area of restraint agreements,

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[229] *Magna Alloys* supra note 9 at 893.
[230] *Basson* supra note 66 at 767G-H.
[231] *Esquire System Technology (Pty) Ltd* supra note 151 para 50-51.
[232] *Plumblink SA (Pty) Ltd v Legodi* [2019] ZALCJHB 357 para 25; *Pecsser (Pty) Ltd v Boshoff* [2019] ZALCJHB 358 para 26.
[233] *Plumblink* supra note 232 para 24.
[234] *Labournet (Pty) Ltd* supra note 42 at 1312C-D.

particularly the relationship between a 'garden leave' clause and a restraint agreement will be discussed.

3.2. The inherent urgency of restraint of trade matters

The case of *Ecolab (Pty) Ltd v Thoabala*,[235] noted the inherent urgency that exists in restraint of trade matters, as the employer's business is at risk. The urgency recognised by the court in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff*,[236] however, does not override rule 8 of the Rules of the Labour Court;[237] an employer seeking to bring an urgent application against a former employee for the breach of a restraint of trade agreement needs to show the court why the matter is urgent and why it could not approach the court through the normal court processes.[238] The court needs to be able to appreciate that urgency does indeed exist, and that the employer stands to suffer harm by pursuing the matter through the normal court processes.[239]

To allow for the self-creation of urgency, or to regard restraint of trade applications as precluded from following the Rules of the Labour Court 'would lead to absurdity and unmitigated abuse of court processes . . . '.[240] Therefore, despite the inherent urgency associated with the enforcement of a restraint of trade agreement, the employer must still meet the requirements stipulated under rule 8 of the Rules of the Labour Court.

Despite the inherent urgency of restraint cases, courts urge parties in restraint disputes to seek alternative forms of dispute resolution first before approaching the

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[235] *Ecolab* supra 102.
[236] *Mozart* supra note 144.
[237] *Ecolab* supra note 102 at 2750B.
[238] *Ecolab* supra note 102 at 2751B-E. Section 77(3) of the BCEA stipulates that the Labour Court has concurrent jurisdiction with civil courts to hear and preside over contractual matters regardless of whether there are any basic conditions of employment which are included as terms in the employment contract. This means that where an employer seeks to enforce a restraint of trade against an employee the employer is free to approach the Labour Court or civil court such as the High Court. Where the matter is urgent the respective rules of court will apply. In the context of a High Court being approached rule 6(12) of the uniform Rules of Court will apply, and in the context of a Labour Court being approached rule 8 of the Labour Court Rules will apply. The urgency rules under the respective courts place the same burden on the employer in proving the urgency of the matter failing to so results in the court rejecting the relief claimed.
[239] Ibid at 2751D.
[240] Ibid at 2750A-B.

courts.[241] This is in the light of the taxing nature of litigation.[242] Where parties pursue litigation, the court can only be of assistance where an employer who seeks to enforce a restraint of trade agreement acts timeously to bring the urgent application.

In the case of *Vumatel (Pty) Ltd v Majra*, [243] the court dismissed the application because the employer failed to bring the application timeously. The respondent, who was a former employee of Vumatel had breached a restraint of trade agreement by working with a competitor,[244] and continued to work with the competitor until such time when the contract of employment ended.[245] The former employer approached the court with an urgent application when the employee had ceased working for the competitor.[246]

The court acknowledged the employer's proprietary interest in the form of confidential information worthy of protection was breached when the former employee was employed by the competitor,[247] but because the former employer only approached the court when the former employee had ceased working with its competitor the matter was decided to be moot.[248] The reasoning was that where a relationship which breaches the restraint of trade agreement no longer exists, the question of whether to issue an interdict was academic.[249]

This case illustrates the importance of bringing urgent matters timeously, and that courts will not be quick to regard a matter as urgent where the party who seeks to enforce a restraint of trade agreement has not conducted itself in a manner which shows that the matter is indeed urgent. The case further emphasises the point made in *Ecolab* that despite urgency being an inherent quality of restraint of trade matters, the party that seeks to enforce a restraint must still follow the directions of rule 8 of the Rules of the Labour Court.[250]

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[241] *Ecolab* supra note 102 at 2752F; *AJ Charnaud and Company (Pty) Ltd v van der Merwe* [2020] ZALCJHB 1 para 5.
[242] *Charnaud* supra note 241 para 5.
[243] (2018) 39 ILJ 2771 (LC).
[244] *Vumatel* supra note 243 at 2778A.
[245] Ibid at 2790D-G.
[246] Ibid at 2779F-G.
[247] Ibid at 2790D-E.
[248] Ibid at 2790E-F.
[249] Ibid at 2790G-2791A.
[250] *Ecolab* supra note 102 at 2750B.

3.3. Protection of employees against unreasonable restraint of trade agreement

In most disputes before the court it is common cause that there has been a breach of contract and the former employer seeks to enforce the restraint; the issue for determination is whether enforcing the restraint would be reasonable.[251] The case of *AJ Charnaud and Company (Pty) Ltd v Van der Merwe,* differs from the norm because the parties were in dispute over the terms that gave rise to the restraint agreement.[252] This meant that the court had inquire whether the terms of the agreement had been breached before it could determine the enforceability of the restraint agreement and whether it would be reasonable to enforce the agreement.

> 'In short, the reasonableness determination cannot serve to establish a breach, but it is the breach that leads to the reasonableness enquiry'.[253] Snyman AJ laid down the pattern of determination.[254] The first step was to prove to the court that the employee signed a restraint of trade agreement to which the employee was now bound.[255] This led to the question whether the employee breached the terms of the agreement.[256] The employer should present evidence to prove the breach.

Only when the breach is established will the inquiry shift to determine the reasonableness of enforcing the restraint of trade agreement, which requires the court to use the '*Basson* test'.[257] The employer in this matter had failed to cover all its interests when drafting the restraint of trade agreement, leaving a loophole which allowed the employees to exploit its trade connections when they moved to a new employer. Since the protection of trade connections was not provided for in the restraint of trade agreement, the court found that there was no breach of contract and as a result the need to consider the reasonableness of the restraint of trade fell away.[258]

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[251] *Charnaud* supra note 241 para 1.
[252] *Charnaud* supra note 241 para 1
[253] Ibid para 57.
[254] Ibid para 56.
[255] *Charnaud* supra note 241 para 56.
[256] Ibid para 56.
[257] Ibid para 56.
[258] Ibid para 80-81.

The decision in the case of *Twincare International (Pty) Ltd v Nel*[259] illustrates the reluctance that courts have in enforcing a restraint of trade agreement that is unreasonable. In this case the restraint of trade agreement was regarded by the court as being 'too wide, vague and ambiguous . . . ', [260] and the employee's interest outweighed the employer's interest, after consideration was given to the employer's interest to protect its proprietary interest, and the employee's right to work in a position where the confidential information was of no use.[261]

This case shows that there is no simple formula to restraint of trade matters. Whilst a proprietary interest worthy of protection was present, the confidential information was of no use or benefit to the employee, so by enforcing the restraint it would have left the employee without work, and this was found to be unreasonable. Therefore, the facts and circumstances of each case and the weighing of the interests of both parties remain essential in determining the reasonableness of enforcing a restraint against a former employee.

3.4. Protection afforded to an employer's proprietary interest

Trade secrets and trade connections are still regarded as protectable interests that require and are worthy of protection.[262] An employee's assurance that he or she will not divulge any confidential information to his or her new employer who happens to be a competitor of the previous employer bears no weight when the enforceability of a restraint of trade is considered.[263] It is enough for the employer to show that should the employee remain employed with its competitor, the risk is present that the employee may divulge the previous employer's confidential information to his or her new employer.[264]

With regard to the protection of trade secrets, the court in *North Safety Products v Naidoo*,[265] held, with reference to the case of *Labournet (Pty) Ltd v*

[259] (2018) 39 ILJ 2760 (LC).
[260] *Twincare* supra note 259 at 2769D-E.
[261] Ibid at 2769E-F.
[262] *Vumatel* supra note 243 at 2783G-2784A.
[263] *Medtronic (Africa) (Pty) Ltd v Van Wyk* (2016) 37 ILJ 1165 (LC) at 1176H-I.
[264] *Van Wyk* supra note 263 at 1176I-1177A.
[265] (2020) 41 ILJ 1736 (LC).

Jankielsohn,[266] that '[t]he law on restraint of trade is wary of preventing an employee from using the general know-how he carries along with him in his head.'[267] Whitcher J held that a significant factor regarding trade secrets is where the trade secret stems from.[268] Was it the knowledge which originated from the employer and which was then conveyed to the employee for the employee to perform his or her duties, to further the business of the employer?[269] The court also acknowledged the difficulty of discerning between a trade secret and 'general recollected knowledge and experience . . . ' .[270]

This shows the importance of adducing evidence from which the court can conclude that a trade secret does indeed exist.[271] There must be a uniqueness in the manner the employer conducts its business, separating itself from competitors within the same industry or sector.[272] Once the uniqueness can be identified it becomes likely that a proprietary interest worthy of protection will be accepted by the court.[273]

The case of *Truworths Ltd v De Bruyn*,[274] is another exceptional case where, despite the presence of a proprietary interest needing protection, the court refused to grant an order which compelled the employee to comply with the restraint agreement. The court acknowledged the presence of a proprietary interest which could be exploited by competitors if the restraint agreement was not enforced.[275] However, the qualitative and quantitative weight of the proprietary interest against the employee's remaining 'economically inactive and unproductive' led to the court's finding that enforcing the restraint agreement would be unreasonable.[276]

The court found that fashion was not stagnant, and the proprietary information that the employee was in possession of, would not give the competitor much advantage in the future.[277] Furthermore, despite the practical experience gained by the employee

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[266] *Labournet* supra note 42.
[267] *North Safety Products* supra note 265 para 18.
[268] Ibid para 18.
[269] Ibid para 18.
[270] Ibid para 18.
[271] *Combustion Technology (Pty) Ltd v Peck* [2020] ZAGPJHC 208 para 55.
[272] *Combustion Technology* supra note 271 para 55.
[273] Ibid.
[274] (2020) 41 ILJ 1617 (WCC).
[275] *Truworths* supra note 274 para 23.
[276] Ibid para 23-24.
[277] Ibid para 24.

from the employer, such practical experience could not be regarded as proprietary to the employer.[278] The court concluded that the employer's proprietary interest was not at risk and that it would be unreasonable to enforce the restraint agreement.[279]

Therefore, where confidential information is not at risk and when the protection of the employer's interests is outweighed both qualitatively and quantitatively by the employee's interest to remain commercially active, a court may find it unreasonable to enforce the restraint agreement.[280]

The scope of a restraint against an employee is influenced by the extent of the risk to the employer's proprietary interest.[281] In the case of *City Paint and Tool (Pty) Ltd v Chamberlain*, the court found that where an employee occupies different positions with the employer for the duration of their employment relationship, and the employee had access to confidential information that was worthy of protection as well as trade connections, it was reasonable to have the restraint of trade agreements apply cumulatively.[282]

The consideration of the seniority of an employee in determining the issue of proprietary interest has been endorsed by many courts; an employee's position whilst working for the employer weighs heavily in determining the reasonableness of enforcing of the restraint, should a proprietary interest be found to exist.[283] The seniority of an employee is not only determined by the position occupied by the employee; factors such as the responsibilities of the employee, the impact that the employee has in the organisation, whether the employee has intimate knowledge regarding the organisation, and the expertise of the employee all play a role in determining the seniority of an employee.[284] Therefore, 'the value of the information is causally linked to the obligation associated with it'.[285]

Courts do not shirk from ensuring that an employer's proprietary interest is protected where it has been shown that the enforceability of the restraint is reasonable

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[278] Ibid.
[279] Ibid.
[280] *Truworths* supra note 274 para 25.
[281] *City Paint and Tool (Pty) Ltd v Chamberlin* 2018 JDR 0903 (ECP) para 56.
[282] *City Paint* supra note 281 para 59.
[283] *City Paint* supra note 281 para 56; *Vumatel* supra note 243 at 2784H-2785A.
[284] *Vumatel* supra note 243 at 2785A-B.
[285] *Charnaud* supra note 241 para 72.

and in line with public policy. In *Alcon Laboraties SA (Pty) Ltd v Potgieter* a protectable proprietary interest was present and a clause in a restraint agreement provided for the lengthening of the period for which the restraint was intended to be enforceable.[286] The court held that extending the period of the restraint was not punitive but to ensure that the protectable proprietary interest was protected for the period which the employer and employees intended when the contract of employment was concluded.[287]

The same sentiments were expressed in the case of *Medtronic (Africa) Proprietary Limited v Cawood*,[288] in which it was held that complying in part with a restraint agreement duration did not exempt an employee from observing the remaining period of the restraint.[289] Where the court finds the restraint agreement to be enforceable and the duration of the operation of the restraint agreement to be reasonable, the employee is obligated to serve the full duration of the restraint as agreed, to prevent the risk of exploitation of the employer's proprietary interest.[290]

The court in the *Plumblink SA (Pty) Ltd v Legodi*,[291] relying on *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjè*,[292] reaffirmed the position that an application for a final interdict was preferable to a claim for damages.[293] The court held that it would 'be cold comfort for business lost' where an employer pursues a damages claim where an employee has breached the restraint agreement.[294] Therefore, an interdict to enforce a restraint agreement is far more effective. '[T]he alternative remedy of a damages claim in due course is more apparent than real . . . '.[295]

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[286] (2020) 41 ILJ 1689 (LC) para 48.
[287] *Alcon Laboratories* supra note 286 para 48.
[288] [2020] ZALCJHB 168.
[289] *Cawood* supra note 288 para 67-70.
[290] Ibid.
[291] *Plumblink* supra note 232.
[292] *Esquire* supra note 151.
[293] *Plumblink* supra note 232 para 49.
[294] Ibid para 49.
[295] *Esquire* supra note 151 para 40.

3.5. Transfer of restraint of trade agreements in terms of section 197 of the Labour Relations Act.[296]

The question of whether the transfer of a restraint agreement occurs by operation of law in terms of section 197 of the Labour Relations Act 66 of 1995 (LRA) was initially considered in *Securicor (SA) (Pty) Ltd v Lotter*.[297] The court held that an objective factual inquiry was needed to determine whether a restraint agreement was transferred by operation of law.[298] The new employer seeking to enforce the restraint of trade agreement would need to show that the transfer of the business as a going concern took place,[299] and establish whether the restraint agreement was meant to form part of the goodwill of the business and whether the goodwill was intended to be transferred with the business as a going concern.[300]

The court in the case of *Laser Junction (Pty) Ltd v Fick,*[301] departed from this approach because the case was based on a different set of facts and circumstances. The question raised was whether all agreements concluded before a transfer of a business as a going concern in terms of section 197 of the LRA were transferable by operation of law under section 197. Pillay J held that only contracts of employment can be transferred in terms of section 197 of the LRA,[302] noting that the definition of an employment contract in section 4 of the Basic Conditions of Employment Act (BCEA)[303] required that a contract of employment may stipulate the basic conditions of employment mentioned 'in the BCEA or a sectoral determination, and any law or term' which had the effect of impacting the employee positively.[304]

The result was that a restraint of trade, which is unfavourable to an employee, is not transferable in terms of section 197 of the LRA as it fails to meet the definition of contract of employment.[305] Therefore, that when the transfer of business as a going concern occurs and a restraint of trade exists and provides less favourable terms to an

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[296] Act 66 of 1995.
[297] 2005 (5) 540 (E).
[298] *Securicor* supra note 297 para 12.
[299] *Sanlic House of Locks (Pty) Ltd v Strydom* (2014) 35 ILJ 2287 (LC) para 30.
[300] *Securicor* supra note 297 para 12.
[301] (2017) 38 ILJ 2675 (KZD).
[302] *Laser Junction* supra note 301 at 2683G-H.
[303] Act 75 of 1997.
[304] Ibid at 2683I-2684A.
[305] Ibid at 2684A.

employee, the agreement will not be transferable by operation of law as it does not meet the definition of a contract of employment envisioned by the provisions of section 4 of the BCEA.[306]

The court in *Laser Junction* held that the determination of the transferability of a restraint of trade agreement when a transfer occurs in terms of section 197 of the LRA must be made on a case-by-case basis.[307] The court held that neither the labour statutes of South Africa nor international law speaks of the right to work; furthermore, that the right to work is only acquired once an employee signs the restraint of trade agreement and is bound to its terms.[308]

The court held that where an employee signs a restraint of trade agreement which brings into play the protection of section 23 of the Constitution and the limitation of his or her right provided for under section 22 of the Constitution, it afforded an employee the right to work.[309] However, when an employer enters into a restraint of trade agreement with an employee for the sole purpose of using it as a weapon to prevent the employees from pursuing other employment opportunities, such an agreement will be regarded as unfavourable and it will cease to exist once the transfer of a business as going concern occurs.[310] In this case the employer was found not to have any protectable proprietary interests which confirmed the court's finding that the employer drafted the restraint of trade agreement to use it as a weapon.[311]

It is submitted that the court's (Pillay J's) interpretation of section 197 of the LRA is incorrect, leading to an incorrect finding. Section 197(2)(a) stipulates that when the transfer of a business occurs the new employer replaces the old employer in respect of the employment contracts which existed before the transfer. Section 197(2)(b) goes on to state that the rights and obligations that existed between the old employer and the employees remain active after the transfer has occurred and they continue to bind the new employer and the employee.

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[306] Ibid.
[307] Ibid.
[308] Ibid at 2684B-C.
[309] *Laser Junction* supra note 301 at 2684B-D.
[310] Ibid at 2684D-E.
[311] Ibid at 2691H.

Regarding the *Laser Junction* matter, the restraint of trade agreement was concluded between the old employer (Laser CNC) and the employee. The transfer occurred and Laser Junction stepped into the shoes of Laser CNC as the new employer regarding employment contract which existed prior to the transfer.[312] The court failed to consider the decision of *Horn v LA Health Medical Scheme*,[313] in which Zondo J as he then was, held that section 197(2)(a) required that rights and obligation that were contained in employment contracts should be transferred when a business transfer occurs.[314]

Section 197(2)(b) serves the purpose of ensuring that rights and obligations which may in some circumstances not be provided for in employment contracts be transferred when a business transfer occurs.[315] These rights and obligations bind the former employer and the employee when the business transfer occurs as arising from 'statutes, agreed rules, common law and subordinate legislation'.[316] Thus, where rights and obligations exist outside the contract of employment between the former employer and the employee when a transfer occurs, section 197(2)(b) would apply. [317]

The restraint of trade agreement was active when the transfer of the business occurred and Laser Junction as the business transferee became bound by the restraint agreement and it gained rights and obligations stemming from the agreement.[318] By finding that the restraint of trade agreement was an 'unfavourable term' which could not be transferred when the transfer of business occurred, the High Court 'read into section 197(2) an exception that is not in the statute'.[319] The High Court's failure to consider the Constitutional Court's decision was contrary to the principle of *stare decisis*, and had the judgment of Zondo J been considered, a different outcome may have resulted.

Therefore, the correct interpretation of section 197(2)(b) is that all rights and obligations active when the transfer of a business occurs

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[312] *Laser Junction* supra note 301 at 2680F-G.
[313] [2015] ZACC 13.
[314] Horn supra 313 para 61.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid para 63.
[319] *Horn* supra note 313 para 74.

> 'is a reference, without exception, to all the rights and obligations in existence at the time of the transfer between the business transferor and every employee and all those rights and obligations continue after the transfer as if they had been rights and obligations between the business transferee and the employee.'[320]

The overall effect of a transfer of a business in terms of section 197, absent an agreement in terms of section 197(6) of the LRA, is that the identity of the employer changes but the rights and obligations that existed before the transfer occurred remain unchanged.[321]

3.6. Novation

In the case of *Stratosat v Vermaak*, one of the issues was whether the restraint of trade agreement provisions became superseded by agreements entered into which stipulated the terms of the employee's subsequent promotion.[322] The employee in this matter was promoted to sales director which meant that his duties and responsibilities changed.[323] The court rejected the argument that that the subsequent agreements entered into when he employee was promoted novated the restraint of trade agreement a restraint of trade agreement that applied to the employee before he was promoted.[324]

The court held that to allow for such an interpretation would 'yield not only an insensible but also an unbusinesslike result'.[325] The court held that the purpose of a restraint agreement was to ensure that the employer's proprietary interests were protected once an employee no longer worked for the employer.[326] The court further held that a restraint agreement was not limited to the position occupied by the employee during employment;[327] the restraint remained active despite the position that

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[320] *Horn* supra note 313 para 84.
[321] *Securicor* supra note 297 para 10.
[322] [2018] ZALCJHB 203 para 19.
[323] *Stratosat* supra note 322 para 20.
[324] Ibid para 22.
[325] Ibid.
[326] Ibid para 21.
[327] Ibid at para 23.

the employee occupied,[328] and its enforcement would be triggered when the employment relationship has ended.

The issue of novation in the context of restraint of trade enforcement was also raised in the case of *Waco Africa (Pty) Ltd v Sack,*[329] under different facts and circumstances. In this instance the employee's employment was transferred by operation of law in terms of section 197 of the LRA.[330] The new employer stepped into the shoes of the old employer and concluded a new contract of employment with the employee.[331] The employee contended that the restraint agreement was terminated when the new contract of employment was concluded with the new employer.[332]

The court relied on the case of *National Health Laboratory v Lloyd-Jansen van Vuuren,*[333] in which the Supreme Court of Appeal held that the intention to novate is not readily presumed, since when novation occurs it means that the existing rights that stemmed from a valid contract have been forfeited.[334] Therefore, absent an agreement between parties which expressly states their intention to novate, the intention of the parties to novate will never be inferred.[335]

Novation will be inferred where it appears that the terms of the new agreement conflict with the rights that stemmed from the original agreement;[336] and where the evidence presented to the court regarding the circumstances under which the new agreement was concluded suggest that the parties intended to novate the original agreement and the rights that stemmed from it,[337] meaning that the parties intended to waive their rights. In the case of *Waco Africa*, the court found there was no express intention by the parties to novate the restraint agreement.[338] Furthermore, it could not be inferred that the parties intended to waive their rights.[339]

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[328] *Stratosat* supra note 322 para 24.
[329] [2019] ZALCJHB 360.
[330] *Waco Africa* supra note 329 para 14.
[331]Ibid.
[332] Ibid para 17.
[333] [2015] ZASCA 20 para 15-17.
[334] *National Health Laboratory Service* supra note 333 para 15.
[335]Ibid para 16.
[336] *Waco Africa* supra note 329 para 23.
[337] Ibid.
[338] Ibid para 25.
[339] Ibid.

3.7. Importance of presenting sufficient evidence

The importance of presenting sufficient evidence to be able to obtain legal redress was illustrated by the case of *TIBMS (Pty) Ltd v Knight*.[340] The former employer approached the Labour Court seeking an interdict to enforce the restraint agreements which bound the former employees not to work with its direct competitor.[341] The former employer, however, could not present the restraint of trade agreements signed by the former employees.[342] The former employer then refused to produce the restraint agreements entered into with of the remainder of the staff.[343]

In the face of the dispute of fact, the court dismissed the claim because neither party applied to present oral evidence, and alternative relief was not appropriate.[344] The Labour Appeal Court (LAC) held that the former employer's refusal to produce the rest of the staff's restraint agreements was detrimental to its case as it would have proved its claim that the former employees destroyed their restraint agreements.[345] The LAC confirmed the Labour Court's finding that the failure of an employer to produce signed restraint agreements or evidence pointing to such a conclusion meant that the application to interdict the former employees' activities must be dismissed.[346]

The importance of signed restraint of trade agreements is illustrated by the case of *Motherland Design Agency v Whitefernfranc (Pty) Ltd*.[347] In this matter employees were also shareholders of the company which was the employer. When presented with restraint agreements the employees refused to sign them.[348] The employment relationship ended, and the employees established a private company in competition with their previous employer.[349] The previous employer sought an interdict in the Labour Court, to prevent the former employees from disclosing confidential information and/or breaching their common law fiduciary duties.[350]

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[340] (2017) 38 ILJ 2721 (LAC).
[341] *TIBMS* supra note 340 at 2722E-F.
[342] Ibid at 2723G-H.
[343] Ibid at 2727A-B.
[344] Ibid at 2727E-F.
[345] Ibid at 2727B-D.
[346] Ibid at 2728C-E.
[347] [2020] ZALCJHB 145.
[348] *Motherland* supra note 347 para 10.
[349] Ibid para 43.
[350] Ibid para 1.

The court found that no restraint of trade existed between the parties and as a result the employees could not be restrained.[351] The court then turned its attention to the duty of good faith and the extent of its application when an employment relationship has terminated.[352] The court held that in the absence of a restraint agreement an employee owes a duty of good faith to an employer not to use or disclose confidential information acquired as an employee.[353] Customer connections were protectable as trade secrets and confidential information under a restraint agreement;[354] however, in the absence of a restraint agreement, former employees were not precluded from exploiting customer connections to further their own interests.[355]

The court found that in the absence of tangible customer list, the customer connections could not be regarded as confidential information under the duty of good faith doctrine.[356] The court went on to consider the issue of unlawful competition and found that 'in the absence of a restraint of trade agreement a former employee is free to compete against his former employer in a free market as the latter does not enjoy any contractual power to restrain him from doing so'.[357] The Labour Court dismissed the claim.[358]

The decision illustrates the importance of restraint agreements to protect employers' trade secrets and confidential information and avert the risk of use or disclosure of the trade secret or confidential information. The use or disclosure of customer connections '(evidenced by customer lists and details)', provided they meets the requirements of what is considered to be confidential information, may in the absence of a restraint agreement still protected should a confidentiality clause exist in an employment contract.[359]

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[351] *Motherland* supra note 347 para 38.
[352] Ibid para 53.
[353] Ibid para 59-60.
[354] Ibid para 63.
[355] Saner op cit note 148 at 7-75.
[356] *Motherland* supra note 347 para 72.
[357] Ibid para 69.
[358] Ibid para 75.
[359] Saner op cit note 148 at 7-75 – 7-76.

In the case of *The Refinery Post Production Facilities (Pty) Ltd v Lautre*,[360] the employer sought an interdict against the employee from using or disclosing confidential information and breaching the common law fiduciary duty. The employment contract contained a confidentiality clause which prohibited the employee from making use of or disclosing confidential information once the employment relationship ended.[361] The court found that the employee was bound to the employment contract despite termination of the employment relationship, and as a result the restraint clause could be enforced.[362] Had a confidentiality clause been present in the employment contract signed by the employees in the *Motherland Design Agency,* the outcome could have been different (in line with the *Refinery* decision) despite the employees having refused to sign the restraint of trade agreement.[363]

3.8. Partial enforcement of a restraint of trade agreement.

Courts refuse of their own accord to order the partial enforcement of a restraint of trade agreement. In *Aquatan (Pty) Ltd v Jansen van Vuuren*,[364] the court held that for a court to consider the partial enforcement of the restraint and to 'cut and trim' the restraint, the party seeking partial enforcement must raise the issue so that parties can argue their positions.[365] Where the question of partial enforcement is only contemplated by a party and not raised in argument from the outset, a court will refuse to engage with the issue.[366]

However, where an employer raises the issue of partial enforcement and expresses willingness to partially enforce a restraint agreement, a court is not precluded from partially enforcing a restraint agreement, to bring it within the boundaries of what is deemed to be reasonable in light of the circumstances of a matter.[367] Furthermore, despite the employer's willingness to compromise on the

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[360] [2018] ZALCJHB 263.
[361] *Refinery* supra note 360 para 7.
[362] *Refinery* supra note 358 para 19-21.
[363] *Motherland* supra note 347 para 67.
[364] (2017) 38 ILJ 2730 (LC).
[365] *Aquatan* supra note 364 at 2741A-C; and *Benchmark Signs Incorporated v Muller* [2016] ZALCJHB 238 para 27.
[366] *Aquatan* supra note 364 at 2741A-C.
[367] *New Justfun Group (Pty) Ltd v Turner* (2018) 39 ILJ 2721 (LC) at 2728C-D.

scope of operation of the restraint agreement, the decision to fully or partially enforce a restraint agreement lies with the court.[368]

Therefore, where a restraint agreement has a scope that is too wide then where the 'cutting and trimming' would attain the intended purpose of the restraint without unreasonably 'burdening and restricting' the employee's economic activities, the 'cutting and trimming' may occur.[369]

3.9.The importance of a valid contract.

One of the requirements of a valid contract is that a party must have the intention to enter into a contract, meaning that they cannot be forced to enter into a contract. In the case of *Compressor Valves and Accessories (Pty) Ltd v Thackery*,[370] at issue was the enforceability of a restraint of trade agreement where the agreement was said to have been signed under duress.[371] The court held that when parties enter into a contract voluntarily it is presumed that the parties also contracted on equal footing.[372] However, where the circumstances point to otherwise, then the reasonableness of enforcing such an agreement will be brought into question.[373]

In this matter the employee had been approached with a restraint of trade agreement after she had commenced her employment with the employer.[374] The employment relationship hung on the employee's decision to sign the restraint of trade agreement, and at that moment the parties were not contracting on equal footing.[375] The employee was placed in a difficult position and as a result the circumstances compelled her to sign the restraint agreement. The court found that it would be unreasonable to enforce the agreement as it would be contrary to the public interest and public policy.[376] Proof of a signed agreement is therefore, not enough when the

[368] *New Justfun* supra note 367 at 2728E-G.
[369] *Pepkor Speciality (Pty) Ltd v Van Huyssteen* [2018] ZAWCHC 157 para 45.
[370] [2020] ZAGPJHC 116.
[371] *Compressor Valves* supra note 370 para 1.
[372] Ibid para 23.
[373] Ibid.
[374] Ibid.
[375]Ibid.
[376] Ibid.

enforceability of the agreement would be unreasonable because one of the essential requirements of a valid contract have not been met.

3.10. The recognition of supplier restraint agreements

In the case of *Vox Telecommunications (Pty) Ltd v Steyn*,[377] the applicant (employer) asked the court to recognise supplier restraint agreements. The court held that the purpose of a restraint agreement 'is to protect the goodwill of a business', which includes the employer's connections with suppliers.[378] Myburgh AJ distinguished a supplier restraint from a competitor restraint. A supplier restraint agreement was a restraint agreement that seeks prevent an employee from engaging with the employer's suppliers and disclosing confidential information which has the potential to make the supplier 'change the terms of supply' or change the manner in which the supplier engages with the employer.[379] A competitor restraint agreement was an agreement that seeks to prevent an employee from exploiting the employer's trade connections or poaching employees or joining the employer's competitor.[380]

The court found that the motivation behind the enforcement of a competitor restraint agreement was broader than that of a supplier restraint.[381] However, the court agreed with the submission made on behalf of the employer, that a supplier restraint should be held to the same regard as a competitor restraint. The reason advanced was that a company's goodwill could be afforded protection by a supplier restraint.[382]This case is a rare case where an employee is only subject to a supplier restraint agreement; in most instances the supplier restraint is coupled with the competitor restraint as in the case of *Truworths Ltd v De Bruyn*.[383]

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[377] (2016) 37 ILJ 1255 (LC).
[378] *Vox Telecommunications* supra note 377 at 1263E-F.
[379] Ibid at 1263I- 1264A.
[380] *Vox Telecommunications* supra note 377 at 1263G-1264A.
[381] Ibid at 1264A.
[382] Ibid at 1263G-H.
[383] *Truworths* supra note 274 para 6.

3.11. The link between a garden leave clause and a restraint of trade clause

An interesting case that came before the Labour Court was *Vodacom (Pty) Ltd v Motsa*,[384] in which the issue was whether the presence of a 'garden leave' term restricts the operation of a restraint of a restraint of trade agreement; and if so to what extent?[385] The employee Motsa had concluded an employment agreement that stipulated that Motsa was to serve a six-month notice period prior to the contract of employment terminating,[386] after which the contract of employment terminated and the restraint agreement began to operate.[387] Motsa submitted to the court that merging the 'garden leave' and the restraint provisions led to the conclusion that the restraint agreement should be regarded as unenforceable.[388]

The court noted that the link between restraint agreements and garden leave clauses had not received judicial attention in South Africa.[389] The court defined garden leave as a clause requiring the employee to serve a notice period at home upon giving notice of termination of the employment relationship.[390] This is to ensure that confidential information to which the employee was privy becomes out of date, whilst at the same time preventing the employee from being employed by the employer's competitor.[391] In return, the employer incurs costs of remunerating the commercially inactive employee.[392]

The court referred to English authorities and relied on the case of *Air New Zealand v Gant Kerr*,[393] in which the court held that where the reasonableness of a restraint agreement is considered in a context in which a garden leave clause is operative, a court must consider the garden leave clause to make the determination on the reasonableness of the operation of the operation of the garden leave clause.[394] Van Niekerk J affirmed the approach, holding that a period of 'commercial inactivity'

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[384] (2016) 37 ILJ 1241 (LC).
[385] *Vodacom* supra note 384 para 2.
[386] Ibid para 5.
[387] Ibid para 6.
[388] Ibid para 21.
[389] Ibid para 22.
[390] Ibid.
[391] *Vodacom* supra note 384 para 22.
[392] Y Mupangavanhu 'The Relationship between restraints of Trade and Garden Leave' (2017) 20 *PELJ* 1 at 6.
[393] [2013] NZEmpC 153 ARC 38/13.
[394] *Vodacom* supra note 384 para 25.

before the operation of a restraint agreement must be considered when a determination on the reasonableness of the restraint agreement is to be made.[395]

Van Niekerk J went on to question whether the period of enforced commercial inactivity, through the means of garden leave or a restraint agreement or both was reasonable in the light of 'the proprietary interests that the employer seeks to protect'.[396] The court upheld the contractual principle that parties that have voluntarily and freely entered into a contract should be bound to their contractual obligations.[397] The court held that Motsa must observe the garden leave period.[398]

With regard to the reasonableness of the operation of the restraint agreement, the court considered Motsa's position and responsibilities,[399] observing that Motsa was heavily involved in his employer's operations and that he had 'intimate knowledge of' his employers plans which would be beneficial to the employer's competitor.[400] Therefore, the court found that the period for which the restraint was intended to operate was reasonable;[401] the garden leave period and the restraint period would operate consecutively.

The outcome of the *Vodacom (Pty) Ltd v Motsa* shows that a garden leave clause and a restraint agreement are both enforceable; the facts and circumstances of a matter dictate the enforceability of one or the other or both. However, where both are present, but the facts and circumstances reveal that the garden leave period has ensured that the employer's proprietary interests are protected, the enforcement of a restraint agreement will be unreasonable.[402] This shows that the operation of restraint agreement is determined by the operation of a garden leave clause and its effects where both are present.[403] The court must determine the reasonableness of the enforceability of the restraint agreement taking into account principles of public policy. [404]

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[395] Ibid.
[396] Ibid.
[397] Ibid para 36.
[398] Ibid.
[399] *Vodacom* supra note 384 para 40-41.
[400] *Vodacom* supra note 384 para 41.
[401] Ibid.
[402] Mupangavanhu op cit note 392 at 16.
[403] Mupangavanhu op cit note 392 at 17.
[404] Mupangavanhu op cit note 392 at 18.

The garden leave clause is an additional safeguard to mitigate the risk of the exploitation of an employer's proprietary interest should a restraint of trade agreement be found to be unenforceable because it is unreasonable and against public policy. [405] The court's decision is welcomed as it will serve as a guide to employers wishing to introduce the clause in an employment contract, and it is valuable authority regarding disputes concerning the application of garden leave clause in the company of restraint of trade clauses.[406]

3.12. Conclusion

The principles governing the restraint of trade doctrine endure. A restraint of trade is *prima facie* valid and enforceable unless an employee can show that the restraint is unreasonable and against public policy.[407] It remains important that employers draft properly defined and worded restraint of trade agreements.[408] The proprietary interest that the employer seeks to protect must be identifiable.[409] Furthermore, the restriction on the conduct of an employee needs to be clearly defined.[410]

When the employer seeks to urgently enforce a restraint agreement, the employer will need to comply with the rules of the court.[411] Regardless of whether a civil or labour court is approached all courts require proof of urgency and why the normal route of litigation could not be followed.[412] The employer must then show a breach of the restraint agreement, the proprietary interest worthy of protection and the risk of exploitation by the former employee.[413] The reasonableness of enforcing the restraint agreement will also be considered,[414] and the court will grant an appropriate remedy taking the facts and circumstances into consideration.

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[405] Aamina Danka, Darren Subramanien & Nicola Whitear 'Garden Leave: A Discussion of the Context of *Vodacom (Pty) Ltd v Motsa* (2016) 37 ILJ 1241 (LC) (2017)' 38 *ILJ* 1511 at 1513.
[406] Danka, Subramanien & Whitear op cit note 405 at 1521.
[407] *Magna Alloys* supra note 9 at 893
[408] *Charnaud* supra note 241 para 55.
[409] Ibid.
[410] Ibid.
[411] S 77(3) BCEA supra note 303.
[412] *Ecolab* supra note 102 at 2750B.
[413] Ibid.
[414] Ibid.

The competing interests of the employer and the employee which the court needs to consider before making an order on the reasonableness of the restraint of trade agreement remain important considerations.[415] The protection which the employer's proprietary interest requires needs to outweigh the employee's interest which is to remain employed.[416] However, in some instances, and despite the proof of a proprietary interest, where the enforcement of the restraint agreement is be contrary to public policy and unreasonable a court will refuse to order that the restraint agreement be enforced.[417] The facts and circumstances of the case determine the outcome and no single formula applies.

The enforceability of a restraint agreement is not always straightforward as in some matters contractual concepts need to be considered. The requirements of valid contract remain important in determining the enforceability of a restraint; a signed restraint agreement which does meet the requirements of a valid contract is unenforceable.[418] Where novation of a restraint agreement is alleged, the express intention of the parties to novate needs to be shown, because courts are reluctant to accept that the parties intend to waive their rights.[419]

A transfer of a business occurs as a going concern (section 197(2)(a) of the LRA) requires the new employer to step into the shoes of the old employer, and all the employment contracts remain in place after the transfer. Similarly, all existing rights and obligations will transfer to the new employer.[420] These rights and obligations include those not provided for in the employment contract but based on a source of law.[421] This means that an existing restraint agreement will remain active despite the transfer.[422] With the transfer of a business as a going concern, in the absence of an agreement in terms of section 197(6), it is only the identity of the employer that changes and everything else remains in place.[423]

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[415] *Aquatan* supra note 364 at 2738F-G.
[416] *Aquatan* supra note 364 at 2738F-G.
[417] *Truworths* supra note 274.
[418] *Compressor Valves* supra note 370 para 23.
[419] *Waco Africa* supra note 329 para 25.
[420] S 197(2)(b) of the LRA supra note 302.
[421] *Horn* supra 313 para 61.
[422] Ibid.
[423] *Securicor* supra note 297 para 10.

The scope of the application of a restraint agreement when coupled with a garden leave clause in an employment contract was determined by the Labour Court in *Vodacom (Pty) Ltd v Motsa*.[424] The decision illustrated the extent to which the enforceability of a restraint of trade depended on the application of the garden leave clause when both are present in an employment contract.[425] Where the garden leave clause serves the purpose of protecting an employer's proprietary interest and it clears the possibility of exploitation by an employee, the enforceability of a restraint agreement in those facts and circumstances becomes less cogent.

The restraint of trade doctrine has cemented itself in the South African legal system. Whilst the application of the principles has become consistent, not in all instances will the outcome be the same. The facts and circumstances of a case and the weighing of the interests of the parties guide the court to its conclusion in determining the enforceability of the restraint of trade.

[424] *Vodacom* supra note 384.
[425] Mupangavanhu op cit note 392.

CHAPTER 4: THE RESTRAINT OF TRADE DOCTRINE IN THE ENGLISH LEGAL SYSTEM

4.1. Introduction

Restraint of trade law in the South African legal system is rooted in English law, and traditional English law principles were imported into the South African legal system.[426] Despite the adoption of the English law principles, the principles were adopted 'with varying degrees of accuracy'.[427] Later on, a turnaround in South African law occurred with *Magna Alloys and Research (SA) (Pty) v Ellis*,[428] which laid the foundation for the cases which came afterwards. This chapter will consider the English legal system in respect of the restraint of trade doctrine as it, initially at least, had a strong influence on the development of the restraint of trade doctrine in South African law. Furthermore, the chapter will discuss the extent in which the South African law departed from the traditional English law approach.

4.2. English law approach

4.2.1. Determination of a reasonable restraint of trade

In the case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*,[429] Lord Macnaghten held that it was in both the individual's and the public interest to have persons freely engaging in economic activity.[430] He laid down the general rule that any action that impedes an individual's freedom to engage in economic activity without any justification was 'contrary to public policy and are therefore void'.[431] The rule was qualified to the extent that the restraint of trade and any restriction to the individual's freedom to engage in economic activity should be justifiable, and justification was based on the restraint being reasonable.[432]

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[426] Sutherland op cit note 3 at 676.
[427] Ibid.
[428] 1984 (4) SA 874 (A) supra note 9.
[429] [1894] A.C. 535.
[430] *Nordenfelt* supra note 429 at 565.
[431] Ibid.
[432] Ibid.

A restraint of trade is regarded as reasonable when it provides sufficient protection to ensure that the party seeking to enforce the restraint of trade has their interests guarded, and the restraint of trade simultaneously is in no way harmful to the public.[433] The reasonableness inquiry takes into consideration the interests of the parties to the matter and the public interest.[434] Lord Pearce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*,[435] cautioned against the separation of what is reasonable between the parties and what is reasonable on the grounds of public policy. Rather '[t]here is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?'[436]

The court in the case of *TFS Derivatives Ltd v Morgan*,[437] laid down 'a three-stage process' to assist courts in examining the reasonableness of a restraint of trade agreement.[438] The first step is for the court to interpret the restraint agreement.[439] The court either interprets the agreement to have an ambiguous outcome, one of which would result in the restraint agreement being found unreasonable and rendered unenforceable; or an interpretation which leads to the restraint agreement being found reasonable. The court should, in any event, choose the interpretation that supports the notion that when parties enter into a restraint of trade agreement they would have intended to do so lawfully, and not to enter into an agreement that is contrary to public interest.[440]

The second step of the process is for the court to determine whether the employer has, through sufficient evidence, shown that a legitimate interest exists that is worthy of protection.[441] The third step is that the court must consider the reasonableness of the restraint agreement.[442] Although, a restraint agreement may be found to be reasonable, the court must still use its discretion to determine whether or not to grant the injunction, taking into consideration the reasonableness of enforcing

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[433] Ibid.
[434] *Nordenfelt* supra note 429 at 565.
[435] 1967 1 All ER 699.
[436] *Esso* supra note 435 at 724.
[437] [2004] EWHC 3181 (QB).
[438] *TFS* supra note 437 para 36.
[439] Ibid para 37.
[440] Ibid para 43.
[441] Ibid para 37.
[442] Ibid para 38.

the restraint of agreement when the matter is heard.[443] If a court finds that the restraint agreement is unreasonable the restraint agreement becomes unenforceable and void.[444]

4.2.2. Interest worthy of protection

A restraint is reasonable when 'in the interests of the parties it . . . affords *no more than adequate* protection to the party in whose favour it is imposed (emphasis added)'.[445] In the case of *Herbert Morris Ltd v Saxelby,* Lord Atkinson held that when the enforceability of a restraint of trade is sought the court has to ask whether there exists a legitimate interest worthy of protection, and if so what it is.[446] Secondly, 'against what is [the employer] entitled to have . . . [it] protected?'[447]

Lord Atkinson recognised that interests worthy of protection include trade secrets, as well as non-solicitation of customers.[448] However, an employer cannot be protected from competition.[449] '[T]he general knowledge' which is imprinted on the employee's mind and has been acquired through working for the employer and which the employee is able to easily recollect, is not an interest worthy of protection should the employee use such information on leaving the employer and working elsewhere.[450] An employee is entitled to make use of the knowledge and skill acquired through employment under the guidance of the employer.[451] The employee may use such knowledge and skill to his or the public's best advantage without any interference from a court.[452] Interference by a court will only be warranted where an employee discloses trade secrets or confidential information which is not general knowledge.[453]

In the case of *Faccenda Chicken Ltd v Fowler*,[454] it was held that where a contract of employment does not provide for the obligations of the employee towards the employer with regard to the use and disclosure of confidential information, the

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[443] Ibid para 39.
[444] Ibid para 41.
[445] *Herbert Morris Ltd v Saxelby* [1916] 1 A.C. 688 at 707.
[446] *Herbert* supra note 445 at 701.
[447] Ibid.
[448] Ibid at 702.
[449] Ibid.
[450] *Herbert* supra note 445 at 703-704.
[451] *Sir W.C. Leng and Co v Andrews* [1909] 1 Ch. 763 at 773.
[452] *Sir W.C. Leng and Co* supra note 451 at 773.
[453] Ibid.
[454] [1987] Ch. 117 at 137.

obligations of the employee will then be 'the subject of implied terms'.[455] The implied terms encompass the duty of good faith which the employee must observe throughout his or her employment with the employer.[456] When the employment relationship has ended, the employee will remain obligated to observe the implied term, although the scope of the implied term will be narrower.[457] The implied term imposes on the employee the duty not to breach confidentiality by making use of or disclosing confidential information which may be in the form of trade secrets.[458]

The court proceeded to list the considerations to which a court must have regard to determine 'whether any particular item or information' can be said to fall under the implied term.[459] These considerations include:

- The position occupied by the employee and the duties of the employee.[460] Where an employee occupies a position where he or she is frequently exposed to confidential information, a greater duty lies with the employee not to disclose such confidential information.[461]
- The nature of the information. Information needs to fall under the classification of a trade secret or needs to have material characteristics from which it can be deduced that it requires the same protection as afforded to trade secrets.[462]
- Whether the employer ensured that the employee was indeed aware that the information was confidential.[463] The attitude and actions of the employer regarding the confidential information may provide guidance to the court to determine whether the information can be classified as trade secrets.[464]
- The last consideration is whether the information for which protection is sought can be isolated from other information which the employee was exposed, to which the employee is free to make use of for himself or herself or for the benefit of the new employer.[465]

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[455] *Faccenda* supra note 454 at 136.
[456] Ibid.
[457] Ibid.
[458] Ibid.
[459] *Faccenda* supra note 454 at 136.
[460] *Faccenda* supra note 454 at 137.
[461] Ibid.
[462] Ibid.
[463] Ibid.
[464] Ibid.
[465] *Faccenda* supra note 454 at 137.

Where an employee possess confidential information which is not provided for in a document it is important that the information which the employer regards as confidential information can be isolated from the rest of the general knowledge which the employee has acquired during the course of his or her employment.[466] '[A] man of ordinary honesty and intelligence' needs to be able to identify such information to belong to the previous employer and not to the employee for him or her to exploit.[467] A court will then grant an injunction to prevent harm against the previous employer from the confidential information being exploited.[468]

4.2.3. Remedies available to employers

a) Severance

Upon a restraint agreement being found to be unreasonable and void a court cannot then read down the unreasonable and unenforceable clause to rescue the restraint agreement and for it to be enforceable and reasonable.[469] In exceptional circumstances a court may sever parts of restraint agreement provided that the overall meaning and object of the restraint agreement does not change.[470]

With regard to unreasonably wide restraint of trade agreements, Lord Moulton in the case of *Mason v Provident Clothing and Supply Company Ltd*,[471] held that it would set a bad example to sever the unreasonably wide parts of a restraint of trade which rendered the restraint agreement unenforceable, to bring the restraint agreement within the boundaries of reasonableness.[472] He held that it would result in a significant increase in cases brought to the court with unreasonable terms, as employers would litigate with the expectation that courts would come to their rescue.[473]

The court in the case of *Beckett Investment Management Group Ltd v Hall*,[474] later laid down the criterion to determine whether an unreasonable restraint can be

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[466] *Printers & Finishers Ltd v Holloway* [1965 1 W.L.R 1 at 5.
[467] *Printers & Finishers Ltd* supra note 466 at 5.
[468] Ibid.
[469] *TFS* supra note 437 para 40.
[470] Ibid.
[471] 1913 All ER 440.
[472] *Mason* supra note 471 at 411.
[473] Ibid.
[474] [2007] IRLR 793.

severed, and this principle has been affirmed by the court in the case of *Tilman v Egon Zehnder*.[475] The first standard of the criterion is to determine whether a part of the unenforceable provision can be erased without manipulating the wording of the restraint provision.[476] The second standard 'is that the remaining terms continue to be supported by adequate consideration'.[477] The third standard is that by erasing the part of the unenforceable restraint provision the 'character of the contract' should remain the same. [478] 'The court cannot change what the parties agree, but it can do its best to enforce all parts of the covenant which do not offend public policy. Once seen in this light, severance is a tool to be used in service of freedom of contract rather than a blight on it.'[479]

b) Injunction

When the enforceability of a restraint of trade agreement is in issue, the onus lies with the employer to show that the restraint provides adequate protection to its interests and that it does not go beyond what is necessary.[480] To determine the enforceability of a restraint of trade the court must consider the facts of the case and circumstances of the parties and then consider the adequacy of the restraint agreement against the employee.[481] A court must also take into consideration the actual terms of the restraint agreement.[482]

It was deemed unsatisfactory for an employer to request a court to order an injunction to prevent an employee from disclosing confidential information because of the blurred line of what sort of information should be considered to be confidential, and because of the difficulty that came with proving a breach by the employee when the confidential information was impressed in the employee's mind.[483] These issues led to the finding that it is best to rather restrain an employee from working for the employer's competitor to whom the confidential information would be beneficial and

[475] 2020 1 All ER 477.
[476] *Tilman* supra note 475 at 26.
[477] *Tilman* supra note 475 at 27.
[478] Ibid.
[479] William Day 'Freedom of contract and restraint of trade' (2020) 79(1) *Cambridge Law Journal* 11 at 13.
[480] *Dickson v Jones* [1939] 3 All ER 182 at 187.
[481] *Dickson* supra note 480 at 187.
[482] *Dickson* supra note 480 at 188.
[483] *The Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at 1033.

such a restraint be regarded as reasonable if it restrains the employee for a limited amount of time.[484] It is for this reason that

> 'the employer's claim for protection must be based on the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation. For while it may be true that an employee is entitled—and is to be encouraged—to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers.'[485]

The purpose of an interlocutory injunction would be to mitigate the risk of harm against the employer where the matter regarding the enforceability of a restraint of trade is still to be decided, and under which the recovery of damages may be a futile exercise as the damage done may become worse.[486]

c) Award for damages

Should an award for damages prove to be an adequate remedy and the employee is be able to pay the damages, an interlocutory injunction is less likely to be granted.[487] Factors which help the court determine whether damages would be an adequate remedy for an employer include the likelihood of the breach being proved, whether the loss incurred by the employer can be proved, and whether the employee will be able to compensate the employer should the employer succeed in the claim for damages.[488] The court must weigh the employer's risk that the employee will remain economically inactive, and not necessarily be 'adequately compensated' during the

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[484] *Littlewoods* supra note 483 at 1033.
[485] *Stenhouse Ltd v Phillips* [1974] 1 All ER 117 at 122.
[486] *American Cyanamid Co.* v. *Ethicon Ltd* [1975] 1 All ER 504 at 509.
[487] *American Cyanamid Co.* supra note 486 at 510.
[488] *Pricewaterhousecoopers LLP v. Nicholas Carmichael* [2019] EWHC 824 (Comm).

employer's pursuit of damages in the event that the matter is decided in the employee's favour.[489]

Where the employee is likely to recover damages from the employer for remaining economically inactive, a court it more likely to grant an interlocutory injunction,[490] with temporary effect.[491] The court is not compelled to grant an interlocutory injunction − it is a discretionary remedy granted on a balance of convenience. [492] The court must make the determination of whether to grant the interlocutory injunction by looking at the matter in its entirety.[493] Regard must be had to both the weight of the claim and the weight of the defence and make a decision.[494] 'The court must . . . be satisfied that the claim is not frivolous or vexatious.'[495]

4.2.4. South African legal system

The South African law regarding the restraint of trade principle has primarily been influenced by English Law.[496] The general rule under English law was that restraint of trade agreements were *prima facie* void and that the onus lies with the party seeking to enforce the restraint agreement to show that restraint agreement is reasonable.[497] This approach favoured the 'freedom of trade over the sanctity of contract' (*pacta sunt servanda*).[498]

The restraint of trade doctrine was not readily accepted by South African courts. In *S.A. Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd* Leon J held:

> 'I am not . . . by any means certain that the South African cases have been right in adopting the English view relating to *onus*. If it is correct to say that the doctrine of restraint of trade is applied in our law because of public policy, then it becomes relevant to enquire what that public policy is. What I think is contrary to public policy is a

[489] *American Cyanamid Co.* supra note 486 at 509.
[490] *American Cyanamid Co.* supra note 486 at 510.
[491] *American Cyanamid Co.* supra note 486 at 508.
[492] Ibid.
[493] *Hubbard v Vosper* [1972] 2 Q.B.84 at 96.
[494] *Hubbard* supra note 493 at 96.
[495] *American Cyanamid Co.* supra note 486 at 510.
[496] JT Schoombee 'Agreements in Restraint of Trade: The Appellate Division Confirms New Principles' 1985 (48) *THRHR* 127 at 129.
[497] Schoombee op cit note 496 at 129.
[498] Schoombee op cit note 496 at 129.

contract in unreasonable restraint of trade. 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 in unreasonable restraint of trade.'[499]

This statement is one of many which resisted the application of the traditional English law approach in the South African legal system. Cases such as *Roffey v Catterall, Edwards and Gourdré*,[500] and *Drewtons (Pty) Ltd v Carlie*,[501] marked the turning point for the application of the restraint of trade doctrine in South African law. Didcott J in *Roffey v Catterall* relied on the general principles of contract of South African law which provide that all contracts are regarded as valid unless the opposite is proven to be true.[502] Didcott J held that restraint of trade agreements are enforceable until the party seeking to escape the restraint agreement proves that the restraint agreement is unreasonable.[503]

The court in the case of *Drewtons* also showed preference for the *pacta sunt servanda* principle, and held that the party who seeks to avoid the consequences of the restraint agreement should provide the court with adequate reasons on why he or she should not remain bound to the obligations provided in the contract.[504] This approach illustrates the courts deviation from the traditional English law approach, and to have the restraint of trade doctrine in the South African legal system conform to the general principles of the South African law of contract.[505]

A pivotal turning point in the law regarding restraints of trade in South Africa was the Appellate Division's decision in *Magna Alloys v Ellis*.[506] The court held that in terms of the general principles of contractual law in South Africa, agreements entered into are *prima facie* enforceable, and the onus rests on the party who seeks to avoid the restraint agreement to prove that the enforcement of the restraint agreement would be contrary to public interest.[507] The court affirmed the principle of *pacta sunt servanda*, by which parties remain bound to agreements they have voluntarily entered

[499] 1968 (2) SA 777 (D) at 787G-H.
[500] *Roffey* supra note 199.
[501] 1981 (4) SA 305 (C).
[502] *Roffey* supra note 199 at 503G-H.
[503] *Roffey* supra note 199 at 505H.
[504] *Drewtons* supra note 501 at 313B-C.
[505] Schoombee op cit note 496 130.
[506] *Magna Alloys* supra note 9.
[507] *Magna Alloys* supra note 9 at 890-891.

into.[508] On the other hand, where the enforcement of a restraint agreement would be prejudicial to public policy the agreement would be rendered unenforceable rather than void.[509]

Post *Magna Alloys*, the Appellate Division has advanced the restraint of trade doctrine. Nienaber JA in *Basson v Chilwan*[510] set out the reasonableness test to assist courts in determining the reasonableness of enforcing a restraint agreement. Considerations which the courts may rely on include the subject matter which the restraint agreement seeks to restrain, the period which the restraint is intended to last and the geographical area within which the restraint agreement operates.[511] The reasonableness test remains relevant in the present day and it has become a significant legal principle relied on by courts in restraint of trade matters when the issue of the enforceability of a restraint of trade agreement is disputed.[512]

The court in *Reddy v Siemens Telecommunications (Pty) Ltd*,[513] reaffirmed the test laid down in *Basson*, adding a fifth question to the four questions of the reasonableness test laid down in *Basson*.[514] The question was whether the restraint against the employee goes beyond what would suffice as adequate protection to protect the proprietary interest which the employer seeks to protect.[515] The court also held that the law as laid down in the leading case of *Magna Alloys* should remain undisturbed.[516]

The Supreme Court of Appeal in addition held that where the enforceability of a restraint agreement is in issue in respect of whether it unreasonably limits the employee's ability to remain economically active, a value judgement must be made within which two important considerations come into play,[517] being the employee's right to choose his or her trade, profession and occupation voluntarily and remain economically active versus the *pacta sunt servanda* principle which requires parties to remain bound to agreements which they entered voluntarily.[518]

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[508] Ibid.
[509] Ibid at 893H-I.
[510] *Basson* supra note 66.
[511] Mupangavanhu op cit note 392 at p4.
[512] *Truworths* supra note 274 para 20.
[513] *Reddy* supra note 31.
[514] *Reddy* supra note 31 at 328E-F.
[515] Ibid.
[516] Ibid at 326A-B.
[517] Ibid at 326E-327A.
[518] *Reddy* supra note 31 326E-327A.

4.3. Influence of English law on the South African legal system

Despite the significant departure from the traditional English law approach, there are principles of the restraint of trade doctrine common to both English and South African law. Under both legal systems an employer is precluded from seeking to enforce a restraint agreement primarily for the protection against competition.[519] The employer must prove a legitimate propriety interest worthy of protection. Another common principle is that despite the reasonableness of a restraint agreement and the existence of legitimate proprietary interest worthy of protection, a court may still deny the enforcement of a restraint agreement because its enforcement is contrary to public policy and prejudicial to the public interest.[520]

The reasonableness test as laid down in English law has, despite 'minor alterations', survived in the South African legal system.[521] The reasonableness inquiry under English law takes into account consideration the interests of the parties as well as the public interest.[522] Similarly the reasonableness inquiry set out by Nienaber JA in *Basson v Chilwan* takes into consideration the interests of the parties and the effect that the enforcement of the restraint agreement would have on public policy.[523]

The South African law of the restraint of trade and the English law acknowledge the competing considerations behind the enforceability of restraint of trade agreements, namely the freedom of trade and the sanctity of contracts, and there has been uncertainty as to which principle triumphs over the other. As held by Didcott J in *Roffey:*

> 'The collision between these two ideas, freedom of trade and the sanctity of contracts, does not dictate the unqualified acceptance of one to the total exclusion of the other. For all its commitment to freedom of trade, English law does not disregard the sanctity of contracts, as is obvious from the judgments in England from which I have quoted. It heeds that notion by making allowance for restraints proved to be reasonable *inter partes*.'[524]

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[519] Schoombee op cit note 496 at 132.
[520] Ibid.
[521] Sutherland op cit note 3 at 677.
[522] *Nordenfelt* supra note 429 at 565.
[523] *Basson* supra note 66.
[524] *Roffey* supra note 199 at 505B-C.

4.4. Conclusion

The restraint of trade doctrine entrenched in the South African legal system stems from the English law.[525] Whilst the traditional approach was readily adopted by South African courts, some courts were reluctant to adopt the traditional approach which holds that restraint of trade agreements are *prima facie* void.[526] The critique of the traditional English law approach to restraint of trade agreement in cases such as *Drewtons* and *Roffey* soon led to the departure from the traditional approach, as South African courts no longer meticulously followed the English law.[527] This led to the introduction of the principle that restraint agreements are enforceable and that the party who seeks to avoid the restraint agreement should provide evidence to show that enforcing the restraint agreement would be unreasonable as contrary to public policy.[528]

Not all the English law principles have been completely discarded. The operation of the restraint of trade doctrine under the South African legal system still operates on some of the significant principles stemming from English law, primarily the competing considerations of freedom of trade and the sanctity of contract;[529] and the reasonableness test which focuses on the interests of the parties and public policy.[530] Under South African law, the English law principles on the restraint of trade have been adopted and altered to conform to the overarching South African general principles of contract which in the present day comply with the constitutional framework.

[525] *Basson* supra note 66 at 761F.
[526] *Basson* supra note 66 at 761F-G.
[527] *Basson* supra note 66 at 761F-G.
[528] *Magna Alloys* supra note 9 at 890-891
[529] *Roffey* supra note 199 at 505B-C.
[530] Sutherland op cit note 3 at 677.

CHAPTER 5: CONCLUSION

5. Conclusion

The restraint of trade law in South Africa is firmly rooted in the English law, as the doctrine was applied in line with the traditional approach which remains entrenched in English law.[531] The traditional approach to a restraint of trade agreement regards it as *prima facie* void and it is for the party seeking to enforce the restraint agreement to show that the agreement is reasonable on grounds that the purpose of the restraint agreement is protect a legitimate interest which, if denied, it would allow for the exploitation of the interest to the benefit of the employee or the new employer.[532]

South African courts showed hesitance in applying the traditional approach in the light of South African contractual law principles. This led the *locus classicus* decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* in which the court rejected the traditional English law approach.[533] The court upheld the South African contractual law principle of sanctity of contract requiring that parties remain bound to agreements entered voluntarily into.[534] This means that agreements concluded between parties observing all requirements of a valid contract are *prima facie* enforceable, and it is for the party who seeks to escape the agreement to prove that the agreement is unreasonable and contrary to public policy.[535] If so proved, the agreement is unenforceable.[536]

Post *Magna Alloys,* courts adopted and approved the new approach to restraint of trade matters. The party seeking enforcement of the restraint (the employer) needs to provide proof that there exists is an interest worthy of protection.[537] The interest may be in the form of trade connections or trade secrets.[538] The party seeking to escape

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[531] Schoombee op cit note 496 at 129.
[532] *Nordenfelt* supra note 429 at 565.
[533] *Magna Alloys* supra note 9.
[534] *Magna Alloys* supra note 9 at 890-891.
[535]*Magna Alloys* supra note 9 at 890-891.
[536] *Magna Alloys* supra note 9 at 893H-I.
[537] *Charnaud* supra note 241 para 56.
[538] *Sibex Engineering* supra note 45 at 502E-F.

the restraint (the employee) then needs to prove on the balance of probabilities that the restraint which the employer seeks to enforce is unreasonable.[539]

The court will then proceed with a reasonableness inquiry which the Appellate Division introduced in the case of *Basson v Chilwan,* an inquiry which is an expansion of the reasonableness inquiry formulated under the English law.[540] The reasonableness inquiry requires courts to consider the competing interests of the employer and the employee, informed by constitutional values, contractual law principles, and public policy.[541] Thereafter, the court must make a value judgment on the enforceability of the restraint of trade agreement.[542] The value judgment must be made in light of the two guiding policy principles, namely that parties should be bound to agreements they concluded freely and voluntarily, and that persons should be allowed to be commercially active and realise their section 22 right of the Constitution.[543]

An analysis of the application of the restraint of trade doctrine in the past five years shows that courts have maintained the uniform standard of approach to the application of restraint of trade legal principles since the case of *Magna Alloys*.[544] Courts continue to acknowledge the inherent urgency of enforcing restraint of trade agreements; however, employers are required to meet the urgency standards for the matter to be heard.[545] It remains important for the employer to shows a proprietary interest worthy of protection, failing which the claim for enforcement fails.[546]

Courts do not readily accept the existence of a restraint agreement without proof,[547] and equally, once a restraint of trade agreement is proved to exist, courts adopt a cautious approach in determining the enforceability of a restraint agreement.[548] The cautious approach involves weighing the interests of the parties to make a value judgment that is guided by the constitutional values at play and the dictates of public

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[539] J Neethling 'Proof in restraint of trade covenants- a need for exercising restraint' (2008) 20 *South African Mercantile Law Journal* 89 at 89.
[540] *Basson* supra note 66 at 767.
[541] *Basson* supra note 66 at 767; *Ball Bambalela* supra note 83 at 2829A.
[542] *Reddy* supra note 31 at 326E-327A.
[543]Ibid.
[544] *Charnaud* supra note 241 para 56.
[545] *Ecolab* supra note 102 at 2750A-B.
[546] *Ecolab* supra note 102 at 2751D.
[547] *TIBMS* supra note 340 at 2728C-E.
[548] Basson supra note 66.

policy.[549] The fact that the employee might or might not be economically active is not a decisive factor; the employee's interests will need to outweigh the employer's interest of protecting its proprietary interest from the risk of exploitation.[550]

It is important for the employee to prove the severity of the consequences of the enforcement of the restraint, because courts adopt a cautious approach before they decide to release a party from his or her contractual obligations. The employee's defence needs to show that enforcing the restraint agreement would be contrary to public policy.[551] Failing to do so results in the original restraint agreement prevailing. The principle of *pacta sunt servanda* will be upheld in the absence of the employee proving that the restraint is unreasonable or contrary to public policy.'

Where an employee contends that the restraint agreement is unenforceable because the agreement was novated, evidence must be presented to show the express intention of the parties to waive their rights in terms of the new agreement.[552] Where an employee contends that the restraint agreement does not meet requirements of a valid contract, evidence must be presented to show that an essential requirement that makes an agreement valid is not satisfied.[553]

Where a contention is made that a restraint agreement was not transferred when a business was transferred to another as a going concern, evidence must be led to show an agreement in terms of section 197(6) of the LRA which supports the claim.[554] The onus of proof on the employee again illustrates the importance of the principle of sanctity of contract. Where an employee fails to prove the unreasonableness of enforcing a restraint agreement or that it was contrary to public policy, the restraint agreement will remain active.

The introduction of new concepts to the restraint of trade doctrine have been scarce, as most principles are embedded in the South African legal system. A concept which courts have yet to grapple with is the so-called 'garden leave' clause. In

[549] *Reddy* supra note 31 at 326E-327A.
[550] *Twincare* supra note 259 at 2769D-F.
[551] *Compressor Valves* supra note 370 para 23.
[552] *Waco Africa* supra note 329 para 25.
[553] *Compressor Valves* supra note 370.
[554] Securicor supra note 297 para 10.

Vodacom (Pty) Ltd v Motsa,[555] the Labour Court had the opportunity to decide on the relationship between the garden leave clause and a restraint of trade clause in an employment contract. [556] The concept of garden leave had never been considered by courts in South African law before this case, and it is not provided for in South African labour law statutes.[557]

The court recognised garden leave as a means of ensuring that employees are isolated from the employer's operations whilst serving a required period of notice to protect employers against having their proprietary interest from being exploited in that period.[558] However, where a garden leave clause and a restraint of trade provision are both included in an employment contract, the enforceability of a restraint of trade will have to be considered in light of the provisions of the garden leave clause, bearing in mind that it is undesirable under public policy to have employees remain commercially inactive for longer than necessary.[559] In the result, should the garden leave clause provide sufficient protection to the employer's proprietary interest, the enforcement of the restraint agreement will be regarded as unreasonable.[560]

The application of the restraint of trade doctrine has become firmly entrenched in the South African legal system; the fundamental principles governing the doctrine remain undisturbed. It is the scope of the application of the doctrine, considered together with other labour law concepts and contractual law principles which courts now grapple with. The garden leave concept has still to be pronounced upon by the highest courts. It remains to be seen whether the Labour Court's consideration of the garden leave concept was a once-off decision, or whether it will find its place in the South African law. In any event, the courts are dealing with these legal questions on a case-by-case basis, and the facts and circumstances guide the determination of the enforceability of the restraint of trade agreement.[561]

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[555] *Vodacom* supra note 384.
[556] *Vodacom* supra note 384 para 2.
[557] *Vodacom* supra note 384 para 22.
[558] *Vodacom* supra note 384 para 22.
[559] *Vodacom* supra note 384 para 26.
[560] Mupangavanhu op cit note 392 16.
[561] *Laser Junction* supra note 301 at 2684A.

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